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Adjudicating the Public Interest in Immigration Law

A Systematic Content Analysis of Strasbourg and Luxembourg Case Law on Legal Restrictions to Immigration and Free Movement

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Contents

Chapter 1 Introduction

1.1 From globetrotting to city hopping

This research started out with the plan of comparing income requirements in immigration law in Canada, the United States, Belgium and the Netherlands; as part of a research project on the relation between migration, integration and social security.[1] After having mapped the legal frameworks in relation to income requirements, I began to explore the adjudication of these requirements, starting with the Netherlands.

It struck me quit soon that the highest Court in immigration cases, the Dutch Council of State,[2] left no room for considerations relating to whether upholding the detailed stipulations of Dutch policy on income requirements was reasonable in the case at hand. Some of the lower administrative courts had accepted that minor formal deviations from the policy criteria could not justify refusal of entry or (continued) residence to foreign nationals. One example was a case featuring the policy provision that in the absence of an annual contract, a sponsor may alternatively prove the sustainability of his income by showing that he has obtained sufficient income in the 36 months preceding the application. In point of fact the applicant had obtained income throughout the above period without having had recourse to public benefits. His application was refused, however, because in two of the 36 months the applicant's income had been less than the minimum-wage level. The District Court observed that the immigration authority had failed to explain why under these circumstances the applicant's income could not be recognised as being sustainable and dismissed the decision to refuse family reunification.[3] The Administrative Council, however, reaffirmed the immigration authority in its strict approach. In fact, the Administrative Council consistently quashed rulings of lower courts that

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1 Cross-Border Welfare State: Immigration, Social Security and Integration, research-project in partnership between KU Leuven and VU University Amsterdam.

2 In full: Administrative Litigation Section of the Dutch Council of State.

3 District Court The Hague, 27 November 2007 and 8 October 2008 (ECLI:NL: RBSGR:2008: BF9098) with case comment of Ben Olivier, RV20080029.

effectively failed to see the sense in sanctioning minor deviations from the policy rules.[4] What struck me was not so much this consistent judicial confirmation of Dutch immigration policy but the fact that the Council's reasoning in this regard lacked substantive grounds. Of course, the principle of marginal judicial review of administrative decisions prescribes that in cases where the administrative authority has exercised discretionary power, the administrative court must observe restraint in reviewing the manner in which the administrative authority has balanced the various interests in the case at hand.[5] Nevertheless, I had anticipated the right to respect for family life laid down in Article 8 ECHR required some judicial evaluation of the public interest served with denying residence. I failed to understand why in addressing Article 8 ECHR, the Council of State confined to mentioning a number of aspects relating to the individual interest in being granted residence, while keeping silent on whether minor deviation from income requirements could justify denying residence. What about the weight of the public interest in refusing entry or residence? Over time this question of the public interest in judicial reasoning became the central tenet of my research.

An initial survey of Strasbourg Article 8 ECHR immigration-cases confirmed that despite the margin of appreciation accorded to States in the area of immigration, the individual interest in being granted residence was to be balanced against the public interest in upholding national immigration rules:

> 46. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.
> […]
> 48. The Court further reiterates that, moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and

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[4] The case addressed in the example (note 3) was quashed by the Council of State in its judicial decision of 23 June 2009 (ECLI:NL:RVS:2009:BJ1558). See for further examples, the Council of State's judicial decisions of 1 jul 2010 (ECLI:NL:RVS:2010: BN1165); 6 January 2010 (ECLI:NL:RVS:2010: BK9641); 25 November 2009 (ECLI:NL:RVS:2009: BK4345); 5 December 2008 (ECLI:NL:RVS:2008: BG7504); 1 October 2008 (ECLI:NL:RVS:2008: BF8567); 12 July 2007 (ECLI:NL:RVS:2007: BB1415); 19 June 2006 (ECLI:NL:RVS:2006: AX9569).

[5] Pieter van Dijk, *Review of administrative decisions of government by administrative courts and tribunals: Report for the Netherlands* (Report for the 10th Congress of the International Association of Supreme Administrative Jurisdictions, Sidney 2010) 31-38.

> to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest.[6]

A fair balance was to be struck between *both* competing interests. However, it appeared that Strasbourg case law could not provide standards on how to 'weigh' a concrete failure to comply with income requirements, due to the margin of appreciation enjoyed by States in this area. The most explicit comment in relation to national income requirements was made in the cases of *Konstatinov* and *Haydarie*:

> [T]he Court does not consider unreasonable a requirement that an alien having achieved a settled status in a Contracting State and who seeks family reunion there must demonstrate that he/she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought.[7]

This remark, made in relation to the *general* Dutch scheme of income requirements, did not imply that non-compliance with detailed policy rules based on this scheme should always outweigh the individual interest. Having accepted that (detailed aspects of) national income requirement policies fall within the margin of appreciation of States, I assumed the outcome of Strasbourg income requirement-cases did not hinge on the public interest in denying residence, but instead depended on the weight of the individual interest in being granted residence.[8] As far as it concerned Article 8 ECHR, the weight accorded to non-compliance with income requirements seemed exempted from being subjected to judicial scrutiny: on the Strasbourg level this aspect fell within the margin of appreciation of States, and on the national level it fell within the discretionary power of the administrative authority.

By contrast, an examination of Luxembourg case law on national income requirements readily made clear that the ECJ showed no reluctance in scrutinising the merits of national income requirements. Specific circumstances, such as a trivial amount of social assistance, were rejected as posing a "burden" on the national social

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[6] *Konstatinov v the Netherlands* App no 16351/03 (ECtHR, 26 April 2007), paras 46, 48.

[7] ibid para 50; *Haydarie v the Netherlands* (dec) App no 8876/04 (ECtHR, 20 October 2005).

[8] Eva Hilbrink, 'The Proportionality Principle, Two European Perspectives: How Serving the Community Interest May End up to Be in the Individual's Best Interest' (Research Seminar Migration Law, Bergen, January 2010). <http://dare.ubvu.vu.nl/handle/1871/15826?show=full > accessed 26 November 2016.

assistance scheme being used to justify denying the right to reside.[9] The ECJ went so far as to dismiss entire policy rules for disproportionately interfering with individual rights, among which the stipulation that individuals should produce an annual employment contract to substantiate the sustainability of their income,[10] and the condition that Union citizens *themselves* should have sufficient resources.[11] Nonetheless, these cases concerned Union citizens, making use of their fundamental right to free movement. "Free moving" Union citizens – in EU law not even addressed as migrants – were not to be put on a par with third country nationals that featured in Strasbourg case law, who were granted no such free movement right. Yet, in cases where Union citizens pursued family reunification with third country nationals the ECJ's approach to national restrictions to family reunification proved equally progressive.[12]

Alongside the developments that had taken place in relation to third country national family members of Union citizens, the Family Reunification Directive came into force.[13] Directive 2003/86 established a right to family reunification for third country nationals. According to the ECJ in its first judgment on this Directive, in the cases determined by the Directive it required Member States to authorise family reunification of certain members of the sponsor's family, without a margin of appreciation.[14] In anticipation of what would happen if the proportionality principle, being a general principle of EU law, would be as rigorously applied in a context in which the right to family reunification is not the state of exception but the point of departure, I assumed that (the ECJ's interpretation of) Directive 2003/86 would have a considerable impact on Member States' ability to strictly uphold detailed income requirement policies in relation to third country nationals.[15]

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[9] Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

[10] Case C-398/06 *Commission v the Netherlands* [2008] ECR I-56.

[11] Case 200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

[12] Case C-127/08 *Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241; E. Hilbrink and K.M. de Vries 'Getrouwd in gemeenschap van rechten, Akrich herzien, noot bij Hof van Justitie EG 27-05-2008, C-127/08 (Metock)' (2009) 1 NJCM-bulletin 92 (note).

[13] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12 (Directive 2003/86).

[14] Case C-540/03 *European Parliament v Council of the European Union* [2006] ECR I-5769, paras 59-60.

[15] Eva Hilbrink 'Income requirements in Community Law' (International Workshop for International Young Scholars (WISH), Berlin, November 2008), published in: Daniel Thym and Francis Snyder (ed), *Europe – A Continent of Immigration? Legal Challenges*

I then decided not to write a book on income requirements without discussing the contrasting approaches of the two European Courts. Given the consistently rigorous scrutiny of the merits of national income criteria by the Luxembourg Court, and the consistent absence of such scrutiny in Strasbourg case law, it would just be a matter of underpinning the above observations by means of a convincing number of examples. That was an underestimation. Writing an overview of Strasbourg cases featuring income requirements proved more complicated than I thought. It turned out to be particularly difficult to substantiate the proposition that the ECtHR did not scrutinise the merits of national income requirements on a case-by-case basis and that instead, the outcome of these cases hinged on the weight of the individual interest at stake. Since, if this Court's comments on income requirements were not to be labelled as establishing the sufficiency of the reason for denying residence in the case at hand, then, how *should* these comments be qualified? What, in terms of balancing competing interests, is the significance of establishing whether in the case at hand a person has tried his best to obtain sufficient resources? Does this aspect of accountability reflect the individual interest in (a family member) being granted residence, or the public interest in limiting public spending? Furthermore, what was the relevance of the observation in *Konstatinov* that due to the continuous lack of sufficient resources it had been clear to the applicant all along that her residence status would remain precarious?[16] How does awareness of the prospects of obtaining a residence status determine the interest in actually being granted such status? In addition, if indeed the individual interest in being granted residence determines the outcome of a case, rather than the relative weight of the public interest; then how could the Court in *Haydarie* conclude that denying residence to the applicant's children did not violate Article 8 ECHR?[17] In that case the national authorities and the Court had acknowledged the need for family reunification as well as the fact that this was not possible in the country of origin.

Another question as regards the Strasbourg approach arose from cases where besides lacking sufficient resources, parents were said to have waited too long after having settled in the host State before pursuing family reunification with their children.[18] In these cases the Court did not discuss the failure to comply with income

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in the Construction of European Migration Policy (Bruylant 2011); Hilbrink (n 8); Eva Hilbrink 'Het middelenvereiste in EU-rechtelijk perspectief' (2010) 2 Journaal Vreemdelingenrecht 13.

[16] *Konstatinov* (n 6), para 49.

[17] *Haydarie* (n 7).

[18] E.g. *Ahmut v the Netherlands* (ECtHR, 28 November 1996) Reports of Judgments and Decisions 1996-VI; *Tuquabo-Tekle and Others v the Netherlands* App no 60665/00 (ECtHR, 1 December 2005); *Şen v the Netherlands* App no 31465/96 (ECtHR 21 December 2001).

requirements, or any other reason for refusing family reunification. In reaction to the government's assertion that residence was to be denied because the family ties between the parents and their children had ceased to exist, the Court evaluated whether the applicants could be held accountable for the separation. Had it been the parents' voluntary decision to leave their country of origin and to leave the child behind when settling in the host State? Could they be excused for not having pursued family reunification sooner? Again, it was not immediately clear to me how this accountability assessment connected to either the individual or the public interest. Another similarity with the Court's approach to income requirements was the importance attached to whether the applicants were entitled to expect that eventually a residence permit would be granted. This time, the Court substantiated the absence of legitimate expectations by pointing out that the application for family reunification had been made after the children had resided in the host State for some time without proper authorisation: time spent together without proper authorisation could not justify a claim to family reunification.

Meanwhile, it seemed that the ECtHR *did* evaluate the weight of the public interest in denying residence in relation to the criminal convictions that occasionally featured in income-requirement cases. With regard to criminal convictions, the ECtHR addressed the number and seriousness of the crimes committed, as well as the chance that the applicant would re-offend.[19]

Due to the differences between the ECtHR's approach to income requirements and its approach to criminal convictions I could not interpret the former as typical for the Court's approach to Article 8 ECHR immigration cases. Due to the similarities between the ECtHR's approach to income requirements and its approach to alleged "ceased family ties" I could also not interpret the Court's approach to income requirements as typical for this particular type of condition. To properly construe the ECtHR's approach to income requirements, i.e. to establish how exactly the public interest is defined in Strasbourg cases featuring income requirements; and why and to what extent the Court's approach to income requirements differs from its approach to other reasons for denying residence; it was necessary to expand the scope of my investigation.

I succeeded, eventually, in obtaining a coherent picture of Strasbourg's review of the public interest in denying residence under Article 8 ECHR. In an empirical analysis of 151 Strasbourg judgments and admissibility decisions, I marked for each case which aspects were addressed in concluding whether denying residence violated Article 8 ECHR. For each aspect I determined how it relates to either the public

[19] *Hasanbasic v Switzerland* App no 52166/09 (ECtHR, 11 June 2013), para 58; *Udeh v Switzerland* App no 12020/09 (ECtHR, 16 April 2013), paras 46-49; *Gezginci v Switzerland* App no 16327/05 (ECtHR, 9 December 2010), paras 64-67.

interest in denying residence or the individual interest in being granted residence. This analysis resulted in a clear picture of the scope of scrutiny in Strasbourg Article 8 ECHR immigration cases according to the various categories of reasons for denying residence. Unexpectedly, I found that certain factors were highly indicative for the outcome of individual cases. With regard to some categories of reasons for denying residence, among which non-compliance with income criteria, a strict correlation emerged between "indicative" factors and the outcome of the case. Notably, none of the indicative factors amount to the individual interest in being granted residence. My initial assumption that the outcome in this type of case primarily depends on the weight of the individual interest in being granted residence proved to be wrong.

In my search for a rationale underlying the patterns of scrutiny I had discovered, I could not rely on the aspects that had been recognised by the ECtHR and in academic literature as being of particular significance in Article 8 ECHR immigration cases; such as the distinction between expulsion cases and (quasi-) admission-cases; strength of relationships with a spouse or children in the host State; incidence of obstacles to establish family life elsewhere; severity of criminal record; age at which crimes were committed; nationality of applicant; irregular residency; or providing false information in immigration procedures. These aspects, typically discussed in Article 8 ECHR immigration-cases, do not account for a consistent pattern of "Strasbourg scrutiny". On the contrary, when it comes to the manner in which these aspects are balanced into a final conclusion on whether Article 8 ECHR has been violated, the Court has generally been portrayed as being unpredictable, lacking transparency and even inconsistent.[20]

Since the start of my investigation of Strasbourg case law I had estimated the paramount importance of the ECtHR's point of departure to be that as a well-established principle of international law, States have the right to control immigration.[21] For one, it had resulted in the acceptance of the very interest in

[20] See section 4.4.1.

[21] As such this was of course not a revolutionary observation. Other academics too have pointed out the significance of the right to control immigration for the manner in which the ECtHR balances the competing interests. Marie-Bénédicte Dembour speaks of the Strasbourg reversal in her analysis of how the ECtHR has rejected a right for migrants to choose where to conduct their family life while having acknowledged the right to control the entry of non-nationals into its territory as a well-established principle of international law. The reversal entails that rather than considering the human being before anything else, the starting point in these cases is the principle of State sovereignty. (Dembour Marie-Bénédicte Dembour, *When Humans Become Migrants* (Oxford University Press 2015) 119. See further, a.o. Anusche Farahat, 'The Exclusiveness of Inclusion: On the Boundaries of Human Rights in Protecting Transnational and Second Generation

controlling immigration as a stand-alone justification for denying residence.[22] Nonetheless, how could this general right to control immigration account for a distinctive pattern of scrutiny within a body of all immigration-cases? At some point during my investigation, I surmised that certain aspects, such as a lack of resources, only within the context of immigration are accepted as justifying a person's physical exclusion from society. Could it be that the Strasbourg Court structurally refrains from substantively scrutinising aspects only where this would directly interfere with *the right of States to control immigration*? Could it be that scrutiny of aspects that also in other contexts may determine whether or not a person is to be physically excluded from society, such as the seriousness of crimes and the chances of re-offending, somehow does not count as scrutiny of how States exercise the right to control immigration? The discovery of the distinction between aspects that are specific to immigration and those that are not had a reversed domino-effect: it enabled me to place Article 8 ECHR-immigration cases in a comprehensive pattern, without unaccounted-for elements causing the fall of neatly set-up rows of cases and blurring the picture. The identification of a rationale of Strasbourg scrutiny furthermore opened a critical perspective on the structural impact of the ECtHR's approach in terms of judicial reasoning in international human rights issues.

The insight into the scope of scrutiny of Strasbourg Article 8 ECHR immigration cases allowed me to examine in detail how the scope of Strasbourg scrutiny of national immigration criteria relates to the scope of scrutiny of such restrictions in Luxembourg case law. This, however, required an adjustment of my initial investigation of Luxembourg case law. I needed not only to examine the ECJ's approach to the public interest in denying residence, but also the consequences of that approach for the significance of other interests at stake. Further, it needed to be confirmed whether the ECJ's approach to income requirements was specific for that

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Migrants' (2009) 11 European Journal of Migration and Law 252; Sylvie Sarolea, 'Quelles vies privée et familiale pour l'etrangèr?' (2000) 13 Revue québécoise de droit international 247; Ciara Smyth, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle? (2015) 17 European Journal of Migration and Law 70-103. Moreover, academic works that contain an overall discussion of Strasbourg reasoning frequently include separate sections on (admission and) expulsion of immigrants, e.g. Marina den Houdijker, *Afweging van grondrechten in een veellagig rechtssysteem. De toepassing van het proportionaliteitsbeginsel in strikte zin door het EHRM en het HvJ EU* (Wolf Legal Publishers 2012) 293; Jonas Christoffersen, *Fair balance: proportionality, subsidiarity and primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 87; Van Dijk P, Arai-Takahashi Y, *Theory and practice of the European Convention on Human Rights* (Intersentia 2006) 704-715.

[22] Discussed in section 4.4.

category of cases or whether in relation to other restrictive criteria perhaps a different approach applied. One of the good things about this expansion was that it allowed me to verify my hypothesis that the expected impact of the Family Reunification Directive also extends to integration requirements: another high-profile restriction in Dutch immigration policies. Finally, the significance of the ECtHR having accepted a generic interest in controlling and restricting immigration as a stand-alone justification for denying residence, urged an examination of how this particular interest is valued in a legal framework which has the promotion of immigration at its core.

The overall analysis of Luxembourg case law showed that the ECJ's approach to national restrictive measures is not reason-specific. It did, however, display a correlation between the technical nature of a restriction and the potential relevance of the various interests at stake. The type of restriction that is at issue determines whether a particular individual or public interest is to be taken into account, and the scope of the aspects relevant for establishing that interest. Further, the generic interest of Member States to uphold national immigration criteria proved not to be a legitimate reason for denying residence.

The process of analysing the argumentation structures of both Courts continuously highlighted new contrasting aspects, ultimately revealing the paramount importance of the interest of States in controlling immigration either being prioritised or marginalised in judicial reasoning. My decision to include a description of the contrasting approaches of the ECtHR and the ECJ to national income requirements changed the scope and nature of this book into what it is now: a systematic content analysis of Strasbourg and Luxembourg adjudication of national legal restrictions to entry and residence of foreign nationals. The central question of this research may be phrased as follows:

> *What is the significance of the public interest in upholding national legal restrictions to entry and residence of foreign nationals in the case law of the European Court of Human Rights and the EU Court of Justice; and how does the answer to the former question relate to the significance of other interests that are at stake in deciding on the outcome of concrete cases?*

1.2 The scope of this research

This book analyses the role of the public interest in upholding national legal restrictions to entry and residence of foreign nationals in the case law of the European Court of Human Rights and the EU Court of Justice. The starting point for the investigation is the contrast between the premises of the two European Courts in

relation to immigration. The premise in Strasbourg Article 8 ECHR immigration cases is the following:

> [S]tates are 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. The Convention does not guarantee the right of an alien to enter or to reside in a particular country.[23]

By contrast, EU law acknowledges explicit rights of entry and residence to foreign nationals, both with regard to Union citizens and with regard to third country nationals. Moreover, the instruments in which EU law entry and residence rights are incorporated are aimed at the *promotion* of immigration. This distinction, combined with the constitutional and institutional differences between the two Courts, naturally account for differences in the scope of scrutiny of these Courts in relation to national immigration policies.[24] Yet, it has proven difficult to establish in detail how scrutiny of national legal restrictions to entry and residence of foreign nationals, depends on whether such restriction is examined in the light of Article 8 ECHR or against standards of EU law.[25]

The main cause for this difficulty has been lack of insight into the boundaries of Strasbourg scrutiny in Article 8 ECHR immigration cases. In this regard, academics have pointed out that the Strasbourg Court has been unable to establish a principled approach to the relationship between State interest in controlling immigration and individual rights of foreign nationals. Indeed, the common perception of ECtHR case law is that it is unpredictable, lacking transparency, and inconsistent.[26] In the words of the often quoted Judge Martens in his dissenting opinion in *Boughanemi*:

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[23] *Darren Omoregie and Others v Norway* App no 265/07 (ECtHR, 31 July 2008), para 54.

[24] See a.o. Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2015); V Guiraudon, 'European Courts and Foreigners' Rights: A Comparative Study of Norm Diffusion' (2000) 34 International Migration Review 1088, 1094.

[25] This issue arises most prominently in cases concerning family reunification on the basis of Directive 2003/86, but also comes to the fore in so-called Zambrano-cases and cases concerning family reunification by Union citizens.

[26] Among many others, Hans Alexy, 'Subsumtion oder Abwägung – Was gilt im Ausweisungsrecht?' (2011) 18 DVBl 1185, 1189 (Alexy does not, however, criticize the absence of coherence: he sees this as proof that the circumstances of the case are actually being balanced and not the result of a fixed process of reasoning); Pieter Boeles, Maarten den Heijer, Gerrie Lodder, and Kees Wouters, *European migration law* (Intersentia 2014) 214, 223, 229; Costello (n 24) 126; Dembour 2015 (n 21) 73; Timothy Endicott 'Proportionality and Incommensurability' in Grant Huscroft, Bradly W. Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law* (Cambridge University Press

> 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. A source of embarrassment since it obliges the Court to make well-nigh impossible comparisons between the merits of the case before it and those which it has already decided. It is - to say the least - far from easy to compare the cases of Moustaquim v. Belgium (judgment of 18 February 1991, Series A no. 193), Beldjoudi v. France (judgment of 26 March 1992, Series A no. 234-A), Nasri v. France (judgment of 13 July 1995, Series A no. 320-B) and Boughanemi v. France. Should one just make a comparison based on the number of convictions and the severity of sentences or should one also take into account personal circumstances? The majority has, obviously, opted for the latter approach and has felt able to make the comparison, but - with due respect - I cannot help feeling that the outcome is necessarily tainted with arbitrariness.[27]

While confirming the common impression of Strasbourg case law as lacking transparency and being inconsistent, this research contributes to the academic debate by identifying a clear pattern of scrutiny in the body of Article 8 ECHR immigration cases. The identification of the boundaries of Strasbourg scrutiny, and the core premises on which these boundaries rest, have thus allowed for establishing to which extent the scrutiny of national restrictions differs according to whether the measure is evaluated in the light of Article 8 ECHR or against standards of EU law.

The core of this book entails a systematic content analysis of Strasbourg Article 8 ECHR immigration cases.[28] This choice has the following implications for the scope of this research. In contrast with case law analysis that rests on an examination

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2014) 314-315; Farahat (n 21) 257; K. Hamenstädt, *The Margins of Discretion in European Expulsion Decisions* (PhD dissertation: Maastricht, 2015) 122; Janis MW, Richard RS, and Bradley AW, *European Human Rights Law* (Oxford University Press, 2008) 410; Thomas Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' (2009) 11 European Journal of Migration and Law 271; Daniel Thym 'Residence as de facto Citizenship? Protection of Long-Term Residence under Article 8 ECHR' in Ruth Rubio-Marin (ed), *Human Rights and Immigration* (Oxford University Press 2014) 115, 110, 122; Karin de Vries, *Integration at the Border: The Dutch Act on Integration Abroad and International Immigration Law* (Hart Publishing 2013) 108.

[27] *Boughanemi v France* (ECtHR, 24 April 1996) Reports of Judgments and Decisions 1996-II.

[28] The term "systematic content analysis" I obtained from Mark A. Hall. It entails, in short, 'selecting cases for study, coding cases to record consistent information about each one, establishing the reliability or replicability of the choices made during the coding, and analysing data.' Mark A. Hall 'Systematic Content Analysis of Judicial Opinions' (2008) 96 California Law Review 63, 66. It is also possible to qualify this research as an empirical legal analysis.

of 'leading cases', 'content analysis insists on replicability'.[29] In this research I have included all ECtHR judgments until 1 April 2014 and all admissibility decisions between 1 April 2004 and 1 April 2014, in which national decisions to refuse entry or (further) residence[30] were assessed in view of Article 8 ECHR.[31] Further, the conclusions of the analysis are based on empirical data. Hence, either the explicit text of the cases, or an empirical correlation between certain aspects featuring these cases have allowed for drawing conclusions on "the Court's approach". Connected to this point, the nature of the questions in the analysis is empirical or analytical (Does the Court make evaluative comments on the facts that have been put forward to deny residence? Which aspects were discussed in establishing that a person was not entitled to expect that any right of residence would be conferred upon him? Do these aspects relate to the weight of the individual or the public interest?). The analysis avoids including normative questions (How should the Court approach the public interest in denying residence? Does the Court sufficiently take into account the individual interests at stake? Did the Court apply the balancing assessment in a correct manner?). Of course, as chapter 4 will demonstrate, a systematic content analysis does not prevent that the findings of such analysis are subsequently subjected to critical analysis.

It must be noted here that the analysis of Luxembourg case law differs in some respects from the Strasbourg analysis. Self-evidently, with regard to both Strasbourg and Luxembourg case law the analysis focused on identification of the features of the judicial approach to the public interest in denying residence. However, only with regard to Strasbourg case law did I examine every case within the indicated time period. As a result of the main purpose of clarifying the Strasbourg approach to immigration cases, and because of the consistency I found in the Luxembourg approach, the analysis of Luxembourg case law does not include every case within a certain period of time. The case law covered in this analysis is limited to national restrictive conditions concerning the right to free movement of Union citizens and their family members, and concerning family reunification pursued by third country nationals on the basis of Directive 2003/86. As a starting point I conducted an in-depth analysis of income-requirement-cases. The features of scrutiny as identified in the Luxembourg case law on income-related restrictions are subsequently set out against the ECJ's approach to other grounds for restricting entry and residence rights.

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[29] ibid 79.

[30] Throughout this book, I use the term "denying residence" for both refusal of admission into and the refusal of (continued) presence, either authorised or unauthorised, in the host State.

[31] See on the selection of cases in more detail, section 2.1.1.

This allowed me to examine whether the ECJ's approach to income requirements is reason-specific or extends to all types of reasons for denying residence.

Having taken a systematic content analysis as the basis for the findings in this research, the focus of this book is placed on the investigation and analysis of case law. This approach has rendered it impossible to do justice to the vast body of literature that exists on these cases and on the many issues that connect with the findings of this research. The outcomes of the analysis of Strasbourg case law are discussed in the light of the concepts of the margin of appreciation and balancing competing interests as judicial tools of scrutiny. The discussion of the outcomes of the analysis of Luxembourg case law will be restricted to a discussion on how the scope of scrutiny of national restrictions differs according to whether a measure is evaluated in the light of Article 8 ECHR or against standards of EU law, and how this relates to the opposing starting points towards immigration between these Courts.

1.3 Structure of the book

The first part of this book examines the Strasbourg approach to the public interest in denying residence to foreign nationals. Chapter 2 presents the results of the systematic content analysis of Article 8 ECHR immigration cases. In the analysis, six categories of reasons for denying residence are distinguished. Each category was examined for whether the ECtHR evaluated the public interest in denying residence on the basis of the circumstances of the case. Where the Court did not evaluate the public interest on a case-by-case basis, it is noted which other aspects were addressed to decide upon the matter. Upon research, a line of distinction appeared between criminal convictions, national security, and national health on the one side; and on the other, non-compliance with income criteria, procedural rules of immigration law and individual interest-related criteria.[32]

In relation to the first three categories of reasons the Court weighed up the public interest in denying residence to the person concerned. Furthermore, the Court does not necessarily follow the national authorities in their appreciation of the facts and circumstances in these cases. Thus, the Court may disagree for example on the seriousness of crimes, or probability of re-offending, or the extent to which a foreign national poses a threat to national security or health. In relation to the latter three

[32] Individual interest-related criteria are criteria for entry or residence that represent certain ties to (persons living in) the host State, such as a requirement of having lived in the host State for a certain period of time to become eligible for family reunification. See elaborately, section 2.1.

categories of reasons, a different picture emerges. Admittedly, the ECtHR here too makes explicit evaluative comments on the facts invoked to justify denying residence; however, in none of the cases was this evaluation at variance with the evaluation expressed by the national authorities. In addition, there is no proportionate link between the evaluation of the facts underlying the decision to deny residence and the outcome of a case. Instead, in the cases featuring the latter three categories of reasons, factors other than the relative weight of competing interests at stake emerge as being indicative for the outcome. These factors concern the issue of whether the national criterion has been applied correctly and consistently and whether there was a good excuse for non-compliance with that criterion. Furthermore, it appears that the Court accepts, as a stand-alone legitimate interest for denying residence, the interest *per se* in upholding national rules of immigration law. This is at issue in cases where residence is denied for non-compliance with procedural criteria or individual interest-related criteria. This unspecified interest, in this book termed *generic* interest in controlling immigration, may justify a decision to deny residence, irrespective of whether there are substantive objections against this person's presence in the host State.

In chapter three I further explore the link between the occurrence of the aforementioned indicative factors and the outcome of a case. This exploration results in a flowchart that shows for each Article 8 ECHR immigration-case under investigation whether its outcome corresponds to the occurrence of predetermined factors.

Chapter four concludes the first part of this book by expounding the findings of the preceding chapters. I start by arguing that the systematic content analysis of Strasbourg Article 8 ECHR immigration cases revealed a distinction between cases in which the ECtHR can be said to conduct a balancing assessment[33] and cases in which the outcome corresponds to a decision-model that implies a full margin of appreciation being accorded to States.[34] I propose this distinction may be understood by focusing on the significance of the public interest concept in controlling immigration.

The distinctive feature of cases to which a full margin of appreciation applies is the presence of so-called immigration-specific aspects. These are aspects that only in the context of immigration may determine whether a person is to be physically

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[33] That is, an assessment in which the Court's approach entails an evaluation of the weight of the competing interests on the basis of the circumstances of the case at hand, without one of the interests being capable to trump the other interest irrespective of the weight of the former or the latter. See extensively, chapter 4.

[34] A decision-model based on whether the national criterion has been applied correctly and consistently, and whether there was a good excuse for non-compliance with that criterion.

excluded from society as a whole.[35] In cases without immigration-specific aspects, the Court demonstrably evaluates the weight of competing interests on a case-by-case basis, without necessarily submitting to national authorities. By contrast, in cases featuring immigration-specific aspects, the Court only concluded that denying residence violates Article 8 ECHR if this would not affect the validity of the restrictive criterion at issue or the manner in which the competing interests had been balanced on the national level. There is, in other words, a full margin of appreciation for States when it comes to immigration-specific aspects. Evidence for this full margin of appreciation in these cases is a strict correlation between the outcome of the case and the aforementioned indicative factors: the correct and consistent application of national, immigration-specific criteria and the existence of a good excuse for non-compliance with these criteria. The correlation entails that if in relation to immigration-specific aspects the applicable national rules have been applied correctly and consistently, denying residence is not considered to be in violation of Article 8 ECHR, unless there was a good excuse for non-compliance with the criterion at issue.

I argue that the dividing-line found in Strasbourg cases reflects the limits of Strasbourg scrutiny, the crossing of which would compel the Court to interfere with national exclusion policies that are specific for immigration and in which accordingly, States have no alternative for physically excluding the person concerned from society as a whole. Indeed, without this being its explicit purpose, the Court has accepted a violation of Article 8 ECHR only in cases where such conclusion would not compromise the pursuance of immigration-specific exclusion policies. In these cases, the weight of the individual interests at stake has proven to be incapable of independently tipping the scales.

The link between immigration-specific aspects and the outcome of Strasbourg cases provides clarity on the outcome of controversial Strasbourg cases in which it was difficult to understand why the Court had not considered the individual interests at stake as outweighing public interest.[36] The fact that this explanation exists in a full margin of appreciation being accorded to States, however, provokes critical views of the use of this judicial tool in Article 8 ECHR immigration cases. The ECtHR's consistent presentation of cases as being the result of balancing, while in fact in a substantive number of these cases a full margin of appreciation applies, has resulted in a distorted view of the precise scope of Strasbourg scrutiny. Furthermore, by adopting this opaque practice the Court has effectively created a potential bias in the political and legal discourse on a national level.

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[35] E.g. a failure to satisfy income requirements, the end of a marriage, or a failure to register one's presence.

[36] E.g. Smyth (n 21); Spijkerboer (n 26).

Moreover, by failing to be clear about the scope of the "margin" of appreciation, the Court has obscured the significance of accepting the generic interest in controlling immigration as an autonomous legitimate interest. With this unspecified interest in controlling immigration per se the Court applies a "public interest" concept that technically does not allow for making a substantive distinction between justified and unjustified decisions to deny residence. I argue that to the extent that Article 8 ECHR immigration cases follow the above decision-model based on its current indicative factors, the ECtHR's approach in Article 8 ECHR immigration cases cannot technically provide protection against arbitrary decision-making.

I conclude by explaining that the criticism regarding the Court's approach to Article 8 ECHR immigration cases cannot easily be remedied within the boundaries of the current paradigms employed by the Court. To maintain the assertion that immigration cases touching upon family or private life are not categorically excluded from the protection of Article 8 ECHR, the Court must either conduct a substantive scrutiny of the public interest in denying residence or, it has to acknowledge a concrete minimum threshold of substantive protection of an individual interest in being granted entry or residence. Since it allows for general exceptions to rights in view of pursuing the public interest, Article 8 ECHR cannot provide substantive protection if a minimum-level of protection of the individual interest in being granted residence, and a minimum level of substantive scrutiny of the public interest in denying residence are both lacking.

In the second part of this book I examine how scrutiny of national restrictions to entry or residence under EU law compares to the findings of the Strasbourg analysis. Consequently, while investigating the public interest role in the case law of the ECJ, I focus on the extent to which the generic interest in controlling immigration plays a role in deciding on the admissibility of national restrictive measures. Further, I examine the extent to which the individual interest in being able to exercise a right of entry or residence can be qualified as an interest that has inherent value, and to which extent an established individual interest may be set aside by a competing public interest.

As mentioned earlier, this part starts out with an examination of the judicial approach to income requirements. I distinguish between various categories of persons: economically active Union citizens (chapter 5), economically non-active Union citizens (chapter 6), various subcategories of family members of Union citizens (chapter 7), and third country nationals that fall within the scope of the Family reunification Directive (chapter 8). In chapter 9, the ECJ's approach to income-related requirements is compared to its approach to other categories of restrictions: criminal convictions, procedural rules, criteria relating to certain family ties and integration criteria. This overall-analysis confirms the assertion that the

judicial approach as discerned in relation to income-related criteria is not reason-specific; it applies generally.

The ECJ subjects national legal restrictions to entry and residence of foreign nationals to a rigorous judicial review that takes place in the context of an extensive interpretation of the right at issue and a narrow interpretation of the restriction. The use of restrictive criteria is strictly permitted to the extent they are stipulated explicitly in EU legislation or in definitions drawn up by the ECJ in its case law. Furthermore, the ECJ is firm in forcing States to make use of only customised standards in applying income-related criteria. This means that fixed standards are prohibited. Although the ECJ's approach is not reason-specific, there is a difference as between the various types of restrictions to entry and residence rights.[37] The type of restriction that is at issue determines whether a particular individual or public interest is to be taken into account, and the scope of the aspects relevant for establishing that interest.

The analysis of Luxembourg case law shows furthermore that the ECJ rejects the generic interest of States in controlling immigration as an aspect of stand-alone relevance in the judicial assessment of national restrictive measures. Irregular residence or a failure to comply with other procedural rules cannot *per se* justify denying residence. Moreover, the individual interest-related criteria that have been incorporated in the various legal instruments are consistently interpreted in the light of the aim to *promote* immigration.

Chapter 10 concludes this book. It evaluates how the scope of scrutiny of national restrictions differs according to whether the restriction is evaluated in the light of Article 8 ECHR or against standards of EU law, and it discusses how this distinction relates to the opposing starting points towards immigration between these Courts. Further, I discuss why the technical contradictions in the Strasbourg approach to Article 8 ECHR immigration cases cannot easily be remedied within the boundaries of the current premises employed by the Court. To maintain the assertion that immigration cases involving family or private life are not categorically excluded from the protection of Article 8 ECHR, the ECtHR must either conduct a substantive scrutiny of the public interest in denying residence, or it has to acknowledge a concrete minimum threshold of substantive protection of an individual interest in being granted entry or residence. I contend that to accept the generic interest of States in controlling immigration as an autonomous justification for denying residence without a guaranteed substantive minimum-level of private or family life, means to

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[37] These concern: conditions relating to the personal scope of a particular right, conditions relating to a national public interest in denying residence, requirements that do not establish or condition, but merely regulate the exercise of an established right; and, finally, general grounds on the basis of which established residence rights may be restricted.

accept that cases in which this particular interest is at stake do not fall within the scope of Article 8 ECHR. It means to accept that as a matter of fact, not of principle, an established generic interest in controlling immigration trumps any individual interests that may be at stake.

PART I STRASBOURG

Chapter 2 Strasbourg adjudication of the public interest in immigration law

2.1 Introduction

This chapter analyses for the various reasons for denying residence the extent to which the Strasbourg Court evaluates the weight of the public interest in denying residence in the case at hand. As indicated in chapter 1, the basis for my conclusions in this regard will be a large-scale systematic content analysis of Article 8 ECHR immigration cases.

2.1.1 Selection of cases

The cases included in this chapter's investigation were selected on the following basis: I started out with a query in HUDOC, using as search terms "immigration" OR "aliens" OR the French terms "non-nationaux" OR "immigrants" OR "étrangers". In addition, the (potential) applicability of Article 8 ECHR was used as a filter. The search further included a date restriction: in principle, only cases dispensed prior to 1 April 2014 fall within the scope of this research.[38] With regard to admissibility decisions in particular, another date restriction has been applied to the query: only decisions delivered since 1 April 2004 have been taken into account. Thus, all judgments until 1 April 2014 and all admissibility decisions between 1 April 2004 and 1 April 2014 involving both immigration and Article 8 ECHR have been included.[39]

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[38] Cases from a later date are discussed by means of illustration.

[39] These results are supplemented with the cases that were included in my initial investigation of Strasbourg income requirement cases, mentioned in the introduction to this book, insofar they had not already been included through the search above. Consequently, some admissibility decisions from before 1 April 2004 are included. Admittedly, it is inconsequent to include only decisions featuring income requirements from before 1 April 2004, but considering the scarcity of cases featuring income-related criteria, I have decided to include them anyway.

From the caseload obtained through the aforementioned procedure, I have excluded a number of cases in order to maintain only those cases that can provide information on the Court's assessment of the weight of the public interest in denying residence. Firstly, cases focussing on a possible violation of Article 3 ECHR were excluded. These concern cases in which an asylum claim has been rejected and where a subsequent appeal to Article 8 ECHR was denied on the sole ground that the applicant should have left the host State after the rejection of his asylum claim. In this type of case, the decision to deny residence essentially comes down to an effectuation of the earlier decision to reject the asylum claim and no 'new' reason for denying residence was introduced.[40] Furthermore, cases were excluded if the contested decision did not involve the denial of entry or residence in the host State. Although a person's residence may be affected in many ways, for example by being refused a claim to social assistance or a particular type of residence status, the focus of this research is confined to the right to entry and residence as such. The term 'denying residence' is used in a broad sense here. This means that it includes both denying a person's entry into a country as well as refusing or withdrawing permission to stay in the country after a person has already stayed in the country, either or with or without permission of the national authorities. The restriction to cases in which national decisions would actually result in 'denying residence' to that person, means that cases in which the foreign national was not, or no longer subject to (the threat of) physical removal from the country have not been taken into account.[41] The selection process finally resulted in 151 cases subjected to analysis.[42]

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[40] See f.e. *Nnyanzi v the United Kingdom* App no 21878/06 (ECtHR, 8 April 2008). By contrast, cases in which after the rejection of an asylum claim a subsequent application for family reunification is rejected on the ground, for example, that the applicant's sponsor does not have sufficient income, are included in this research. In this type of case the reason for denying residence is not merely an extension of the decision to reject an asylum claim, and thus lends itself for a separate inquiry.

[41] In cases in which the claim entailed the obtainment of a particular residence status, rather than the right to reside as such, the Court either concludes that the Convention does not cover the right to a particular residence status, or it is concluded that because residence has been granted, the foreign national concerned is not considered a victim in terms of the Convention. In both instances, the legitimacy of the contested national decision remains undiscussed and thus, these cases cannot provide us with any relevant information on how the Court evaluates the reason for that decision. E.g. *Sisojeva and Others v Latvia* (striking out) [GC]] App no 60654/00 (ECtHR, 15 January 2007); *Aristimuño Mendizabal v France* App no 51431/99 (ECtHR, 17 January 2006).

[42] These cases are included in the flow chart discussed in chapter 3.

2.1.2 Methodical aspects

For each case included in this research I marked a number of elements enabling me to examine whether the weight of the public interest in denying residence was established on the basis of the circumstances of the case at hand. First, I identified the reasons presented by the national authorities to justify the decision to deny residence to the foreign national. If more than one reason was put forward, this was marked. Further, I examined whether the Court evaluated these circumstances in terms of their weight, significance or seriousness. By means of illustration, in a case where the applicant was expelled because of having committed certain crimes, I examined whether the Court evaluated the severity of the crimes or the risk of re-offending, since these aspects connect to the weight of the public interest in the prevention of crime.

It is noted here that the mere observation that a national decision *pursues* a certain legitimate aim is not considered a statement regarding the weight of the public interest in taking that decision. These are two different issues. Indeed, the observation that a measure pursues a legitimate aim does not prevent the Court from deeming that same measure to be in violation with Article 8 ECHR for being disproportionate to the aim pursued. Similarly, a mere reiteration by the Court of the circumstances put forward by the State to justify the decision to deny residence does not constitute an appraisal of the weight of the reason for denying residence. In the context of this research, in order to be labelled as 'an evaluation of the weight of the public interest in denying residence on the basis of the circumstances of the case at hand' it is essential that the Court's considerations entail explicit evaluative remarks regarding the weight, significance or seriousness of the circumstances that were alleged against the person concerned. In cases featuring more than one reason for denying residence, the examination is conducted in relation to each reason. It is important to note here that the analysis will be confined to the Court's factual approach to the reasons for denying residence. The appropriateness of the Court's approach is not at issue here.[43]

In cases where I found that the Court did not evaluate the weight of the public interest on the basis of the circumstances of the case, I marked which aspects in relation to the reason for denying residence were considered instead. I examined how these considerations relate to the public interest in a different manner than in terms of the relative weight of that interest, *i.e.* in a manner that implies a fixed relationship between public and individual interest. If the reason for denying residence remained unaddressed altogether in the Court's considerations, this was also duly marked.

[43] A critical analysis is conducted in chapter 4.

2.1.3 Categories of reasons for denying residence

In order to examine the extent to which the Court's approach to national reasons for denying residence is reason-specific, in my analysis, I have distinguished the following six categories of reasons that have been put forward to deny residence to foreign nationals:

Criminal convictions (discussed in section 2.2)
National security (discussed in section 2.3)
National health (discussed in section 2.4)
Income-related criteria (discussed in section 2.5)
Procedural rules of immigration law (discussed in par section 2.6)
Individual interest-related criteria (discussed in section 2.7)

The above distinction between categories of reasons is not clear-cut; national criteria may be categorised in more than one way. In order to ensure the outcome of my analysis was not influenced by my choice of categorisation, the analysis was conducted in respect of the various possible manners of categorisation.

Criminal convictions

The first category of reasons concerns offences committed by a foreign national. This category of "criminal convictions" features the majority of Article 8 ECHR immigration cases and generally speaks for itself. Nevertheless, there may be an overlap with some of the other categories listed above. For example, if a foreign national has been denied residence for posing a threat to the host State's national security, this may very well be based on the circumstance that this person has committed certain crimes. Furthermore, non-compliance with procedural rules of immigration law in some States qualifies as a crime. In this research, the boundaries of the category of criminal conviction cases are largely defined by more specific categories. Thus, cases featuring criminal convictions that do not fall within one of those specific categories are placed in the category of 'ordinary' criminal conviction cases.

Threat to national security

The second category concerns the concept of posing a threat to the host State's national security. A case is discussed under this heading if the fact that the foreign national is considered a threat to the national security of the host State is explicitly put forward as the reason for denying residence. In some cases, the person concerned allegedly posed a threat to national security because of a failure to comply with a registration requirement, *i.e.* a procedural immigration rule. These cases are also

discussed in the category of cases featuring infringement of procedural immigration rules.

Threat to national health

The category 'posing a threat to national health' includes only one case. It concerns a case in which a foreign national had been refused a residence permit on the basis that he was HIV infected.[44] In the body of case law under investigation there is one other case in which HIV played a role in denying residence to the foreign national concerned.[45] In that case, however, the reason for expulsion was that the applicant had repeatedly and knowingly engaged in unprotected sexual intercourse without disclosing that he was HIV positive. Since this particular conduct was explicitly labelled as a criminal offence[46] rather than being discussed in terms of protection of health, the case is placed in the category of 'criminal convictions'.[47]

Non-compliance with income-related criteria

Cases featuring *non-compliance with income-related criteria* are those in which the applicant's financial situation is invoked to substantiate the decision to deny residence to either the applicant himself or, where the applicant serves as a sponsor, to the family members with whom he wishes to be reunited. Examples are: posing a burden on the social assistance scheme, having accumulated debts or lacking sufficient housing. In some cases, a person's income-related aspects arguably connect to both the public interest in denying residence and the individual interest, for example if it is considered that a person's lack of employment proves that he is not integrated in the host State. These cases will also be discussed under the heading of individual interest-related criteria.

Infringement of procedural immigration rules

Contrary to the reasons addressed so far, the reasons for denying residence in the two final categories of cases do not connect to a specified or substantive objection against the presence of a particular individual in the host State. Procedural rules of immigration law enable States to establish that a foreign national satisfies substantive

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[44] *Kiyutin v Russia* App no 2700/10 (ECtHR, 10 March 2011).

[45] *Ndangoya v Sweden* (dec.) App no 17868/03 (ECtHR, 22 June 2014).

[46] 'By repeatedly and knowingly engaging in unprotected sexual intercourse without disclosing that he was HIV positive, he [the applicant, EH] had perpetrated criminal offences of the utmost gravity, causing irreparable and potentially life-threatening harm to two of his victims.' *Ndangoya* (n 45).

[47] The placement of this case under the heading of criminal convictions does not influence the conclusions I have drawn in relation to either of both categories.

conditions for entry or residence. The requirement to obtain a residence visa, for example, allows States to verify whether foreign nationals satisfy the requirement to have sufficient income or sufficient housing, or the obligation to submit proof that the person concerned has not committed crime. Not having a residence visa, however, does not necessarily mean that the person concerned does not satisfy the aforementioned substantive conditions. Similarly, the requirement to show a passport serves to make sure that the person allowed into the country because he fulfils the entry requirements - is indeed this person and not someone else who perhaps does not fulfil these requirements. Yet, failure to show a passport is not *in itself* indicative of any substantive objections that may exist against this particular person's entry or residence of in the host State.

The category of infringement of procedural immigration rules also includes cases where an individual failed to stay outside or leave the host State after formally having been refused entry or residence. If previous irregular entry or residence is invoked as a stand-alone ground for refusing a subsequent request for entry or residence, there is no immediate indication of the substantive objections that may exist against a person's presence in the host State.

Finally, this category includes cases where a right to residence was obtained on the basis of false information. The reason for making false statements about one's situation or one's identity may be to hide the existence of substantive objections against a person's entry or residence. Nevertheless, if the very fact that false information was provided constitutes a separate ground for denying residence, this ground is not in itself indicative for specified objections that may exist against that person's presence in the host State.

The cases placed under this 'umbrella-category' of infringement of procedural immigration rules have one thing in common: the reasons that have been put forward to deny residence to a person are separated from the substantive issue of whether the presence of *that particular person* is detrimental to the public interest. Indeed, in these cases it is the very ability to control immigration, *i.e.* the very ability to decide who may lawfully enter or reside in the State's territory that is at stake. For this reason, it is a *generic*, rather than a *substantive* public interest that is pursued with denying residence in these cases.

Non-compliance with individual interest-related criteria

In the final category of cases discussed in this chapter, the reason for denying residence is not formulated in terms of a public interest at all. This reason concerns non-compliance with *individual interest-related criteria* for entry and residence. Examples are the condition to have a sufficiently secure residence permit in order to be eligible for family reunification; or the so-called attachment criterion, which requires that the spouse's aggregate ties to the host State are stronger than those with

the country of origin.[48] Further examples are the condition of cohabitation between family members in the country of origin in order to be granted family reunification in the host State; or the requirement to prove that during a period of separation between family members sufficient efforts were made to maintain or restore close family ties. It is important to distinguish individual interest-related reasons for denying residence from other individual interest-related aspects discussed in Article 8 ECHR immigration cases. If it is argued e.g. that expelling a person for having committed crimes would not be disproportionate in view of the fact that this person still has strong ties with his country of origin, the latter aspect obviously cannot be considered as the reason for denying residence. Only if an individual interest-related aspect serves as an autonomous condition for obtaining permission for entry or residence, is the failure to satisfy this condition discussed under this heading.

In relation to individual interest-related reasons for denying residence, another remark must be made here. While formulated in terms of a certain individual interest in being granted residence in the host State, the reason why conditions of this kind are incorporated in national immigration laws in the first place, is to quantitatively restrict immigration. Upholding individual interest-related criteria thus pursues a public interest. Since individual interest-related criteria generally do not distinguish between foreign nationals who are detrimental to the public interest and those who are not, here too is the ostensible public interest *generic* rather than *substantive*: the public interest in denying residence is not connected to the person to whom residence is denied in the case at hand. Arguably, in some cases, an individual interest-related reason for denying residence can simultaneously represent a substantive public interest. A case in point is the case of *Gezginci*, where the applicant's failed economic integration in Switzerland implied a lack of individual ties to the host country but – at least this was the view of the Swiss authorities – also connected to the public interest in protecting the economic well-being. These cases will be analysed under both headings.

In the following sections, for each of the abovementioned categories of reasons, I analyse the extent to which the Court evaluates the weight of public interest in

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[48] In 2016, the Court has ruled in *Biao* that by upholding the attachment criterion, or 28-year rule, Denmark had violated Article 14 in conjunction with Article 8 ECHR (*Biao v Denmark* [GC] App no 38590/10, ECHR 2016). However, as noted and heavily criticised by a.o. Judge Pinto de Albuquerque in his Concurring Opinion, the Court did not dismiss the attachment criterion *as such*. Instead, the Court's conclusion was confined to the application of the requirement only to Danish nationals who were not of Danish ethnic origin and not to Danish nationals who were of Danish ethnic origin. For this reason, the discussion of the attachment requirement in this research has not lost its relevance; nor has the 2016 *Biao* case altered the conclusions made in relation to the first ruling in *Biao* in 2014 (*Biao v Denmark* App no 38590/10 (ECtHR, 25 March 2014)).

denying residence to the persons concerned on the basis of the circumstances of the relevant case.

2.2 Criminal offences

In the majority of the Article 8 ECHR immigration cases - 88 out of 151 - (one of) the reason(s) presented for denying residence concerned one or more criminal offences committed by the foreign national. In relation to this particular ground for denying residence, it is clear that the Court evaluates the weight of public interest in denying residence on the basis of the circumstances of the case. A typical example of how in such a case the Court reaches its conclusion on whether the contested decision violated Article 8 ECHR is *Bajsultanov v. Austria.*[49] The case concerned a Russian national, Mr Bajsultanov, who had been ordered to be expelled by the Austrian authorities because of the crimes he had committed. In assessing whether that decision was necessary in a democratic society, the Court examined the reason for the applicant's expulsion through an evaluation of the circumstances of the case at hand. First, it established the gravity of the offences as committed by the applicant. Subsequently, the Court evaluated the risk of re-offending, again based on the circumstances of the case at issue:

> [T]he Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks imprisonment, suspended with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions.[50]

In its conclusion, the Court connected the concrete aspects that made up the reason for expulsion and the weight of the public interest in the prevention of disorder or crime:

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[49] *Bajsultanov v Austria* App no 54131/10 (ECtHR, 12 June 2012).

[50] ibid para 84.

> 91. Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.[51]

The argumentation in *Bajsultanov,* without doubt, entails an evaluation of the weight of the reason for expulsion based on the circumstances of the case at hand.

An example of a case in which the Court did not accept that the applicant's criminal convictions posed a sufficient justification for the applicant's expulsion, is *Udeh*.[52] Considering both the nature of the offence and the applicant's impeccable behaviour after his imprisonment, the Court found that the Swiss authorities had unjustly considered the applicant a threat to public order and safety. The sufficiency of the weight of the public interest is thus established on the basis of the circumstances of the case at hand:

> […] Cette infraction n'a pas été punie très sévèrement, à savoir par une peine de quatre mois d'emprisonnement. Il s'avéra établi que le requérant ne possédait qu'une faible quantité de cocaïne. Par ailleurs, le requérant a bénéficié d'un sursis à l'exécution de cette peine. La Cour en conclut qu'il convient d'apprécier cette condamnation à sa juste mesure.
> 47. Il convient d'observer que le comportement criminel du requérant s'est limité à ces deux actes, un fait qui n'a pas été considéré comme pertinent par le Tribunal fédéral. La présente affaire se distingue donc notamment de l'affaire Emre c. Suisse (no 42034/04, §§ 72-76, 22 mai 2008), dans laquelle le requérant avait été condamné pour plus de 30 infractions. On ne saurait dès lors dire que le requérant aurait fait preuve d'une véritable énergie ou d'un potentiel criminel.
> […]
> 49. La Cour constate qu'il n'est pas contesté entre les parties que le comportement dont le requérant a fait preuve en prison et après avoir été remis en liberté, le 5 mai 2008, était irréprochable. Or, cette évolution positive, notamment le fait qu'il a été remis en liberté conditionnelle après avoir purgé une partie de sa peine, peut être prise en compte dans la pesée des intérêts en jeu (voir notamment Maslov, précité, §§ 87 et suiv., et Emre c. Suisse (no 2), no 5056/10, § 74, 11 octobre 2011). A cet égard, la Cour considère comme spéculatif l'argument du Gouvernement selon lequel la condamnation du requérant pour 42 mois d'emprisonnement laisse croire que celui-ci constituera à l'avenir un danger pour l'ordre et la sûreté publics.[53]

The fact that in criminal conviction cases the Court establishes the weight of the reason to deny residence on a case-by-case basis is not an unexpected finding.

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[51] ibid para 91.

[52] *Udeh v Switzerland* App no 12020/09 (ECtHR, 16 April 2013).

[53] ibid, paras 46, 47, 49.

Indeed, this approach directly follows from the guiding principles formulated by the Court in *Boultif*[54] and *Üner*.[55] To establish whether denying residence to settled migrants may be considered necessary in a democratic society, the Court stipulates that the following aspects are to be taken into account:

- The nature and seriousness of the offence committed by the applicant;
- The length of the applicant's stay in the country from which he or she is to be expelled;
- The time elapsed since the offence was committed 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, and other factors expressing the effectiveness of a couple's family life;
- Whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- Whether there are children of the marriage, and if so, their age; and
- The seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.
- 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.[56]

The cases of *Boultif* and *Üner* confirmed a long-standing practice, at least when it comes to the practice of taking into account the nature and seriousness of the committed offences; the time elapsed since the offence was committed and the applicant's conduct during that period.[57] Indeed, the analysis in this research shows that in relation to criminal convictions the Court as a rule establishes the weight of the interest in denying residence in view of the specifics of the case at hand. To this general rule there has been only one obvious exception.

The one instance of a criminal conviction case in which the Court has not established the weight of the public interest on the basis of the specific circumstances of the case is *Mawaka v the Netherlands*.[58] This case concerns the revocation of a foreign national's permanent residence permit because of a criminal conviction. In

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[54] *Boultif v Switzerland* (ECtHR, 2 February 2001) ECHR 2001-IX.

[55] *Üner v The Netherlands* App no 46410/99 (ECtHR, 18 October 2006).

[56] ibid paras 57-58.

[57] These aspects have already been taken into account since the Court's first judgment featuring criminal convictions as a reason for denying residence: *Moustaquim v Belgium* (ECtHR, 18 February 1991) Series A no. 193, paras 42-44.

[58] *Mawaka v the Netherlands* App no 29031/04 (ECtHR,1 June 2010).

its reasoning the Court did not get to the point of evaluating the aforementioned circumstances because upon the revocation of the applicant's residence permit, the residence permits of his spouse and son were revoked as well. The Court considered that as a consequence of this particular circumstance, the expulsion of the applicant would not raise an issue under Article 8 ECHR:

> 61. While the withdrawal of the applicant's residence permit results in the situation that he is unable lawfully to reside in the country where he has been enjoying family life with his wife and child (and, subsequent to his divorce, with his child), the Court notes that these family members are also no longer lawfully residing in the Netherlands. As mentioned above (see paragraph 58) it is indeed well-established in the Court's case-law that an issue may arise under Article 8 due to the removal of a person from a country where close members of his family are living. However, that principle is in general to be understood as applying only if those family members are residing lawfully in that country or, exceptionally, if there is a valid reason why it could not be expected of them to follow the person concerned. In the present case, it has not appeared that the applicant's ex-wife and son - who are not parties to the present proceedings and who have not themselves lodged an application to the Court - have attempted to regularise their situation in the Netherlands, and neither have any arguments been submitted to the effect that they are unable to return to the DRC.
> 62. Accordingly, there has been no violation of Article 8.[59]

Thus, despite the fact that the *Mawaka* case had passed the admissibility stage, it nevertheless stranded on the circumstance that refusing residence would not result in breaking up the family and therefore did not raise an issue under Article 8 ECHR. Since the Court considered the contested measure not to touch upon the right to respect for family life under Article 8 ECHR in the first place, it was not appropriate to establish whether there was a sufficient public interest that could justify that measure.[60]

A final case to be discussed here is that of *Narenji Haghighi v the Netherlands*.[61] The minimal attention paid to the circumstances relating to the criminal offences renders it doubtful whether in this case the Court established the weight of the public interest in denying residence. The case concerns an Iranian national who had entered

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[59] ibid paras 61-61.

[60] This logic does not necessarily apply on the national level: there, neither the proportionality or the fair balance assessment are applied exclusively within the context of the European Convention on Human Rights. Thus, the circumstance that the Court – that only deals with infringements of the Convention – refrains from evaluating the reason for denying residence because the Convention is not applicable, does not mean that explicating the public interest in denying residence might not be imposed on the basis of national law.

[61] *Narenji Haghighi v the Netherlands* (dec.) App no 38165/07 (ECtHR, 14 April 2009).

the Netherlands in 1994 and who, after rejection of his asylum request, remained in the country without a residence permit and after some time married a Dutch national. His request for a residence permit for the purpose of residing with his spouse was rejected because he was not in the possession of a provisional residence visa. In the Netherlands, such a visa is a prerequisite for granting a regular residence permit and it must be applied for in a person's country of origin. The applicant subsequently returned to Iran and filed a request for a provisional residence visa. The latter request was rejected because during the earlier period the applicant had resided in the Netherlands he had repeatedly committed criminal offences. The Court started by pointing out that this case was to be distinguished from a case dealing with the expulsion of settled migrants:

> The Court observes that the present case concerns the refusal of the domestic authorities to allow the applicant to reside in the Netherlands. Although he lived in that country between 1994 and 2005, he did not do so on the basis of a residence permit issued to him by the Dutch authorities. Even though it appears that during some of this time his presence in the country was tolerated while he awaited decisions on his applications for asylum, this cannot be equated with lawful stay where the authorities explicitly grant an alien permission to settle in their country (see Useinov v. the Netherlands (dec.), no. 61292/00, 11 April 2006). *The instant case is therefore to be distinguished from cases concerning settled migrants, i.e. persons who have already been granted a right of residence in a host country*. A subsequent withdrawal of that right – for example because the person concerned has been convicted of a criminal offence –, will constitute an interference with his or her right to respect for private and/or family life within the meaning of Article 8 (see Üner v. the Netherlands [GC], no. 46410/99, § 59, 18 October 2006). In such cases, the Court will examine whether effective respect for private and/or family life entails that the respondent State refrain from withdrawing the right of residence in question, and the Court will do so by considering whether or not the interference is justified under paragraph 2 of Article 8 (see, amongst many others, Boultif v. Switzerland, no. 54273/00, ECHR 2001-IX; Üner v. the Netherlands, cited above; and Maslov v. Austria [GC], no. 1638/03, 23 June 2008).
>
> The question to be examined in the present case is rather whether the Netherlands authorities were under a duty to allow the applicant to reside in the Netherlands, enabling him to maintain and develop family life in their territory; the case thus concerns not only family life but immigration as well. For this reason the Court considers that this case is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation (see Ahmut v. the Netherlands, judgment of 28 November 1996, Reports of Judgments and Decisions 1996-VI, p. 2031, § 63).[62]

The fact that the case did not concern a settled migrant but rather a foreign national, whose residence at the time had not been authorised by the national authorities, was

[62] ibid p. 7

of influence on the applicable assessment scheme. A different set of factors was to be taken into account in concluding on whether Article 8 ECHR had been violated:

> […]In a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see Gül v. Switzerland, judgment of 19 February 1996, Reports 1996-I, pp. 174-75, § 38). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. Another 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 (see Rodrigues da Silva and Hoogkamer v. the Netherlands, no. 50435/99, § 39, ECHR 2006-I).[63]

The list of factors to be taken into account in cases that do not deal with settled migrants includes 'considerations of public order weighing in favour of exclusion', under which heading the commission of offences may be discussed. Compared with the *Üner* criteria discussed above, the placement, as well as the wording of the 'public order criterion' enlisted in *Narenji* might indicate that in this particular context - a context in which the foreign national cannot build on a preceding period of authorised residence – the specifics regarding the crimes committed play a less important role in the Court's assessment. In concluding on the matter, the Court addressed the fact that the applicant had committed offences, but it did not elaborately discuss the nature and seriousness of these offences or the time elapsed since the last offence was committed and the applicant's conduct during that period. The applicant's criminal convictions were addressed in the following manner:

> It is […] to be noted that the relationship relied on by the applicant was created at a time and developed during a period when the persons involved were aware that his immigration status was uncertain and that the persistence of that family life within the Netherlands was thus precarious. This situation however did not prevent the applicant from committing a number of criminal offences even though he must have been aware of the adverse effects these events would have on his applications for a residence permit as well as the opportunity to continue living with his wife.[64]

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[63] ibid p. 7-8.

[64] ibid p. 8.

By addressing the circumstance that the applicant had committed *a number of criminal offences*, the Court seems to distinguish this case from one in which the applicant had committed just administrative offences, or only one criminal offence. Thus, it could be argued that the Court in *Narenji*, albeit only in minor detail, did indeed established the weight of the public interest on the basis of circumstances of the case at hand. It may, however, also be argued that highlighting the commission of crimes served to underpin that the applicant had no legitimate interest in being granted residence: he willingly jeopardised the chances of obtaining a residence permit. Another way of looking at the quote above is that the Court has just entangled the establishment of the weight of the public interest in denying residence with the argument that applicants could not reasonably have expected to be granted a residence permit.

At this point there is no reason to assume that the *Narenji* case constitutes an exception of significance when it comes to the Court's manner of evaluating criminal convictions. Apart from the *Narenji* case, out of 88 criminal conviction cases there is only one case – the case of *Mawaka* – in which the Court has not assessed the reason for denying residence on the basis of the case at hand. As discussed above, the Court's approach in the *Mawaka* case can perfectly be explained: since the applicant's expulsion was not considered to raise an issue under Article 8 ECHR in the first place – the residence permits of his family members had been withdrawn too – the Court simply did not get to the point of evaluating the justification for the decision concerned. Unlike the facts of the case in *Mawaka*, however, the facts in *Narenji* do not deviate in a unique way from other criminal conviction cases. Indeed, in other cases, the circumstance that applicant's family life had been developed during a precarious residence status, or the Court's qualification of the matter as a positive obligation issue, did not result in a less elaborate evaluation of the public interest in denying residence.[65] Given the consistency with which the Court approaches criminal convictions and the absence of unique features in the *Narenji* case, I see no reason to qualify the rather minimal assessment of aspects relating to the criminal offences in the latter case as an exceptional approach.[66]

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[65] See f.e. *Amara v the Netherlands* (dec.) App No 6914 (ECtHR, 5 October 2004); *Arvelo Aponte v the Netherlands* App No 28770/05 (ECtHR, 3 November 2011); *Samsonnikov v Estonia* App No 52178/10 (ECtHR, 3 July 2012).

[66] The reason for including a separate discussion of this case anyway was to avoid leaving 'inconvenient' cases undiscussed.

2.3 National security

The third category of reasons for denying residence concerns applicants considered a threat to national security. In the majority of the cases in this category (16 out of 19) the main complaint was directed against the issue that the facts on the basis of which the foreign national was considered to pose a threat to national security, had been kept secret to the applicant or ineligible for judicial review. In cases featuring such unsubstantiated allegations, the Court has generally taken a procedural approach when it comes to the weight of the public interest in denying residence. This means that rather than evaluating the circumstances of the case in relation to public interest in denying residence, the Court focused on whether the contested decision had been subjected to judicial scrutiny at all.

The first of a series of cases dealing with unsubstantiated allegations in relation to national security is the case of *Al-Nashif v Bulgaria*.[67] It concerns a stateless person, who, while lawfully residing with his family in Bulgaria, had been detained and deported to Syria on the basis of the allegation that he posed a threat to the national security. The decision to deport Mr Al-Nashif was taken without disclosing any reasons to the applicants, to their lawyer or to any independent body competent to examine the matter. Moreover, the issue of whether the applicant's activities constituted a threat to the national security of the Bulgarian State could not be disputed in legal proceedings. The mere fact that it concerned issues of national security had brought the national court to decide that these decisions were not subject to judicial review at all.[68] The Strasbourg Court concluded the case under the heading of whether the interference was in accordance with the law. It started out by emphasising the significance of national procedures designated to assess whether there is sound and sufficient reason for interfering with the rights protected by the Convention:

> 121. The Court reiterates that as regards the quality of law criterion, what is required by way of safeguards will depend, to some extent at least, on the nature and extent of the interference in question (see *P.G. and J.H. v. the United Kingdom*, no. 44787/98, ECHR 2001-IX, § 46). […]
> 122. There must, however, be safeguards to ensure that the discretion left to the executive is exercised in accordance with the law and without abuse.
> 123. Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with

[67] *Al-Nashif v Bulgaria* App No 50963/99 (ECtHR, 20 June 2002).
[68] ibid para 40.

> appropriate procedural limitations on the use of classified information (see the judgments cited in paragraph 119 above).
> 124. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary.
> Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.[69]

Applying these principles to the case at hand, the Court subsequently considered that within the national legal framework there had been no possibility to evaluate whether the applicant indeed posed a threat to national security. Accordingly, the Court concluded that the decision to expel the applicant had violated Article 8 ECHR:

> 125. In the present case the initial proposal to deport Mr Al-Nashif was made by the police and a prosecutor in Smolyan (see paragraph 21 above). It is true that the prosecution authorities in Bulgaria are separate and structurally independent from the executive. However, the Government have not submitted information of any independent inquiry having been conducted. The prosecutor did not act in accordance with any established procedure and merely transmitted the file to the police. The decision-making authority was the Director of the Passport Department of the Ministry of the Interior (see paragraph 22 above).
> 126. Furthermore, the decision to deport Mr Al-Nashif was taken without disclosing any reasons to the applicants, to their lawyer or to any independent body competent to examine the matter.
> Under Bulgarian law the Ministry of the Interior was empowered to issue deportation orders interfering with fundamental human rights without following any form of adversarial procedure, without giving any reasons and without any possibility for appeal to an independent authority.
> [...]
> 128. This Court finds that Mr Al-Nashif's deportation was ordered pursuant to a legal regime that does not provide the necessary safeguards against arbitrariness. The interference with the applicants' family life cannot be seen, therefore, as based on legal provisions that meet the Convention requirements of lawfulness. It follows that there has been a violation of Article 8 of the Convention.[70]

After *Al-Nashif*, the Court, in a number of similar cases consistently disqualified national procedures that did not allow for substantive judicial scrutiny of allegations involving national security. While the case of *Al-Nashif* had solely dealt with procedural aspects, in later cases the Court also included substantive aspects of the case to assess whether denying residence would violate Article 8 ECHR. An example

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[69] ibid paras 121-124.

[70] ibid paras 123, 124, 128.

is *C.G. and others v Bulgaria*,[71] which concerned the expulsion of a Turkish immigrant who had married and settled in Bulgaria. The applicant had been detained without any notification in advance and subsequently deported to Turkey because he was said to present a serious threat to national security. The basis for this assertion was his alleged involvement in the unlawful trafficking of narcotic drugs together with a number of Bulgarian nationals. The factual grounds, on which this allegation rested, however, were kept secret. After reiterating the principles formulated in *Al-Nashif*, the Court went on to substantively evaluate the weight of the public interest, or perhaps rather the soundness of the qualification of that interest:

> 43. The Court first observes that, while the decision to expel the first applicant stated that the measure was being taken because he posed a threat to national security, in the ensuing judicial review proceedings it emerged that the only fact serving as a basis for this assessment – with which both levels of court fully agreed – was his alleged involvement in the unlawful trafficking of narcotic drugs in concert with a number of Bulgarian nationals (see paragraphs 6, 14 and 16 above). It is true that the notion of "national security" is not capable of being comprehensively defined (see Esbester v. the United Kingdom, no. 18601/91, Commission decision of 2 April 1993, unreported; Hewitt and Harman v. the United Kingdom, no. 20317/92, Commission decision of 1 September 1993, unreported; and Christie v. the United Kingdom, no. 21482/93, Commission decision of 27 June 1994, DR 78-A, p. 119, at p. 134). It may, indeed, be a very wide one, with a large margin of appreciation left to the executive to determine what is in the interests of that security. However, that does not mean that its limits may be stretched beyond its natural meaning (see, mutatis mutandis, Association for European Integration and Human Rights and Ekimdzhiev, cited above, § 84). It can hardly be said, on any reasonable definition of the term, that the acts alleged against the first applicant – as grave as they may be, regard being had to the devastating effects drugs have on people's lives – were capable of impinging on the national security of Bulgaria or could serve as a sound factual basis for the conclusion that, if not expelled, he would present a national security risk in the future.
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> 44. It thus seems that the national courts, while ex post facto accepting for examination the first applicant's application for judicial review, did not subject the executive's assertion that he presented a national security risk to meaningful scrutiny (see, mutatis mutandis, Lupsa, cited above, § 41).[72]

In considering that the alleged acts could hardly be said to affect the national security, the Court in fact evaluated whether the circumstances of the case at hand provided a sound justification for the decision concerned.

The analysis shows that in cases featuring unsubstantiated allegations of foreign nationals posing a threat to national security, the Court is consistent in carrying out an assessment of the national procedure. Central in this assessment is whether the

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[71] *C.G. and others v Bulgaria* App No 1365/07 (ECtHR, 24 April 2008).

[72] ibid paras 43-44 (emphasis added).

procedure allows for a meaningful, independent judicial scrutiny of the facts underpinning the allegation that a person poses a threat to national security. In some cases we see that this assessment is complemented with a substantive evaluation of whether the facts of the case justify the conclusion that the person concerned constitutes such a threat.[73]

In three national security cases the complaint had *not* been directed against the lack of independent judicial scrutiny of the concrete reasons for denying residence.[74] In these cases the Court evaluated the circumstances of the case at hand in order to establish the weight of the public interest in denying residence. The case of *Slivenko v Latvia* may serve as an example. The applicants in this case had resided in Latvia for almost their entire lives but had become stateless when Latvia regained its independence in 1991. Subsequently, they were required to leave the country under a deportation order. As members of the family of a retired Russian military officer, pursuant to the Latvian-Russian treaty on the withdrawal of the Russian troops, they were considered a threat to national security. The Court, after having stressed the importance of evaluating the public interest in denying residence on a case-by-case basis, observed that the Latvian authorities in the case at hand had failed to follow that principle:

> 117. In so far as the withdrawal of the Russian troops interfered with the private life and home of the persons concerned, this interference would normally not appear disproportionate, having regard to the conditions of service of military officers. This is true in particular in the case of active servicemen and their families. Their withdrawal can

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[73] The conclusions in these cases not always takes place under the heading of 'in accordance with the law'. In the case of *Kostadinovic* the Court considered that the contested decision had not infringed the applicant's family or private life protected in Article 8 ECHR in the first place. For this reason the Court did not evaluate the weight of the public interest in denying residence to the applicant. The complaint that the circumstances on the basis of which the applicant was considered a threat to national security had not been subjected to judicial scrutiny was dealt with under Article 4, Protocol n. 4 of the Convention. The Court considered this complaint to be unfounded: 'la Cour relève que l'acte critiqué, bien que non motivé, était basé sur un document interne à l'administration où étaient exposées les circonstances factuelles individuelles ayant motivé la mesure de retrait du permis et que, malgré les carences qu'elle a constaté ci-dessus, le requérant a eu l'opportunité de faire valoir les arguments s'opposant à son expulsion dans le cadre du recours judicaire qu'il a introduit. La Cour constate dès lors qu'un examen individuel de la situation du requérant a bien été effectué.' *Kostadinovic v Bulgaria* App No 4512/02 (ECtHR, 4 January 2012), para 47.

[74] *Slivenko v Latvia* [GC] (ECtHR, 9 October 2003) ECHR 2003-X; *Kuric and others v Slovenia* App no 26828/06 (ECtHR, 13 July 2010); *Haliti v Switzerland* App No 14015/02 (ECtHR, 1 March 2005).

> be treated as akin to a transfer to another place of service, which might have been ordered on other occasions in the course of their normal service. Moreover, it is evident that the continued presence of active servicemen of a foreign army, with their families, may be seen as being incompatible with the sovereignty of an independent State and as a threat to national security. The public interest in the removal of active servicemen and their families from the territory will therefore normally outweigh the individual's interest in staying. However, even in respect of such persons it is not to be excluded that the specific circumstances of their case might render the removal measures unjustified from the point of view of the Convention.
> 118. The justification of removal measures does not apply to the same extent to retired military officers and their families. After their discharge from the armed forces a requirement to move for reasons of service will normally no longer apply to them. While their inclusion in the treaty does not as such appear objectionable (see paragraph 116 above), the interests of national security will in the Court's view carry less weight in respect of this category of persons, while more importance must be attached to their legitimate private interests.
> 119. In the present case, the first applicant's husband retired from the military after 28 January 1992, the deadline established by the third paragraph of Article 2 of the treaty, and was thus regarded by the Latvian authorities as being concerned by the withdrawal of troops, together with active servicemen. Regardless of the actual date of his retirement, which is disputed by the parties, the fact remains that from mid-1994 onwards, and during the proceedings concerning the legality of the applicants' stay in Latvia, the first applicant's husband was already retired. Yet that fact made no difference to the determination of the applicants' status in Latvia.[75]

We can see here that it was because of the circumstances of the case, that the Court held that the public interests of national security in removing Russian military officers should carry little weight.

Considering the foregoing discussion of national security cases, we may conclude that in this type of case the Court, in principle, conducts an evaluation of the weight of the reason for denying residence on a case-by-case basis. The one instance in which the Court has refrained from doing so, *Kostadinovic*, can be explained by the circumstance that in that case the Convention was not considered infringed in the first place.[76] In cases where, on the national level, due to the use of secret evidence or to the absence of independent judicial review of the reasons why a person is considered a threat to national security, it had been impossible to undertake such case-specific assessment, the Court consistently deemed such practices to be in violation of Article 8 ECHR.

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[75] *Slivenko* (n 74), para 117-119.

[76] Discussed in the text of note 73.

2.4 National health

The next category to be discussed consists of one case only, *Kiyutin v Russia*.[77] It concerned an Uzbek citizen, who applied for a residence permit to live with his Russian wife and daughter in Russia. As part of his application for a residence permit he was required to undergo a medical examination during which he tested positive for HIV. On account of that circumstance, his application for a residence permit was refused.

The Court discussed the matter in view of Article 14 ECHR in conjunction with Article 8 ECHR.[78] With regard to Article 8 ECHR taken alone, it was merely stated that the case 'fell within the ambit' of this provision. The Court remained inconclusive on whether the circumstances relating to the applicant's family life would have attracted the protection of the Convention.[79] In addressing Article 14 ECHR in conjunction with Article 8 ECHR, the Court extensively discussed whether being infected with HIV provided a sufficient reason to deny residence to the applicant. Firstly, the Court explained that - contrary to what may be the case in relation to other diseases - the authorities' assertion that imposing travel restrictions on HIV-positive individuals could be considered as protection of national health was incorrect:

> 68. Admittedly, travel restrictions are instrumental for the protection of public health against highly contagious diseases with a short incubation period, such as cholera or yellow fever or, to take more recent examples, severe acute respiratory syndrome (SARS) and "avian influenza" (H5N1). Entry restrictions relating to such conditions can help to prevent their spread by excluding travellers who may transmit these diseases by their presence in a country through casual contact or airborne particles. However, the mere presence of an HIV-positive individual in a country is not in itself a threat to public health: HIV is not transmitted casually but rather through specific behaviours that include sexual relations and the sharing of syringes as the main routes of transmission. This does not put prevention exclusively within the control of the HIV-positive non-national but rather enables HIV-negative persons to take steps to protect themselves against the infection (safer sexual relations and safer injections). Excluding HIV-positive non-nationals from entry and/or residence in order to prevent HIV transmission is based on the assumption that they will engage in specific unsafe behaviour and that the national will also fail to

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[77] *Kiyutin v Russia* (ECtHR, 10 March 2011) ECHR 2011.

[78] Article 14 ECHR reads as follows: 'The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

[79] Compare *Abdulaziz, Cabales and Balkandali v the United Kingdom* (ECtHR, 28 May 1985) Series A no. 94, where the Court explicitly noted that denying residence to the persons concerned would not violate Article 8 ECHR taken alone.

> protect himself or herself. This assumption amounts to a generalisation which is not founded in fact and fails to take into account the individual situation, such as that of the applicant. In addition, under Russian law any form of behaviour by an HIV-positive person who is aware of his or her HIV-status that exposes someone else to the risk of HIV infection is in itself a criminal offence punishable by deprivation of liberty (see paragraph 27 above). The Government did not explain why these legal sanctions were not considered sufficient to act as a deterrent against the behaviours that entail the risk of transmission.[80]

In addition to disqualifying travel restrictions as an adequate measure in the prevention of the spread of HIV, the Court observed that the Russian authorities had failed to take into account the individual situation of the applicant in estimating the risk he would pose for national health. Further, it was argued that imposing travel restrictions only to those pursuing long-term settlement in Russia – and not to short-term visitors – could not be considered an effective approach in preventing the transmission of HIV by HIV-positive migrants:

> 69. Furthermore, it appears that Russia does not apply HIV-related travel restrictions to tourists or short-term visitors. Nor does it impose HIV tests on Russian nationals leaving and returning to the country. Taking into account that the methods of HIV transmission remain the same irrespective of the duration of a person's presence in the Russian territory and his or her nationality, the Court sees no explanation for a selective enforcement of HIV-related restrictions against foreigners who apply for residence in Russia but not against the above-mentioned categories, who actually represent the great majority of travellers and migrants. There is no reason to assume that they are less likely to engage in unsafe behaviour than settled migrants. In this connection, the Court notes with great concern the Government's submission that the applicant should have been able to circumvent the provisions of the Foreign Nationals Act by leaving and re-entering Russia every ninety days. This submission casts doubt on the genuineness of the Government's public-health concerns relating to the applicant's presence in Russia. In addition, the existing HIV tests to which an applicant for Russian residence must submit will not always identify the presence of the virus in some newly infected persons, who may happen to be in the time period during which the test does not detect the virus and which may last for several months. It follows that the application of HIV-related travel restrictions only in the case of prospective long-term residents is not an effective approach in preventing the transmission of HIV by HIV-positive migrants.
> 70. The differential treatment of HIV-positive long-term settled migrants as opposed to short-term visitors may be objectively justified by the risk that the former could potentially become a public burden and place an excessive demand on the publicly funded health-care system, whereas that risk would not arise for the latter, who could seek treatment elsewhere. However, such economic considerations for the exclusion of prospective HIV-positive residents are only applicable in a legal system where foreign residents may benefit from the national health-care scheme at a reduced rate or free of charge. This is not the case in Russia: non-Russian nationals have no entitlement to free

[80] *Kiyutin* (n 77), para 68.

> medical assistance, except emergency treatment, and have to pay for all medical services themselves (see paragraph 23 above). Thus, irrespective of whether or not the applicant obtained a residence permit in Russia, he would not be eligible to draw on Russia's public health-care system. Accordingly, the risk that he would represent a financial burden on the Russian health-care system has not been convincingly established.[81]

Based on the circumstances of the case: an infected individual with HIV and not with another disease; no facts suggesting the applicant would engage in unsafe behaviour; and a pursued long-term settlement in Russia and not just a short visit; – the Court found insufficient grounds for denying residence to the foreign national concerned.

2.5 Income-related criteria

National authorities have invoked income-related criteria in fourteen of the cases under present review.[82] At face value, the Court's approach to income-related requirements seems less coherent than its approach to the categories discussed in the previous sections. In seven out of fifteen cases the Court does not even mention the failure to satisfy income requirements in concluding whether denying residence would result in a violation of Article 8 of the Convention. In two cases, the Court did address the failure to satisfy the income condition, but the focus of the assessment was on whether the applicant had a good excuse for non-compliance with the requirement instead of the extent to which the public interest would be served by denying residence to the party concerned. In two other cases, it seems that the applicants' financial situation was discussed in order to establish whether there are reasons against denying residence to the persons concerned, rather than to establish whether there are sufficient reasons in favour of denying residence. Finally, in two

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[81] ibid paras 69-70.

[82] It concerns the following cases: *Gül v Switzerland* App no 23218/94 (ECtHR, 19 February 1996); *Cılız v the Netherlands* App no 29192/95 (ECtHR, 11 July 2000); *Chandra and others v the Netherlands* (dec.) App no 53102/99 (ECtHR, 13 May 2003); *Afonso and Antonio v the Netherlands* (dec.) App no 11005/03 (ECtHR, 8 June 2003); *Benamar v the Netherlands* (dec.) App no 43786/04 (ECtHR, 5 April 2005); *Haydarie v the Netherlands* (dec.) App no 8876/04 (ECtHR, 20 October 2005); *Rodrigues Da Silva and Hoogkamer v the Netherlands* App no 50435/99 (ECtHR, 31 January 2006); *Konstatinov v the Netherlands* App no 16351/03 (ECtHR, 26 April 2007); *Darren Omoregie and Others v Norway* App no 265/07 (ECtHR, 31 October 2008); *Gezginci v Switzerland* App no 16327/05 (ECtHR 9 December 2010); *Çakir v Romania* (dec.) App no 13077/05 (ECtHR, 13 November 2012); *Udeh v Switzerland* App no 12020/09 (ECtHR, 16 April 2013); *Hasanbasic v Switzerland* App no 52166/09 (ECtHR, 11 June 2013); *Palanci v Switzerland* App no 2607/08 (ECtHR 25 March 2014).

cases, the Court *did* acknowledge a link between the applicants' financial situation as a reason for denying residence and the public interest to be pursued. In the first of these cases the Court confined its reasoning to stating that Article 8 ECHR does not preclude States from expelling foreign nationals in service of economic well-being and that in the case at hand the State indeed had put forward the applicant's financial situation as a justification. Whether the applicant's situation in fact posed a sufficient reason for denying residence, however, remained undiscussed.[83] In the second case in which the Court explicitly connects aspects relating to the applicant's financial circumstances to the public interest, the applicant's conduct is evaluated in view of the public interest. However, the public interest taken into account regards the protection of the public order rather than the economic well-being.

2.5.1 Income requirements mentioned only in describing the facts of the case

In seven of the fourteen cases,[84] the failure to satisfy income requirements is only mentioned in the description of the course of proceedings on the national level. In discussing the merits of these cases, the Court does not address the failure to satisfy income requirements. On the basis of these seven cases no more can be said about the Court's view on income requirements other than the use of income requirements to restrict entry or residence of foreign nationals does not as such attract the Court's attention in terms of human rights protection. These cases do not, however, include an evaluation of the public interest in upholding the income requirement on the basis of the circumstances of the case.

2.5.2 Income requirements 'in principle not considered unreasonable'

Significantly, in two cases, *Haydarie*[85] and *Konstatinov*[86], the Court did reflect on income requirements as an instrument to regulate immigration. The case of *Haydarie* concerned the rejection of a request made by a mother to be reunited with her children after she had been granted a humanitarian status in the Netherlands. In *Konstatinov* the Dutch authorities had refused to regularise the status of a woman, inter alia because the applicant's partner, with whom family reunification was sought

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[83] Only the outcome of the case - the Court concluded that denying residence would violate Article 8 ECHR - would suggest that the Court considered that the applicant's situation did not pose a sufficient threat to the economic well-being. In chapter 4, I contend that the cause for the violation in *Hasanbasic* is not primarily the lack of a sufficient public interest in protecting the economic well-being.

[84] *Gül* (n 82); *Chandra* (n 82); *Benamar* (n 82); *Afonso and Antonio* (n 82); *Da Silva and Hoogkamer* (n 82); *Darren Omoregie* (n 82); *Çakir* (n 82).

[85] *Haydarie* (n 82).

[86] *Konstatinov* (n 82).

and who served as the sponsor, did not have sufficient means of subsistence. In both cases the Court used almost identical wording:

> In principle, the Court does not consider unreasonable a requirement that an alien who seeks family reunion must demonstrate that he/she has sufficient, independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought.[87]

This remark is obviously evaluative: the Court agrees with the basic notions of the Dutch scheme of income requirements. With this general statement, however, the Court has not established that *given the circumstances in the cases of Haydarie* and *Konstatinov*, the Dutch authorities had sufficient reason to deny residence.

First of all, agreeing with the general principles of the Dutch scheme of income requirements leaves open the possibility that concrete income requirements stemming from these principles are considered unreasonable, even if they fall within the scope of those general principles. By way of illustration, the fact that it is considered reasonable to require a foreign national, seeking family reunion to demonstrate lasting income, does not mean that the Court would agree with a requirement to produce a permanent employment contract. Agreeing with the general principles of Dutch income requirements does not implicate that every failure to satisfy specified requirements based on that scheme provides a sufficient reason for denying residence.

Furthermore, the Court does not substantiate its comment on the Dutch scheme of income requirements. In the absence of a principal endorsement of the Dutch scheme the Court may on another occasion agree with the requirement of an income level that corresponds to the level of a middle-income earner. In other words, the Court's comment does not imply that further reaching or even completely different principles or requirements than those applicable in the Netherlands will also be characterised as reasonable.[88] Rather than as a demarcation of the circumstances under which States may enforce income requirements in concrete cases, the above citation should be seen as an expression of the fact that the Court does not consider

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[87] *Haydarie* (n 82); *Konstatinov* (n 82), para 50.

[88] This argument connects to the assertion of Aleinikoff, who asserts that definitional balancing, which entails the formulation of a rule that allows for future application without the need for further balancing, does not produce more certainty than *ad hoc* balancing. He argues that formulation of such a rule does not guarantee that in later cases new interests or different weights undermine the rule that was generated before. T. Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 The Yale Law Journal 943, 979.

its task to be the evaluation of national income requirements whenever they occur.[89] Instead, it seems that the Court may undertake to disqualify the application of such requirements in cases where application appears to be apparently *un*reasonable.

That the Court in *Haydarie* and *Konstatinov* apparently endorses the use of income requirement without evaluating the public interest within the circumstances of the case also follows from the manner in which, in both cases, the Court subsequently unrolls its assessment of the reasonableness of the income requirement in the current case. In its argumentation, the Court moves from the general to the specific:

> *In principle,* the Court does not consider unreasonable a requirement that an alien who seeks family reunion must demonstrate that he/she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought. *As to the question whether such a requirement was reasonable in the instant case* [...].[90]

If the reasonableness of the income requirement would have depended on the weight of the public interest in upholding the income requirement in that case, in the considerations that follow the Court would in some way have qualified the burden on the social assistance scheme if the foreign family member(s) was allowed to reside in the host State's territory. Instead, however, the Court's assessment of the reasonableness of the income requirement consists of two aspects that do not connect the circumstances of the case to the weight of the reason for the State to deny residence to the persons concerned.[91] The first aspect entails the confirmation that in the relevant case the income condition was indeed not satisfied; the second entails an examination of whether the sponsor had made sufficient effort to comply with the income requirement or whether there was an excuse for not having satisfied the income requirement. I will explain why these two aspects do not comprise an evaluation of the weight of upholding the income requirement on the basis of the circumstances of the case at hand.

Only if non-compliance with income-related criteria *always* constituted a sufficient reason for denying residence, the very confirmation that a person failed to satisfy income-related criteria would directly establish the sufficiency of the weight

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[89] This would be in line with the Court's statement in the case of *Berrehab*, where the Court emphasised that 'its function is not to pass judgment on the Netherlands' immigration and residence policy as such.' *Berrehab v the Netherlands* App no 10730/84 (ECtHR, 21 June 1988), para 29.

[90] *Haydarie* (n 82); *Konstatinov* (n 82), para 50.

[91] Note that I do not contend here that the Court *should* have made such evaluative remarks. The purpose is strictly to establish *whether* such evaluative remarks are made.

of the public interest in denying residence. However, in that case, the sufficiency of the public interest in denying residence would not follow from the Court's evaluation of the circumstances of the case at hand. Indeed, this evaluation would have been made beforehand, by the State that has set out the income criterion at issue. The observation that the person concerned has not satisfied the criterion would therefore not entail an *evaluation* of the sufficiency of the public interest in denying residence.

That an evaluation of whether the sponsor had an excuse for failing to satisfy income requirements does not add up to an evaluation of the weight of the public interest in denying residence is perhaps less self-evident. To show precisely where the occurrence of a good excuse fits in the balancing exercise, the complete argumentation in this regard is included:

> The Court notes that in the present case the crucial question is whether it could be expected from the first applicant to comply with the income requirement under the domestic immigration rules. On this point, the Court notes that, in order to meet this requirement, the applicant should have an independent and lasting income of an amount equal to benefits under the General Welfare Act to which she was entitled. The Court further understands that the Netherlands authorities would not maintain this income requirement if the first applicant could demonstrate to have made, during a period of three years, serious but unsuccessful efforts to find gainful employment, also bearing in mind the possible existence of an objective obstacle for the applicants' return to Afghanistan.
> In principle, the Court does not consider unreasonable a requirement that an alien who seeks family reunion must demonstrate that he/she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought.
> As to the question whether such a requirement was reasonable in the instant case, the Court considers that it has not been demonstrated that the applicant has in fact actively sought gainful employment after 10 October 2000 when she became entitled to work in the Netherlands. Although it is true that her Netherlands language and sewing courses may have been helpful in this respect, there is no indication in the case-file that she has in fact applied for any jobs. What does appear from the case-file is that she preferred to care for her wheel chair bound sister at home. In this respect, the Court considers that it has not been demonstrated that it would have been impossible for the first applicant to call in and entrust the care for her sister to an agency providing care for handicapped persons as referred to in the Regional Court's judgment of 19 June 2003.
> Having regard to the above considerations, the Court finds that it cannot be said that the Netherlands authorities failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration and public expenditure on the other. There is therefore no appearance of a violation of the applicants' right to respect for his family life within the meaning of Article 8 of the Convention.[92]

The argumentation in the *Haydarie* case has the following structure: whether Article 8 ECHR has been violated depends on whether the Dutch authorities have failed to

[92] *Haydarie* (n 82), 13-14.

strike a fair balance between the applicants' interests on the one hand and its own interest on the other. This "fair-balance" assessment involves an investigation of the reasonableness of the requirement in the instant case, i.e. whether it could be reasonably expected of Mrs Haydarie to comply with the income requirement under the domestic immigration rules. This means that it is examined whether Mrs Haydarie had made sufficient efforts to meet the income requirement, and – since this was not the case - whether she had a good excuse for that failure. The Court observed that Mrs Haydarie could have entrusted the care for her sister to an agency providing care for the handicapped instead of caring for her sister herself. Thus, investigating the reasonableness of enforcing the income requirement comprised an evaluation of whether Mrs Haydarie had set her priorities straight.

In *Konstatinov* it was not just the failure to fulfil the income requirement that was held against the applicant. In addition to the fact that the applicant's partner did not have sufficient means, the applicant had never lawfully resided on Dutch territory and during this period of residence had been arrested repeatedly for theft. With regard to failing to satisfy national income requirements, the Court, as in *Haydarie*, evaluated the reasonableness of this requirement in the instant case:

> In principle, the Court does not consider unreasonable a requirement that an alien having achieved a settled status in a Contracting State and who seeks family reunion there must demonstrate that he/she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought. As to the question whether such a requirement was reasonable in the instant case, the Court considers that it has not been demonstrated that, between 1990 and 1998, Mr G. [the applicant's husband, EH] has in fact ever complied with the minimum income requirement or at least made any efforts to comply with this requirement whereas the applicant's claim that he is incapacitated for work has remained wholly unsubstantiated.[93]

As in the *Haydarie* case, the reasonableness of the income requirement "in the instant case" in *Konstatinov* depended on whether the applicant had made sufficient effort to comply with the income requirement. The Court recalled that the applicant had not made any efforts to acquire sufficient income and that there was no excuse for this: the claim that the applicant was incapacitated had remained unsubstantiated. Both in *Haydarie* and *Konstatinov*, the reasonableness of the Dutch income requirement thus seemed to hinge on the efforts made by the sponsor to obtain sufficient resources and on whether there was an excuse for not having satisfied the income requirement. However, having a good excuse for failing to meet income requirements does not mean that there is a diminished public interest in denying

[93] ibid, para 50.

residence. On the contrary, granting a right of residence because of a good excuse clearly takes place *despite* the fact that there is a public interest in denying residence.

Importantly, in *Haydarie* and *Konstatinov* no other evaluative comments were made in relation to the public interest served with enforcing income-related criteria, e.g. regarding the extent to which the applicants had burdened the social assistance scheme or whether it was likely that the applicants would pose a burden on the social assistance scheme in the future. Thus, the circumstances relating to the applicants efforts to obtain income are not linked to the weight of the public interest in denying residence.[94]

2.5.3 Lack of income reflecting the socio-economic ties with the host country

In the next two cases, *Gezginci*[95] and *Udeh*[96], the applicants' lack of income was linked to the extent of their socio-economic ties to the host State. The *Gezginci* case concerns a Turkish national who, over a period of around 30 years, had alternated periods of both regular and irregular residence in Switzerland with periods of residence in Romania and Turkey. A number of years preceding the contested decision to deny residence, Mr Gezginci had returned to Switzerland every year only to secure the extension of his residence status there. For this purpose, he would begin employment only to stop after being granted the extension of his residence permit.[97] At a certain point, the Swiss authorities refused to grant Mr Gezginci such extension. Among the reasons put forward to substantiate this decision were that he had entered Switzerland irregularly twice and he had repeatedly been convicted of criminal offences. Furthermore, it was argued that he had not integrated into the Swiss labour marked and that his financial situation had not improved over the years. Finally, it was contended that since he had been away from Switzerland several times, the centre of his life was no longer considered to take place in Switzerland. After the rejection of the application for extension, the applicant did not leave Switzerland on his own initiative, nor was he expelled. Afterwards, while employed as a construction worker, the applicant underwent a serious accident, in connection with which he applied for social benefits. A subsequent request for a residence permit on humanitarian grounds was denied, generally on the same grounds as addressed before.[98]

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[94] Again, it is noted that I do not contend here that the Court *should* have made such evaluative remarks. The purpose is strictly to establish *whether* such evaluative remarks are made.

[95] *Gezginci* (n 82).

[96] *Udeh* (n 82)

[97] *Gezginci* (n 82), paras 10-19.

[98] ibid paras 20-25.

In its examination of whether denying residence violated Article 8 ECHR, the Court explicitly discussed the applicant's financial situation. Yet, it is questionable whether doing so entailed an evaluation of whether there was a sufficient public interest in denying residence to the applicant. The applicant's lack of income was discussed in relation to his lack of socio-economic ties with Switzerland when establishing that Mr Gezginci had insufficient interest in remaining in Switzerland. In other words, zooming in on the applicant's economic position did not relate to whether the State had sufficient reason to expel Mr Gezginci, but rather served to answer the question of whether Mr Gezginci had sufficient reason to remain in Switzerland. It is important to distinguish between these two perspectives because in the first case the Court would have indeed evaluated the income requirement as to its merits, or differently put, as to its weight to justify expulsion. In taking the latter perspective, the attention paid to the applicant's lack of income encompasses an appraisal of the applicant's interest in remaining in Switzerland *while leaving untouched the reasonableness of the income requirement as a justification to deny residence*.

Arguably, the proposition may be defended that in *Gezginci* the Court in fact *has* argued that the economic situation of the applicant posed sufficient reason for refusing to extend his residence permit. Indeed, pointing out that the applicant has proven not to be able to hold a job, accumulated considerable debts combined with an appeal for social assistance may very well serve to underpin the public interest in denying further residence to that person. Additionally, the Swiss authorities themselves found the applicant's financial situation as justification for refusing the extension of his residence permit:

> 50. Le Gouvernement estime que *des raisons importantes justifiaient* le refus d'octroi au requérant de l'autorisation de séjour demandée. En plus des condamnations pénales, l'ensemble de son comportement démontrerait qu'il ne respecte pas les normes en vigueur en Suisse. Le Gouvernement rappelle notamment que, à deux reprises, le requérant a quitté une habitation qu'il louait sans en informer les propriétaires et sans s'acquitter du loyer et qu'il s'est fait verser des avances par son employeur avant de disparaître sans les rembourser. En outre, l'intéressé aurait fait l'objet, jusqu'en 2004, d'actes de défaut de biens à hauteur de presque 50 000 CHF et accumulé des dettes d'un montant supérieur à 107 000 CHF. Son comportement ne se serait pas amélioré à cet égard puisque, bien que bénéficiant de l'assistance sociale, il aurait contracté de nouvelles dettes et fait l'objet de nouvelles poursuites depuis la décision incriminée.[99]

The Court's considerations with regard to the applicant's financial situation are the following:

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[99] ibid para 50.

> Par ailleurs, il estime que l'intéressé a clairement démontré par son comportement qu'il ne pouvait et ne voulait pas s'intégrer au monde du travail. En raison de son attitude, le requérant ne serait jamais parvenu, pendant toute la durée de son séjour légal en Suisse, à conserver durablement un emploi. En outre, il aurait accumulé des dettes d'un montant considérable et aurait bénéficié d'allocations chômage et d'aides de l'assistance publique.[100]

One may easily take the view that with these words, the Court expressed the view that the applicant's financial problems - combined with other circumstances - provided sufficient reason for the Swiss authorities to deny residence to Mr Gezginci. However, given the particular context in which the financial situation of the applicant was being discussed, there are also arguments in favour of the view that the Court's remarks on this issue are in fact to be regarded as an evaluation of the applicants' *individual* interest in remaining in Switzerland.

In adjudicating immigration cases such as this one, where preceding the decision to deny his residence the applicant has resided for a considerable period of time in the host country, the Court has established a standardised list of aspects to be addressed in its conclusion on whether denying residence violated Article 8 ECHR.[101] These aspects are the following:

> - the nature and seriousness of the offence committed by the applicant;
> - the length of the applicant's stay in the country from which he or she is to be expelled;
> - the time elapsed since the offence was committed and the applicant's conduct during that period; and
> - the solidity of social, cultural and family ties with the host country and with the country of destination.[102]

The applicant's financial situation is discussed under the heading of the final criterion: 'the solidity of social, cultural and family ties with the host country and with the country of destination'. The significance of the Court's remark being placed under this particular heading lies in the reason why the Court has introduced this very criterion to its standardised list of aspects to be addressed in adjudicating cases where a foreign national is expelled after having spent a considerable period of time in the host country. The introduction of this criterion – in the case of *Üner*[103] – served to strengthen the significance that was to be attached to the foreign national's length

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[100] ibid para 73.

[101] *Boultif v Switzerland* App no 54273/00 (ECtHR, 2 August 2001), para 48; *Üner v the Netherlands* App no 46410/99 (ECtHR, 18 October 2006), paras 54-55 and 57-58; *Maslov v Austria* App no 1638/03, para 71 (ECtHR, of 23 June 2008).

[102] *Gezginci* (n 82), para 61.

[103] *Üner* (n 101), para 58.

of stay in the host country.[104] The list of criteria that until that point had been applied – the '*Boultif* criteria' – already included the length of the applicant's stay in the host country. Yet, the Court reasoned that the *Boultif* criteria were not 'sufficiently comprehensive to render them suitable for application in all cases concerning the expulsion and/or exclusion of settled migrants following a criminal conviction'[105]. It found that due regard must be had, not only to 'family life' which may have developed in the host State but to 'the totality of social ties between settled migrants and the community in which they are living' as part of the concept of 'private life' within the meaning of Article 8 ECHR. Thus, in cases that involved the protection of private life,[106] a considerable period of residence in the host State brings with it an extended scope of judicial protection for the individual concerned: not only bonds with family members but in a much wider sense 'the network of personal, social and economic relations that make up the private life of every human being'[107] is to be taken into account when evaluating whether denying residence would violate Article 8 ECHR.[108] In other words, an investigation of the socio-economic aspects of the case under this particular heading arguably serves the purpose, not to evaluate whether the circumstances of the case are sufficient to expel a long-term residing foreign national but to evaluate whether that person's social and economic relations are such that they beg *against* expelling this person.[109]

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[104] Charlotte Steinorth 'Üner v The Netherlands: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family life' (2008) 8 Human Rights Law Review 185, 191.

[105] *Üner* (n 101), para 59.

[106] As was the case in *Gezginci* (n 82), para 57: 'Pour ce qui est des circonstances de l'espèce, la Cour estime que, en raison de la très longue durée du séjour du requérant en Suisse, le refus de lui octroyer une autorisation de séjour pour raisons humanitaires constitue une ingérence dans le droit au respect de sa vie « privée ».' On the distinction between private and family life see further Steinorth (n 108) 185-196.

[107] *Slivenko and Others v Latvia* App no 48321/99 (ECtHR 9 October 2003), para 96.

[108] Daniel Thym 'Residence as de facto Citizenship? Protection of Long-Term Residence under Article 8 ECHR' in Ruth Rubio-Marin (ed), *Human Rights and Immigration* (Oxford University Press 2014) 115, 125.

[109] See also *El-Habach*, where the applicant's socio-economic ties were evaluated in a similar manner, while the reason for denying residence in that case purely regarded the commission of offences (*El-Habach v Germany* (dec.) App no 66837/11 (ECtHR, 22 January 2013), para 36). See furthermore the reading of para 55 of the Grand Chamber's judgment in the *Üner* case by Judge Rozakis in his Concurring Opinion to *Kaya* (*Kaya v Germany* App no 31753/02 (ECtHR, 28 June 2007)).

Indeed, the text in *Gezginci,* immediately shows that in these paragraphs, the applicant's socio-economic ties to Switzerland are set out against the ties he had developed within his country of origin and Romania:

> *La solidité des liens sociaux, culturels et familiaux avec le pays hôte et le pays d'origine ou de destination*
> 73. Le Gouvernement relève que, dans sa demande d'asile déposée en Suisse, l'épouse du requérant a affirmé qu'elle résidait avec sa fille en Turquie auprès de la sœur de son mari. Aux yeux du Gouvernement, ces éléments non seulement montrent que le requérant y conserve de la famille, mais donnent aussi à penser que celle-ci pourrait, le cas échéant, être disposée à lui apporter un certain soutien. Le Gouvernement relève en outre que le requérant s'est également rendu à plusieurs reprises en Roumanie et y aurait même exercé une activité économique. Par ailleurs, il estime que l'intéressé a clairement démontré par son comportement qu'il ne pouvait et ne voulait pas s'intégrer au monde du travail. En raison de son attitude, le requérant ne serait jamais parvenu, pendant toute la durée de son séjour légal en Suisse, à conserver durablement un emploi. En outre, il aurait accumulé des dettes d'un montant considérable et aurait bénéficié d'allocations chômage et d'aides de l'assistance publique.
> 74. La Cour observe que le requérant a quitté la Turquie pour entrer illégalement en Suisse en 1978 au plus tard, soit à l'âge de 24 ans. Depuis lors, il y a certes vécu la grande majorité de sa vie. La Cour reconnaît que, âgé aujourd'hui de 56 ans, il serait sans doute exposé à des difficultés de réintégration dans l'hypothèse d'un retour, bien qu'il soit retourné à plusieurs reprises dans son pays d'origine. Par ailleurs, dans sa demande d'asile déposée en Suisse, l'épouse du requérant a déclaré qu'elle résidait avec sa fille en Turquie auprès de la sœur de son mari. Cela étant, la Cour partage l'avis du Gouvernement, selon lequel le requérant y a conservé un certain cercle familial qui pourrait être un soutien dans sa réintégration sociale et professionnelle dans ce pays. Par ailleurs, il maîtrise parfaitement le turc, langue par laquelle il s'est adressé à la Cour (voir l'arrêt Kaya, précité, § 65).
> 75. La Cour estime que des considérations semblables s'appliqueraient dans l'hypothèse où le requérant se décidait à vivre en Roumanie, pays qu'il connaît par ses visites, où vit son épouse, où sa fille a passé une grande partie de sa vie et où il semble même avoir exercé une activité lucrative (ibidem.).
> 76. Par ailleurs, à l'instar du Gouvernement, la Cour estime que l'intéressé a clairement démontré par son comportement qu'il ne pouvait et ne voulait pas s'intégrer au monde du travail. Il est avéré que le requérant a très souvent changé de travail, a accumulé des dettes importantes et dépend des allocations chômage et de l'assistance publique.[110]

Thus, the circumstance that the applicant could not hold a job in Switzerland and had asked for social benefits, served to be set against the circumstance that in Turkey, the applicant could be supported by family members in becoming socially and professionally integrated in that country; and furthermore, against the circumstance that he had been gainfully employed in Romania. In other words, the Court's line of argumentation here entails that while the applicant did have socio-economical

[110] *Gezginci* (n 82), paras 73-76.

resources in Turkey and Romania, he lacked such ties with Switzerland. Accordingly, his ties to Switzerland are not considered an obstacle against expulsion from Swiss territory. Based on the foregoing, there are convincing arguments to take the view that the Court in *Gezginci* did not judge the Swiss income requirement on its merits as a justification for denying residence; it did not evaluate whether the applicant's lack of income and appeal for social security posed a reason of sufficient weight to justify refusing the extension of his residence permit.[111]

In *Udeh v Switzerland*[112], the appeal made to social assistance again is discussed as part of an examination in which the applicant's economic integration in his country of origin is set out against that in the host State:

> 51. Ensuite, le Tribunal fédéral a observé que le requérant a grandi au Nigéria et, dès lors, devait y posséder encore un réseau familial intact. Selon cette juridiction, il pourrait s'intégrer assez facilement dans son pays d'origine. Par contre, il ne serait pas véritablement intégré en Suisse, ni professionnellement, ni socialement, et ne parlerait que mal l'allemand. Il n'appartient pas à la Cour de remettre en cause ses allégations, non contestées par les requérants. Elle rappelle simplement que le Tribunal fédéral a reconnu les efforts des requérants pour échapper à leur dépendance de l'aide sociale et qu'il n'a pas exclu que la maladie du requérant (tuberculose) jouait un rôle sur le fait qu'il n'exerçait pas de véritable activité lucrative.[113]

This discussion of the applicant's lack of income does not involve an establishment of whether this aspect posed a sufficient reason for denying residence. Notably, the Court again addresses the issue whether the applicant tried his best to obtain sufficient resources. However, in this case, the Court observed that based on the information provided by the national authorities, the applicant in fact had set his priorities straight.

2.5.4 The link between insufficient income and the national economic well-being

In the case of *Hasanbasic*[114] the Court for the first time explicitly acknowledged a link between the financial situation of a foreign national and the pursuance of the public interest in denying residence to that foreign national, i.e. the interest in protecting the national economic well-being.[115] The case concerns Mr Hasanbasic,

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[111] This proposition is further substantiated in Chapter 4.

[112] *Udeh* (n 82).

[113] ibid para 51.

[114] *Hasanbasic* (n 82).

[115] With this judgment the Court seems to have rejected the assumption of those that had asserted that economical reasons were generally considered insufficient to justify the expulsion of foreign nationals. E.g. Arai-Takahashi *The Margin of Appreciation Doctrine*

who, after 18 years of having resided regularly in Switzerland with his wife, announced to the Swiss authorities in 2004 that he would permanently move back to Bosnia-Herzegovina. Notwithstanding, after four months, Mr Hasanbasic returned to Switzerland on a tourist visa and requested a residence permit to live with his wife again. His request was rejected, whereby it was pointed out that between 1995 and 2002 (previous to his departure from Switzerland) the applicant had committed various crimes. Additionally, it was argued by the Swiss authorities that Mr Hasanbasic's family was dependent on welfare and furthermore, had accumulated considerable debts. Therefore, the refusal to grant a residence permit was considered justified in view of the national interest in the economic well-being, protection of the public order, prevention of crime and protection of the rights and freedoms of others. With regard to the issue of debts and public assistance, the Court reasoned as follows:

> 59. Ce qui semble avoir joué un rôle important dans la pesée des intérêts opérée par les instances internes est le cumul des dettes importantes ainsi que les sommes considérables que les requérants avaient touchées de l'assistance publique entre 1994 et 2001, ainsi qu'entre 2003 et 2008 (voir, *mutatis mutandis*, *Gezginci*, précité, § 73). Le montant total s'élève à 333 000 CHF (environ 277 500 EUR). Rappelant que le bien-être économique du pays a expressément été prévu par les auteurs de la Convention en tant que but légitime pour justifier une ingérence dans l'exercice du droit au respect de la vie privée et familiale (voir, par ex., *Miailhe c. France (n° 1)*, 25 février 1993, § 33, série A n° 256-C ; *Hatton et autres c. Royaume-Uni* [GC], n° 36022/97, § 121, CEDH 2003-VIII ; *Mubilanzila Mayeka et Kaniki Mitunga c. Belgique*, n° 13178/03, § 79, CEDH 2006-XI ; *Mengesha Kimfe c. Suisse*, n° 24404/05, § 66, 29 juillet 2010 ; *Agraw c. Suisse*, n° 3295/06, § 49, 29 juillet 2010, et *Orlić c. Croatie*, n° 48833/07, § 62, 21 juin 2011), contrairement aux droits protégés en vertu des articles 9-11 de la Convention, la Cour est d'avis que les autorités suisses pouvaient prendre en compte l'endettement et la dépendance de l'assistance publique des requérants dans la mesure où cette dépendance avait une incidence sur le bien-être économique du pays. Elle estime néanmoins que ces éléments ne constituent qu'un aspect parmi d'autres à prendre en compte par la Cour.[116]

In *Hasanbasic* the Court explicitly states that in balancing the interests concerned, States may take into account the applicant's debts and his relying on welfare benefits. In view of the Court, this follows from the circumstance that the second paragraph of Article 8 ECHR expressly states the national economic well-being as one of the legitimate interests. The Court argues that States may take into account the applicants' debts and their dependence on the national welfare system "*in so far that dependence affected the country's economic well-being*". However, in what follows, the Court remains silent on whether in the case at hand the applicant's circumstances

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and the Principle of Proportionality in the Jurisprudence of the ECHR (Intersentia 2002) 68.

[116] *Hasanbasic* (n 82), para 59.

indeed were such as to affect the country's economic well-being. In other words, while the Court acknowledges that accumulating debts and having recourse to the national social assistance scheme may justify denying residence to a family member, it does not conclude whether in the underlying case the burden was sufficiently high as to affect the country's economic well-being. The Court left this issue on the table by concluding its reflection with the observation that the aspect of the applicant's income was 'just one among other aspects to be taken into account.' In its final conclusion, after having elaborated on the consequences of an expulsion decision for the persons concerned, the Court summarised the decisive aspects for its conclusion that the expulsion decision would violate Article 8 ECHR:

> 66. Compte tenu de ce qui précède, la Cour admet que le bien-être économique du pays peut certes servir de but légitime pour un refus de renouveler un titre de séjour. Ce motif doit néanmoins être apprécié à sa juste mesure et à la lumière de l'ensemble des circonstances de l'espèce. Or, eu égard notamment à la durée considérable du séjour des requérants en Suisse et à leur intégration sociale incontestée dans ledit pays, la Cour estime que la mesure litigieuse n'était pas justifiée par un besoin social impérieux et n'était pas proportionnée aux buts légitimes invoqués. Partant, l'Etat défendeur a dépassé sa marge d'appréciation dont il bénéficiait en l'espèce.
> 67. Par conséquent, il y a eu violation de l'article 8 de la Convention.[117]

Again, the assertion that economic aspects may justify denying residence to a foreign family member is discussed only in abstract terms, while the question of whether such justification is at issue here is left aside.

Although the outcome of the case – the Court concluded that denying residence would violate Article 8 ECHR – suggests that the Court found that the applicant's situation did not pose a sufficient threat to the economic well-being, the Court has not included in its assessment an *evaluation* of the circumstances in that regard. In chapter 4, I provide further evidence that the violation in *Hasanbasic* is not primarily connected with a lack of sufficient public interest in protecting the country's economic well-being.[118] Notably, with regard to the criminal offences held against the applicant, the Court made a direct connection between the circumstances of the case and the public interest in denying residence. The Court explicitly considered

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[117] ibid paras 66-67.

[118] Yet, the fact that the Court allowed the debts and social assistance burden to be taken into account 'in so far as this dependence affected the economic well-being of the country', arguably allows for the conclusion that if there is no actual burden on the social assistance scheme, income requirements may not be invoked to interfere with the right to respect for family or private life. Accordingly, a failure to comply with a so-called 'positive' income requirement, such as the stipulation to produce a year contract, would not justify an interference with the right to respect for family or private life.

that due to their lack of severity and the fact that the crimes were committed a long time ago, the applicant could not be considered a threat to public order or public safety.[119]

2.5.5 A Lack of income affecting public order?

The previous paragraph illustrates that the Court in *Hasanbasic* explicitly opened the way for evaluating national income requirements in view of the economic well-being but that it had not yet actually carried out such an evaluation in view of the circumstances of a concrete case. In the final case to be discussed here, that of *Palinci v Switzerland,*[120] the Court evaluated income-related aspects in view of the weight of the public interest in denying residence, albeit not in line with the guidelines it provided in this regard in the preceding case of *Hasanbasic*. The *Palanci* case concerns the refusal in 2005 by the Swiss authorities to extend a residence permit requested by a Turkish national who had regularly resided in Switzerland since 1995 as a consequence of his marriage to a Turkish national, lawfully residing in Switzerland. Various grounds had been put forward to reject the extension. Besides having committed numerous criminal offences, some of which were labelled as serious, the applicant had accumulated considerable debts. Additionally, the applicant and his family had lived off social welfare for many years.

Before discussing the Court's approach to the applicant's financial situation in *Palanci*, it should be recalled here that in *Hasanbasic*, the Court substantiated its view that the applicant's accumulated debts and his dependence on social assistance could be taken into account by pointing out the fact that the protection of the economic well-being was explicitly enlisted as one of the legitimate aims in Article 8(2) ECHR:

> [r]appelant *que le* bien-être économique du pays a expressément été prévu par les auteurs de la Convention en tant que but légitime pour justifier une ingérence dans l'exercice du

[119] *Hasanbasic* (n 82), para 58. 'En ce qui concerne d'abord le comportement délictuel du requérant, la Cour rappelle que celui-ci a été condamné à plusieurs reprises entre 1995 et 2002, à savoir à des amendes ne dépassant pas des montants de 400 CHF et à une peine d'emprisonnement de 17 jours (au total) pour des infractions à la législation sur la circulation routière et pour violation du domicile. La Cour observe, à l'instar des requérants, que ces infractions ne pèsent pas très lourdement et en conclut qu'il convient de les apprécier à leur juste mesure. Par ailleurs, elle juge important le fait que le requérant n'a plus récidivé depuis 2002. Compte tenu de ce qui précède, l'on ne saurait considérer le requérant comme un danger ou une menace pour la sécurité ou l'ordre public suisse.'

[120] *Palanci* (n 82).

> droit au respect de la vie privée et familiale […], contrairement aux droits protégés en vertu des articles 9-11 de la Convention.[121]

Furthermore, for national authorities to take into account these debts and dependence on social assistance, the Court had stated in *Hasanbasic* that this was allowed '*où cette dépendance avait une incidence sur le bien-être économique du pays*.'[122] In *Hasanbasic,* States' ability to take into account the applicant's financial situation was thus directly linked to (its effect on) the national economic well-being. That the Court indeed seemed to stipulate that taking into account the applicant's financial situation generally should connect to the particular aim of the economic well-being of the country – as opposed to other legitimate interests – may be inferred from the emphasis it placed in this regard on the very fact that Articles 9-11 of the Convention do *not* enlist the protection of the economic well-being as a legitimate aim.

However, in *Palanci*, the Court took a rather different course of reasoning. While it connected the applicant's debts and his appeal to the pursuance of a legitimate national interest, the interest chosen was, remarkably, the protection of public order:

> 58. Apart from his criminal convictions, the Court observes that the applicant's continuously growing debts and his failure to pay his family maintenance were pertinent for the domestic authorities' decision when deciding on the immigration measures. In this regard they had considered that despite the immigration authorities' repeated warnings, the applicant's financial situation had continuously deteriorated because of his unsuccessful attempts to establish a business of his own. The Court therefore agrees with the domestic authorities that the applicant lacked the necessary diligence and responsibility in financial and professional matters, with the result that the number of debts increased and he and his family were dependent on social welfare until September 2004. Since the applicant, furthermore, only changed his behaviour in financial matters once he had been informed by the immigration authorities in October 2004 that his expulsion was imminent, the Court takes the view that the domestic authorities rightly assumed that the applicant's behaviour had been a threat to public order.[123]

Besides posing a deviation from its own rather clear starting point on the role of the applicant's economic position presented in the case of *Hasanbasic*, the approach displayed in *Palanci* is problematic from a substantive perspective. The substantive connection between a person's financial situation on the one hand and the occurrence of a threat to public order is far from self-evident. This especially holds true in view of the fact that in *Hasanbasic* the Court observed that a person's financial situation could be relevant in Article 8 ECHR-cases, precisely because of the inclusion in this provision of protection of the economic well-being as an autonomous legitimate aim.

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[121] *Hasanbasic* (n 82), para 59.
[122] ibid para 59.
[123] *Palanci* (n 82), para 58.

In this regard, it is also interesting to note the joint concurring opinion to the *Palanci* case of Judges Raimondi, Sajó and Spano:

> 1. We agree with the Court's resolution of this case. However, we write separately to express disagreement with the way in which the Court categorises the aim, in Convention terms, of the domestic authorities' reference to the applicant's financial situation and its effect on the decision to expel him from Switzerland in 2004.
> 2. The Court has previously held that one of the legitimate aims that a Contracting state may pursue under Article 8 § 2, when deciding whether to expel a foreigner, is whether the interference with the foreigner's right to family and private life is justified on the basis of the "economic well-being of the country" (see Hasanbasic v. Switzerland, no. 52166/09, § 52, 11 June 2013). In our view, the financial conduct of the applicant in the present case was an element that the domestic authorities were justified in taking into account on this basis.
> 3. However, in paragraph 58, in fine, of the Court's judgment, it is stated that the domestic authorities "rightly assumed that the applicant's [financial] behaviour had been a threat to public order".
> 4. In this regard, we note, that "public order", as such, is not listed as one of the legitimate aims under the limitation clause of Article 8 § 2 justifying a restriction on the rights afforded in paragraph 1 of that Article. However, the limitation clause does contain the synonymous aims of "public safety" and "the prevention of disorder or crime".
> 5. In our view, it is clear that a foreigner's financial disarray, provided no criminal offence is involved, and in particular, the extent to which he or she has had to rely on material support from the State, cannot be equated with conduct that is capable, in principle, of constituting a threat to "public safety" within that term's autonomous meaning under the Convention. It is furthermore self-evident that an expulsion order on the basis of a foreigner's financial conduct, if it does not contravene domestic law, cannot be justified by the aim of "the prevention of disorder or crime".

Thus, the Court's choice for 'protection of the public order' as legitimate aim in view of which the applicant's financial situation is evaluated is all but a self-evident one. Nevertheless, the Court's argumentation in *Palanci* can be said to take at least the *shape* of an assessment of the weight of reason for denying residence in view of a legitimate aim, even though 'public order' perhaps may not be considered the appropriate legitimate aim in view of which such assessment should be conducted.

2.5.6 Summary

The central question in this section on cases featuring income-related requirements was whether and if so, how, the Court in its case law on Article 8 ECHR evaluates a failure to comply with such requirements in national immigration laws when weighing up the public interest in denying residence in view of a legitimate aim. Overseeing the above discussion, the following picture emerges. In seven out of fifteen cases the Court does not make mention of the failure to satisfy income

requirements in concluding whether denying residence results in a violation of Article 8 of the Convention.

The failure to satisfy income conditions does emerge in the Court's argumentation in the cases of *Haydarie* and *Konstatinov*. However, the Court's evaluation of the manner in which the income requirement had been applied left the validity of the requirement fully untouched. The Court confined itself to observing *that* the income requirement had not been fulfilled and that it examined whether the applicant could be excused for not having fulfilled this requirement. As explained above, these two elements do not encompasses an examination of the merits of the income requirement as such.

In the cases *Gezginci*, and *Udeh*, again the attention paid to the applicant's lack of income did not result in an evaluation of the circumstances of the case in view of the weight of the reason for denying residence. Instead, the applicant's precarious financial situation in Switzerland was used as a yardstick to measure the level of his socio-economic integration in that country set out against his prospects in this regard in his country of origin. As discussed above, the Court established by these means whether there was significant interest in being allowed to remain in the host state, rather than to examine whether there was sufficient evidence supporting the applicant's expulsion.

In the case of *Hasanbasic*, for the first time, the failure to fulfil income requirements actually appears in the capacity of a factor used for determining sufficient reason for denying residence to a foreign national family member. The Court began its judgement by first reiterating that, as opposed to Articles 9-11 of the Convention, Article 8 ECHR *does* provide for the protection of the national economic well-being as a legitimate aim for interfering with a person's private or family life. Subsequently, it explicitly accepts taking into account the economic situation of the applicant to justify expulsion. Nevertheless, the Court did not assess whether the applicant's financial situation was indeed of sufficient weight to justify his expulsion. An explicit link between the circumstances of the case and the issue of whether expulsion would violate Article 8 ECHR was only made with regard to his criminal convictions and the extent to which the applicants would be affected by the expulsion decision.

Eventually, in the case of *Palanci*, at least in form, the Court evaluated whether the applicant's lack of income could sufficiently justify the State's decision to deny residence. However, the legitimate aim in view entailed the protection of public order, which may be said to be problematic. Not only is 'the protection of public order' an aim that is not listed in the second paragraph of Article 8 ECHR; it also lacks a self-evident substantive link with having insufficient income. Even if a link was accepted between lacking sufficient income and the protection of public order, the choice for this particular national interest may still be said to be rather peculiar,

especially since Article 8 ECHR *does* provide for a national interest inherently connected with a person's financial situation: the national economic well-being. Furthermore, it is precisely this aim that the Court approximately nine months earlier had indicated as *the* appropriate legitimate interest in this regard in view of the very occurrence of this particular aim in Article 8(2) ECHR.

Thus, whereas the Court has accepted that in principle, a failure to meet income requirements may serve as a justification to deny residence to a foreign national, an actual scrutiny of national income requirements has not yet been properly conducted. Admittedly, an exception may be seen in the case of *Palanci*, where the Court accepted that the applicant, due to his behaviour in financial matters posed a threat to public order. However, because there is no obvious substantive link between one's behaviour in financial matters and posing a threat to public order, and also due to the fact that the Court has not underpinned the existence of such a link, the latter case can hardly be said to provide any delineation of what is or what is not considered reasonable in imposing income requirements in a concrete case.

2.6 Procedural rules of immigration law

As explained in the introduction of this chapter, the category 'infringement of procedural rules' is rather broad. It first of all entails instances in which residence is denied for infringement of rules that allow states to verify whether a person satisfies the substantive conditions for entry and residence. Examples are the requirement to provide a (provisional) residence permit upon entry or the requirement to timely renew one's existing residence permit. This category, furthermore, includes cases where the person has entered or resided in the host State following an explicit refusal of permission to enter or reside in the host state. Also, those cases where an individual has submitted false information in order to obtain a residence status fall within this category. The common feature of these cases is that non-compliance with the rules at issue does not in itself indicate that there are substantive objections against the presence of the person concerned in the host state. Indeed, it is the very ability to control immigration, *i.e.* the ability to decide who is allowed to enter and reside and who is not, that is at stake here. For this reason, it is a *generic*, rather than a *substantive* interest in controlling immigration that is served with upholding procedural rules of immigration law.[124]

In discussing these immigration-control cases a distinction is drawn between cases in which procedural aspects of immigration law posed the main reason for denying residence; and cases in which procedural aspects were just one among other,

[124] See extensively, section 4.4.3.

substantive reasons for denying residence. The purpose of this separate discussion is to get a clear view on how the Court perceives the generic interest in controlling immigration, apart from possible substantive objections that may exist against the presence of this particular person in the host state. The reason for zooming in on the Court's perception of the generic interest in controlling immigration is to be found in the second paragraph of Article 8 ECHR. The latter stipulates that interferences with the right to respect for private and family life are to pursue one of the specified, substantive interests listed in the second paragraph of this provision: the interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others. I examine whether the Court attaches importance to whether besides the failure to comply with procedural rules there are any substantive objections against the presence of this particular person in the host state. In this way it can be established whether the generic interest in controlling immigration can pose a stand-alone justification for denying residence to foreign nationals. If that indeed would be the case, an interference with a person's family or private life may be considered in accordance with the second paragraph of Article 8 ECHR, without an examination of whether and to which extent the decision to deny residence serves one of the substantive interests of that paragraph.

2.6.1 Infringement of procedural rules as the main reason for denying residence

In eleven out of seventeen immigration-control cases, interfering with procedural rules of immigration law posed the main reason for denying residence.[125] For each case, I describe the Court's approach to the circumstances that were put forward to deny residence. In the first two cases to be discussed[126] the Court evaluated the weight of the public interest in controlling immigration on the basis of the circumstances of the case, albeit by merely referring to the conclusion that had been expressed by the national authorities in this regard. In the next five cases, the Court expressed its own evaluation of the facts of the case in view of the public interest in

[125] Only if in describing the circumstances of the case infringement of procedural immigration rules was explicitly mentioned as one of the circumstances held against the applicant by the national authorities, it is included in this category. This means that not every case featuring non-compliance with procedural immigration rules is discussed in this section. Chapter 3 discusses the significance of infringement of procedural rules in cases where if this has not explicitly been put forward as a reason for denying residence.

[126] *Darren Omoregie v Norway* App No 265/07 (ECtHR, 31 July 2008); *Kamaliyevy v Russia* App No 52812/07 (ECtHR, 3 June 2010).

ensuring effective immigration control.[127] In the final four cases, the Court completely refrained from commenting on the public interest to be pursued in the relevant case.[128]

2.6.1.1 Darren Omoregie v Norway

In the case of *Darren Omoregie*, it was held against the applicant that he had failed to leave Norway after being refused asylum and that he had taken up gainful employment without the required work permit. After the applicant got married he did apply for a work permit based on family reunification. This application, however, was denied on the ground that he did not satisfy the condition of ensured means of subsistence. A few months after the latter decision it was decided to expel the applicant. The reasons provided for this decision were that after the rejection of the asylum application the applicant had not left the country within the prescribed time limit and that had worked in breach of the Immigration Act.

As regards the seriousness of the breaches of immigration law, the Court merely notes what had been put forward in this respect by the national authorities, without explicitly endorsing that qualification. Arguably, the purpose of discussing infringement of the Immigration Act was not to establish whether the expulsion decision was sufficiently justified in view of (the seriousness of) the applicant's conduct. Rather, it seems that its purpose was to underpin the *consistency* with which the national authorities had expressed their intention to expel the applicant.

Discussing breaches of national procedural rules was part of the Court's reasoning on whether despite such procedural infringement, the applicant could reasonably have expected that he would eventually be granted lawful residence in the host state. In this respect the Court argued that notwithstanding the fact that the City Court had deemed the measure to be disproportionate, there could have been no mistake as to whether or not the applicant would eventually be allowed to reside in the country. The conclusion was therefore that the applicant was not entitled to expect that any right of residence would be conferred upon him:

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[127] *Nunez v Norway* App no 55597/09 (ECtHR, 28 June 2011); *Alim v Russia* App No 39417/07 (ECtHR, 27 September 2011); *Antwi v Norway* App No 26940/10 (ECtHR, 14 February 2012); *Rahmani and Dineva v Bulgaria* App No 20116/08 (ECtHR, 10 May 2012); *Butt v Norway* App No 51682/99 (ECtHR, 11 December 2001).

[128] *Margoum v Belgium* (dec.) App No 63953/09 (ECtHR, 15 November 2011); *Biraga and others v Sweden* (dec.) App No 1722/10 (ECtHR, 3 April 2012); *Mbuisa v the United Kingdom* (dec.) App Nos 22897/09 and 37369/12 (ECtHR, 10 September 2013); *Bolek and others v Sweden* (dec.) App No 48205/13 (ECtHR, 28 January 2014).

61. In the Court's view, at no stage prior to their marriage on 2 February 2003 could the first and the second applicants have reasonably held any expectation that he would be granted leave to remain in Norway.
62. This state of affairs was not changed, but was confirmed rather, by the developments in the case in the ensuing period. On 14 February 2003 the first applicant made a new request on the ground of family reunification with the second applicant, but again his request was rejected and he was ordered to leave the country, in a decision of 26 April 2003, notified to him on 7 May 2003. Therefore the applicant could not reasonably expect a right to reside in Norway based on these proceedings.
63. Moreover, on account of the first applicant's unlawful stay in Norway for four months and a half from September 2002 to February 2003 and for his having worked there unlawfully without a work permit for nine months from September 2002 to July 2003, the Directorate of Immigration decided on 26 August 2003 firstly that he should be expelled pursuant to section 29(1)(a) of the Immigration Act and secondly be prohibited to re-enter Norway for five years (with a possibility of re-entry on application- normally after two years). To the Court's understanding, the first part of the decision represented hardly anything new but was rather a renewed response to the first applicant's failure to comply with previous orders to leave the country. The decision of 26 August 2003 was upheld by the Immigration Appeals Board on 21 July 2004 and by the appellate courts respectively on 27 February and 14 June 2006. At each level (including the City Court which held in his favour on 15 February 2005) it was found established that the basic condition for expelling the first applicant – that he had seriously or repeatedly violated the Immigration Act or had defied implementation of the decision that he should leave the country – had been fulfilled. It is true that the City Court found the measure disproportionate but that finding was not final and was overturned by the High Court and leave to appeal was refused by the Appeals Leave Committee of the Supreme Court.
64. Against this background the Court does not consider that the first and second applicants, by confronting the Norwegian authorities with the first applicant's presence in the country as a *fait accompli*, were entitled to expect that any right of residence would be conferred upon him (see *Roslina Chandra and Others v. the Netherlands* (dec.), no. 53102/99, 13 May 2003; *Yash Priya v. Denmark* (dec.) 13594/03; 6 July 2006; cf. *Rodrigues da Silva and Hoogkamer*, cited above, § 43).[129]

The Court points out that throughout the applicant's residence in Norway, the message had always been that he would *not* be allowed to reside in the country and that the City Court ruling had not changed anything in this regard. Indeed, at each level it had been was established that the applicant had 'seriously or repeatedly violated the immigration Act or had defied implementation of the decision that he should leave the country'.[130] This reasoning thus exemplifies the consistency of the approach on the national level. It does not constitute an evaluative assessment of whether there was sufficient reason for expulsion.

[129] *Darren Omoregie* (n 126), paras 61-64.

[130] The use of 'or' between the elements that make up the applicant's conduct reinforces that it is not the Court's own evaluation that is expressed here.

In discussing the proportionality of the duration of the entry ban, the very fact that immigration control is at stake, together with the circumstance that there may be an early lift of the sanction, is decisive for concluding that the duration of the entry ban imposed was justified:

> 67. Finally, the Court notes that the decision prohibiting the first applicant re-entry for five years was imposed as an administrative sanction, the purpose of which was to ensure that resilient immigrants do not undermine the effective implementation of rules on immigration control. Moreover, it was open to the first applicant to apply for re-entry already after two years.[131]

Thus, the conclusion that the five-year entry ban was not disproportionate was not based on the *severity* of the breaches of immigration law. Notably, in a later case, *Antwi v Norway*,[132] the Court seemingly expressed its view on the seriousness of the offences in the *Omoregie* case. In *Antwi*, the Court substantiated its conclusion that the duration of the re-entry ban was not disproportionate by comparing the circumstances of the case with those in *Omoregie*:

> In this connection, the Court reiterates that in a comparable case, Darren Omoregie (cited above, §§ 63-68), it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case.[133]

Contrary to what this quote may suggest, in *Omoregie* the proportionality of the duration of the entry ban had *not* been made dependant on the seriousness of the applicant's conduct; instead, the general observation that the applicant had circumvented national immigration law had proven sufficient. Thus, in *Antwi* the Court considers the seriousness of the applicant's conduct in relation to the seriousness of the applicant's conduct in the *Omoregie* case, without considering the seriousness of the conduct of either of these applicants in relation to whether a five-year entry ban is proportionate.

The fact that the nature of the breaches of immigration law are only discussed in relation to the duration of the entry ban and not to the decision to expel the applicant

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[131] *Darren Omoregie* (n 126), para 67.
[132] *Antwi* (n 127).
[133] *Antwi* (n 127), para 104.

confirms that in view of the Court the very decision not to authorise residence - hence irrespective of the nature of the applicant's conduct giving rise to that decision - in itself may justify the applicant's subsequent expulsion. Still, in its final conclusion the Court states that it is satisfied that the impugned interference was supported by relevant and sufficient reasons and that in reaching the disputed decision the domestic authorities struck a fair balance between the competing interests:

> 68. Against this background, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed their margin of appreciation when deciding to expel the first applicant and to prohibit his re-entry for five years. The Court is not only satisfied that the impugned interference was supported by relevant and sufficient reasons but also that in reaching the disputed decision the domestic authorities struck a fair balance between the personal interests of the applicants on the one hand and the public interest in ensuring an effective implementation of immigration control on the other hand. In view of the first applicant's immigration status, the present case disclosed no exceptional circumstances requiring the respondent State to grant him a right of residence in Norway so as to enable the applicants to maintain and develop family life in that country. In sum, the Court finds that the national authorities could reasonably consider that the interference was "necessary" within the meaning of Article 8 § 2 of the Convention.[134]

The above confirms that the Court treats the public interest in controlling immigration as an autonomous interest in deciding on the outcome of the *Omoregie* case. Indeed, the conclusion that the national authorities could reasonably have considered the applicant's expulsion to be necessary within the meaning of Article 8 (2) ECHR is not based on whether indeed one of the substantive public interests enlisted in that provision necessitated the expulsion. The stand-alone significance of the public interest in controlling immigration further shows from the Court's remark that it was "*in view of the first applicant's immigration status*" that there were no exceptional circumstances requiring the respondent State to grant him a right of residence in Norway. Finally, the autonomous character of the generic interest in controlling immigration is reflected in the fact that the Court does not investigate the seeming contradiction that the applicant had been sanctioned for taking up gainful employment, while his subsequent application for a work permit based on family reunification was denied on the ground that he did not have ensured means of subsistence.[135] Indeed, the irrelevance of (inconsistencies regarding) whether there are substantive objections against the applicant's presence in the host State may be

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[134] *Darren Omoregie* (n 126), para 68.

[135] The failure to satisfy the income requirement was not one of the reasons put forward to substantiate the final decision to expel the applicant; that decision solely hinged on the non-substantive violations of immigration law.

explained by considering that a consistently expressed intention to expel the applicant in itself is enough to justify enforcement of that decision.

(Lack of) legitimate expectations

At this point, a separate remark needs to be made on the Court's examination in *Omoregie* of whether the applicant was entitled to expect a right of residence to be conferred upon him. At face value, this examination appears to be part of establishing the weight of the applicant's interest in being granted a residence permit. Indeed, upon investigation of how this aspect is generally used in the Court's reasoning in Article 8 ECHR immigration cases, it shows that if it is established that the applicant's family life in the host State was developed without a (secure) residence status and that he could not have reasonably expected to be granted such status, this detracts from the weight that is to be attached to the applicant's interest in being granted residence in the host state. Thus, in balancing the interests concerned, the outcome of the "legitimate expectations" issue, as it is called here for sake of convenience, determines the weight to be attached to the *individual interest*. Yet, attaching significance to whether the applicant was entitled to expect that any right of residence would be conferred upon him, can only serve to establish the occurrence of a *public interest*. This can be explained as follows.

Effectively, the interest of a person in being allowed to continue his presence in a State does not depend on whether his presence previous to the request for a permit was lawful or not.[136] Neither is a person's interest in being granted a residence permit determined by his expectations of actually being granted such residence permit.[137] Hence, the "legitimate expectations" issue must serve a different purpose than establishing the "objective" weight of the individual interest in being granted residence.

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[136] See also the Court's explicit starting point in *Marckx v Belgium*, where - in the context of the interest of a child in having established a legal bond of affiliation with his mother – it is discussed whether a child's interest in having this legal bond – i.e. this particular legal status – could be said to depend on whether or not this child had the legal status of a legitimate child. In this regard the Court reiterated that 'the interest of an "illegitimate" child in having such a bond established is no less than that of a "legitimate" child. *Marckx v Belgium*, (ECtHR, 13 June 1979) Series A no. 31, para 31.

[137] The opposite view would imply that someone who does not have any reasonable prospects of being able to buy food should be considered not to have an interest in being able to buy food. Of course, it may be considered unfair to deprive a person from the ability to further develop family life in a country while he was entitled to expect that he would be allowed to remain in this country. This unfairness however, relates to the general principle of legal certainty; it does not relate to the objective individual interest in being granted entry or residence in a particular country.

Accordingly, what is the purpose of evaluating the legitimate expectations of the individuals concerned? This becomes clear when considering decisive aspects in that evaluation. These aspects are a) whether or not family life has been developed on the basis of a residence permit, and b) whether the national authorities have acted consistently in expressing the view that the person concerned would not be granted a residence status. Therefore, no decisive weight is attached to the individual interest in being granted residence, if previous to the request the person concerned was not authorised to reside in the host State and if in addition the national authorities have acted consistent in expressing their intention not to allow residence to these persons. In other words, examining the "legitimate expectations" issue prevents the Court granting a claim to a right of residence on the basis of Article 8 ECHR if that would go against the express wishes of the host State. Thus, what is established here is whether the interest of the State in being able to decide who is allowed residence *i.e.* the public interest in controlling immigration - stands in the way of the *Court* attaching decisive weight to the individual interest.

In sum, when procedural immigration rules are at stake, a violation of Article 8 ECHR in view of the weight of the individual interest in being granted residence is only possible *after* it is established that the public interest in ensuring effective immigration control does not pose an obstacle. This may be the case if the applicants have developed family life in the host State in accordance with national immigration rules, or if the national authorities have not acted consistently in (expressing) their intention to refuse residence to the applicant.[138]

The foregoing implies that as a matter of principle, family life developed in the host State without secure authorisation does not have the capacity to outweigh the public interest in controlling immigration.[139] It thus appears that infringement of

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[138] Below, another situation is described that may 'resolve' the obstacle of the public interest in controlling immigration: that in which the applicant had a good excuse for non-compliance with the national rules of immigration law.

[139] Note that this manner of reasoning is essentially different from balancing the individual interest against for example against the interest in the prevention of disorder and crime: where balancing implies that the individual interest may outweigh the public interest in the prevention of disorder and crime - in the sense that despite a considerable public interest the individual interest may still be considered more significant - this is not possible if the interest in ensuring effective immigration control *as such* prevents that decisive weight is accorded to the individual interest in being granted residence. In the latter case, the individual interest may qualify as an interest of decisive importance only after it is established that taking into account this interest would not interfere with the public interest in ensuring effective immigration control, hence after it has been established that either there was no breach of immigration law, or the national authorities themselves have raised doubts as to the public interest in ensuring effective immigration control for example by

procedural rules of immigration law may 'weigh' twofold in balancing the interests concerned: a concrete failure to comply with procedural rules of immigration law may firstly be taken into account with the explicit purpose of identifying the public interest in ensuring effective immigration control. Subsequently, the same failure to comply with national immigration law may be put forward in establishing whether decisive weight may be attached to the individual interest, which again entails an identification of the public interest in ensuring effective immigration control.

2.6.1.2 Kamaliyevy v Russia[140]

The second case in which the evaluation of the reason for denying residence took place by means of referring to the national authorities is *Kamaliyevy v. Russia*. It concerned the expulsion of an Uzbek national who after seizure of his illegally obtained Russian passport, subsequently neglected to regularise his residence status. The grounds invoked for the applicant's expulsion were that he had "failed to take any steps to get a residence permit or to obtain nationality by legal means".[141] The Court refrained from expressing its own appraisal of the applicant's conduct that gave rise to the expulsion decision, relying instead on the significance attached to the breaches of immigration law by the national authorities:

> 62. Turning to the circumstances of the present case, the Court first notes that the offence for which the first applicant was expelled consisted of a breach of the registration rules for foreign nationals. This offence is punishable under the Code of Administrative Offences by a fine of RUB 500 to 1,000 (about 11 to 23 euros (EUR)) and possible administrative removal. While this offence does not appear to be particularly serious, the authorities noted that in February 2006 the first applicant had been found to be in possession of an invalid Russian identity document, and that after that he had taken no steps to regularise his stay. Thus, his stay in Russia was illegal for a long period of time and certainly after the document in question had been seized. Nevertheless it did not appear that the first applicant had taken any steps to regularise his status. The domestic courts attached particular weight to this fact when deciding on the first applicant's expulsion.[142]

The Court's rather implicit endorsement of the approach taken by the national authorities may be inferred from its concluding remarks:

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having sent mixed messages in this regard. In these situations, attaching decisive importance to the individual interest does not mean that the individual interest *outweighs* the public interest in controlling immigration.

[140] *Kamaliyevy* (n 126).

[141] ibid para 27.

[142] ibid para 62.

> 65. In such circumstances, the Court concludes that in striking a balance between achieving the legitimate aim and the applicants' protected interests, the State did not exceed the margin of appreciation which it enjoys in the area of immigration matters. Consequently, there was no violation of Article 8 of the Convention.[143]

In sum, in *Kamaliyevy* the Court did take into account the circumstances of the case in order to establish sufficient reason for expelling the applicant, albeit that it refrained from expressing its own appraisal of the applicant's conduct. Furthermore, as in *Omoregie*, the Court did not take into account whether there were substantive objections against the applicant residing in the country. Instead, controlling immigration served as an autonomous public interest in balancing the interests concerned.

In the two cases discussed above, the Court established the weight of the public interest in denying residence by merely recalling the State's position in this respect. In the next four cases, the Court is less reluctant to express its own appreciation of the facts. Nevertheless, this is clearly only the case in situations where the Court *confirms* the seriousness of the facts underlying the decision to deny residence. Indeed, when it comes to aspects that *detract* from the starting point that decisive weight should be attached to the interest in controlling immigration, the Court confines itself to measuring the national decision at issue against its own national standards. By this I mean that only where national authorities prove inconsistent in implementing national immigration rules, or, if on the national level, mixed messages were sent as to the necessity of denying residence to the person concerned, could this detract from the significance attached by the Court to the public interest in controlling immigration. In other words, when it comes to verifying whether the circumstances of the case justify the decision to deny residence, it seems that the Court has no room for disagreeing with the national authorities regarding the weight to be attached to a failure to comply with procedural rules of immigration law. The consequence of this practice is that States find themselves effectively assured that the validity of their national restrictive immigration criteria remains intact.

There is a second feature of the Court's approach to non-compliance with State procedural rules: once it is established that procedural rules of immigration law have been implemented correctly and consistently, there is no room for attaching decisive importance to the individual interest in being granted a right of residence, unless there was a good excuse for failure to comply with the rule at issue. It is illustrated that this too, secures the validity of national immigration criteria remains untouched.

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[143] ibid para 65.

2.6.1.3 Nunez v Norway[144]

The first case in which the Court expressly stated its own opinion with regard to the nature of the breaches of immigration law in the case at hand is that of *Nunez v Norway*. In this case the applicant, who then resided in Norway on the basis of a tourist visa, had been expelled after she had been arrested for shoplifting. Despite a two-year re-entry ban she returned to Norway just four months after her expulsion. With a different passport and without revealing her previous expulsion, she acquired a work permit. Almost five years later - in the meantime the applicant had been granted a settlement permit - the national authorities discovered that the applicant had provided false information about her identity and that she had entered Norway in breach of a re-entry ban. The discovery finally resulted in an expulsion decision together with a re-entry ban for the period of two years, based on the national legal provision according to which an alien may be expelled if he or she has committed serious or repeated violations of one or more provisions of the immigration Act. In reasoning whether this decision would result in a violation of Article 8 ECHR, the public interest at issue was initially discussed in general terms:

> 71. By way of a preliminary observation the Court takes note of the rationale of the Norwegian legislator in authorising the imposition of expulsion with a re-entry ban as an administrative sanction (see paragraph 50 of the Supreme Court's judgment quoted at paragraph 23 above). Whilst such offences could normally also lead to criminal liability, it was deemed advantageous in the interest of procedural economy to authorise expulsion even in the absence of a criminal conviction. Since it would be impossible for the authorities to exercise effective control of all immigrants' entry into and stay in Norway, to a great extent the system would have to be based on trust that the immigration law be respected by those to which it applied, notably the expectation that foreign nationals provide correct information when applying for residence. If serious or repeated violations of the immigration law were to be met with impunity, it would undermine the public's respect for that law. Since an application for a residence permit would be rejected in the event of failure to meet the conditions for residence, a refusal of such an application would not in itself constitute a sanction for the provision of false information. Therefore, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act. 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 it serious or not, must be rejected (see *Darren Omoregie and Others*

[144] *Nunez* (n 127).

> *v. Norway*, no. 265/07, § 67, 31 July 2008; *Kaya v. the Netherlands* (dec.) no 44947/98, 6 November 2001).[145]

The public interest at issue in this case entails the ability to react to serious or repeated violations of immigration law, and is perceived in terms of procedural economy. In this regard, the Court confirms the Norwegian view that to maintain a system of controlling entry and residence, it must be based on trust that the immigration law is respected. Hence, expulsion in cases of serious or repeated violations of that law is considered an important means of general deterrence.

Inconsistent application of valid rules

After having generally agreed with the manner in which the Norwegian authorities underpinned the public interest in controlling immigration, the Court proceeds with an assessment of the circumstances of the case at hand:

> 72. […] the Court [does not] see any reason to disagree with the assessment made by the national immigration authorities and courts (see paragraphs 47 to 51 of the Supreme Court's judgment) as to the aggravated character of the applicant's administrative offences under the Immigration Act. In July 1996 she had returned to Norway in breach of the two-year-prohibition on re-entry imposed in March 1996. She had given misleading information about her identity, her previous stay in Norway and her criminal conviction. By having intentionally done so she had obtained residence and work permits, which were renewed a number of times, then a settlement permit, none of which she had been entitled to. She had thus lived and worked in the country unlawfully throughout and the seriousness of her offences does not seem to have diminished with time.
> 73. In these circumstances, the Court considers that the public interest in favour of ordering the applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention.[146]

In evaluating the circumstances of the case at hand the Court does refer to the assessment made by the national authorities; however, as opposed to the cases of *Omoregie* and *Kamaliyevy* discussed above, the Court also expresses its own point of view in this regard. Moreover, the Court's assessment of the facts explicitly deviates from the view that had been expressed on this issue at the national level. The Court disagreed with the national authorities on whether the expulsion decision indeed fulfilled the interest of procedural economy:

> 82. The Court observes furthermore that, although the unlawful character of the applicant's stay in Norway was brought to the authorities' attention in the summer of 2001 and she admitted this to the police in December 2001, it was not until 26 April 2005

[145] ibid para 71.
[146] ibid para 72.

> that the Directorate of Immigration decided to order her expulsion with a prohibition on re-entering for two years. Although this state of affairs could to some extent be explained by the immigration authorities' choice to process the revocation of her work and settlement permit not in parallel but separately, *it does not appear to the Court that the impugned measure to any appreciable degree fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures* (see paragraph 50 of the Supreme Court's judgment quoted at paragraph 23 above).[147]

It shows that inconsistency on the national level in pursuing the public interest in controlling immigration detracts from the weight of that interest in the case at hand: the national authorities had invoked the need for rapid decision making while in fact they had waited a considerable period of time before making the actual expulsion decision. In line with *Omoregie*, the issue is whether the national authorities were consistent in expressing their intention to deny residence to the person concerned.[148]

In view of the foregoing, it may be concluded that in *Nunez* the Court evaluated the weight of the reason for denying residence on the basis of the circumstances of the case at hand. Firstly, by addressing the seriousness of the violations of immigration law and secondly, by pointing out that the national authorities were inconsistent as regards the need to pursue swiftness in controlling immigration in this particular case. Notably, while the Court in *Nunez* may have scrutinised the weight of the interest in denying residence, the Court has not rejected the criterion for denying residence as such. On the contrary, the Court has made clear that acquiring residence on the basis of false information, in principle, provides states with a solid reason for expulsion. As such, the validity of the Norwegian immigration criterion thus remained fully in tact; it was only its inconsistent application *in this particular case* that was rejected.

Effective immigration control as an autonomous legitimate interest

As in the immigration-control cases previously discussed, also in *Nunez* effective immigration control was perceived as a public interest that may autonomously serve as a justification for denying residence. No substantive argument was necessary to underpin the public interest in refusing further residence in the host state, nor did substantive arguments counter the weight to be attached to the public interest. This is illustrated firstly by the Court's remark, that for the public interest in expulsion to be preponderant, it is not essential that the person concerned has been convicted for a criminal offence.[149] With this observation, the Court establishes that the interest in

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[147] ibid para 82.

[148] Section 2.6.1.1.

[149] *Nunez* (n 127), para 71.

controlling immigration per se may justify a foreign national's expulsion, *i.e.* regardless whether there are any substantive objections against the presence of this person in the host country, such as having committed offences.

That the interest in ensuring effective immigration control is treated as an autonomous concern also follows from the subsequent evaluation of the circumstances of the case at hand. The Court exclusively pays attention to aspects that add up to or detract from the interest in ensuring effective immigration control as such. Thus, the Court addresses the applicant's conduct only in so far as it concerned the infringements of procedural immigration rules. It leaves unaddressed, aspects that relate to substantive objections against the applicant's presence in the host State – such as the nature of the offence for which the applicant had been initially expelled, or whether the applicant had committed any criminal offences since entering Norway for the second time. The circumstance that a period of more than three years had passed between the discovery of the applicant's fraud and the decision to expel the applicant apparently lies within the sphere of the interest in controlling immigration.[150] That the occurrence or absence of any substantive objections against the applicant's presence in the host State does not affect the weight of the interest in controlling immigration denotes the autonomous nature of this particular interest.

2.6.1.4 Alim v Russia[151]

In *Alim v Russia*, the applicant's residence visa had been withdrawn after his expulsion from university because he had failed to attend classes. Since the applicant subsequently failed to regularise his stay, he was fined.. The applicant paid the fine but still neglected to regularise his stay, for the purpose of which he had to follow a registration procedure outside Russia. The second time the applicant was arrested without having registered, it was decided he should be expelled.

In discussing whether this decision was in accordance with Article 8 ECHR, the Court noted that – given the minor sanctions provided for in national legislation in case of non-compliance – the offence for which the applicant had been expelled could be classified as a minor administrative offence. Furthermore, the Court took

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[150] To exemplify this point, suppose that the Court would have reasoned that despite the weight to be accorded to the public interest in ensuring effective immigration control denying residence would violate Article 8 ECHR because it had appeared that the applicant had never committed any crimes and had always been able to financially support himself and his family. In that case, the weight of the interest in controlling immigration would not have had an autonomous value, but would have been proportionalised in view of other, substantive interests.

[151] *Alim* (n 127).

into account that before the arrest leading to the applicant's expulsion, he had already been fined for the same offence.

> 87. Furthermore, the Court observes that the offence for which on 11 January 2007 the applicant was ordered to leave Russia consisted of non-observance of the "registration" procedure for foreigners, which could be classified as a minor administrative offence (see paragraph 26 above). It is noted that until 15 January 2007 the Foreigners Act contained provisions concerning registration of foreigners. Foreigners had to apply for "registration" within three days of arrival in Russia (see paragraph 33 above). The Court does not overlook the Government's argument that in November 2006 the applicant had already been fined on the same grounds.[152]

In this case, the Court established the weight of the reason for denying residence by providing its own evaluation of the nature of the offences.[153] Again, the weight of the reason for denying residence is discussed solely in the light of the interest in ensuring effective immigration control. Whether there were any qualitative objections against the applicant's presence in Russia was not part of the Court's investigation.

A good excuse for non-compliance with valid procedural rules

The Court continues its examination in *Alim v Russia* by addressing the manner in which the registration procedure was organised and whether the applicant could be excused for having failed to follow that procedure:

> 88. [T]he Court is not convinced that after his visa had been revoked in September 2006 the applicant, who was no longer "lawfully" resident in the country, had any reasonable opportunity to regularise his presence in Russia, having regard to the applicable provisions and procedures of Russian law. Under the Foreigners Act a foreigner should leave Russia after the expiry of the authorised period, except when on the date of expiry he has already obtained an authorisation for extension or renewal, or when his application for extension and the relevant documents have been accepted for processing (see paragraph 30 above).
> 89. Thus, it appears that in the circumstances of the case the applicant had to leave Russia in order to have a legal possibility to seek a new authorisation to re-enter the territory of Russia. Indeed, as the applicant had no valid authorisation to remain in the country he was provided with a transit visa valid from 7 to 16 November 2006, to enable him to leave

[152] ibid para 65.

[153] Another qualifying remark on the nature of the offence occurs in the discussion on which party should be held responsible for the fact that the occurrence of migitating circumstances were not taken into account in deciding on the applicant's expulsion: 'given the nature of the proceedings which concerned a possible breach of registration or residence regulations for foreigners, the Court accepts that the pertinence of the matters relating to or affecting family life might not be immediately clear for the applicant at that point in the proceedings.' *Alim* (n 127), para 91.

> Russia. However, he did not leave the country, as he explained, because his wife had recently given birth to their second child and he had to take care of their first child. In so far as the applicant's behaviour and eventual efforts to regularise his presence in Russia may be relevant for its assessment, the Court considers that the applicant acted in the way lacking diligence and thus contributing to reaching a "deadlock" situation concerning his immigration status in Russia. At the same time, it should be noted that the applicant was found liable because of non-observance of the registration procedure rather than because of staying in the country without a valid document such as a visa or a residence permit.[154]

What the Court evaluated here is whether the applicant had a good excuse for not complying with the registration rules. This aspect in the Court's scrutiny also features in the previously discussed cases. However, in this case the Court concludes that there *was* in fact a good excuse for non-compliance with the procedural rule of immigration law.

At this point it is good to recall that the issue of a good excuse for non-compliance with national immigration rules also emerged in the discussion of income requirement cases.[155] On that occasion, it was explained that a good excuse for non-compliance with income criteria does not mean there is no significant public interest in denying residence to the person concerned. On the contrary, granting a right of residence because of a good excuse for non-compliance with the rules at issue inevitably takes place *despite* the fact that there is a public interest in denying residence.

Notably, a good excuse for non-compliance with a rule that represents a particular public interest does not indicate a particularly substantial *individual* interest in being granted a right of residence. Admittedly, there may be a relationship between the interest of a person in being granted a residence permit and the efforts made by that person to satisfy the conditions in order to obtain such permit. Yet, the relationship between these two circumstances is not that individuals who have an excuse for non-compliance with immigration rules have a greater substantial interest in being granted residence than others.[156] Therefore, we cannot conclude that the outcome of the case in *Alim* was the result of the individual interest in being granted residence outweighing the public interest in controlling immigration. What can be said

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[154] ibid paras 88-89.

[155] Section 2.5.2 and 2.5.6.

[156] To illustrate this point: an illiterate person who wants to be reunited with his spouse and minor children in the host State does not have a more substantial interest in being granted that right than a highly educated person who wants to be reunited with his spouse and minor children in the host state. Exempting only the illiterate person from the obligation to have a basic knowledge of the language of the host country therefore does not imply that the latter is considered to have a greater interest in being granted residence in the host state.

however, is that the excuse for non-compliance with the registration requirement allowed the Court to conclude that the decision to deny residence violated Article 8 ECHR, without affecting the restricting capacity of the national immigration criterion at stake. Indeed, the message still remains that as a rule, the requirement to register abroad should be respected.[157] Thus, while in *Alim* the Court deviated from the conclusion drawn on the national level as to whether denying residence was compatible with Article 8 ECHR, it did so without compromising the application of the criterion concerned in future cases. Only in these particular circumstances could non-compliance with national registration requirements be excused.

2.6.1.5 Antwi v Norway[158]

The next case to be discussed is *Antwi v Norway*. The applicant in this case had been granted a five-year residence and work permit as an EEA national, on the basis of a forged Portuguese passport indicating a false identity. In reality, the applicant was of Ghanaian origin.[159] About five years later the fraud was discovered – in the meantime the applicant had married and had a daughter - which resulted in an expulsion order. A crucial factor leading to the decision was submission of false information regarding date of birth, identity and nationality. The applicant had stated that his name was Jose Joao Olas Pinto, a citizen of Portugal, born on 1 March 1969 while his true identity had been Henry Antwi, a citizen of Ghana, born on 9 May 1975.

With referral to its approach taken in the *Nunez* case, in *Antwi* the Court discussed the seriousness of the violations of the national immigration Act in view of the

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[157] To substantiate this argument: imagine a case in which registration abroad would have been possible without too many difficulties. And imagine that the Court would consider that denying residence for failure to comply with that requirement violates Article 8 ECHR, in view of the fact that the applicant's spouse cannot be expected to accompany the applicant to her country of origin because of adjustment problems that he would face. Such conclusion would seriously impair the effect of the requirement to register abroad. Firstly, the exemption criterion for complying with the registration-rule would be extended from persons who cannot be required to comply with the registration-rule to persons who cannot be required to undergo the sanction for non-compliance with the criterion (to move indefinitely to another country). Furthermore, such a conclusion would oppose the message that as a rule, national immigration criteria are to be complied with.

[158] *Antwi* (n 127).

[159] 'The EEA' was established in 1994 under an agreement, bringing the three Member States of the European Free Trade Association (EFTA) – Iceland, Liechtenstein and Norway – and the twenty-seven Member States of the European Union (EU) together in a single internal market, without the EFTA members having to join the EU.

general interest in expulsion as an important means of general deterrence against gross or repeated violations of the Immigration Act:

> [T]he Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the *first* applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see *Nunez*, cited above, § 71, and *Darren Omoregie and Others v. Norway*, no. 265/07, § 67, 31 July 2008; see also *Kaya v. the Netherlands* (dec.) no 44947/98, 6 November 2001). 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 (see *Nunez* and *Darren Omoregie and Others*, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see *Nunez*, cited above, § 73).[160]

Subsequently, the applicant's violations of the immigration act were put forward to argue that the applicant could not have had any legitimate expectations of being granted a right of residence in the host state:

> 91. Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country.[161]

Furthermore, like in *Nunez*, the Court addressed the period of time between the discovery of the fraud and the decision to expel the applicant so as to rule out any inconsistency regarding the alleged necessity of denying residence. In this case it was considered that the authorities had not failed to respond with due swiftness:

> 102. Also, the duration of the immigration authorities' processing of the matter was not so long as to give reason to question whether the impugned measure fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such

[160] ibid para 90.
[161] ibid para 91.

> administrative measures (compare *Nunez*, cited above, § 82). On the contrary, in October 2005, only a few months after the discovery of the first applicant's fraud in July 2005, he was put on notice that he might be expelled from Norway. In May 2006 the Directorate ordered his expulsion and prohibition on re-entry and gave him until 24 July 2006 to leave the country.[162]

In view of the foregoing, in *Antwi,* the Court can be said to have conducted a case-specific evaluation of the reason for denying residence to the foreign national in view of the pursued public interest.

Enforcing procedural immigration rules to pursue the legitimate aim of general deterrence

In the above case, public interest in ensuring effective immigration control served again as an autonomous factor. The Court did not examine whether there were any qualitative objections against this person residing in Norway. Self-evidently, the fact that a person is not Jose Joao Olas Pinto, a citizen of Portugal, born on 1 March 1969, but instead Henry Antwi, a citizen of Ghana, born on 9 May 1975 does not in itself constitute a qualitative objection against this person residing in the host state. The fact that the Court still found there was a sufficient reason for expelling this particular person can only be understood if the interest in the State being able to decide who is and who is not authorised to reside in its territory is accepted as an autonomous legitimate interest. Indeed, expelling Mr Antwi was explicitly considered to pursue general deterrence, that is, to make sure that *other* people will refrain from circumventing rules of immigration law.[163]

2.6.1.6 Rahmani and Dineva v Bulgaria[164]

In *Rahmani and Dineva v Bulgaria*, the applicant had failed to timely renew his residence permit after it had expired. Although the applicant had paid the fine imposed as a sanction for this omission, he neglected to take any steps to regularise his stay. On the basis of his irregular residence it was decided to expel the applicant. In its reasoning on whether there was a sufficient justification for interfering with the applicant's family life – at that point he had resided for almost ten years in Bulgaria – the Court explicitly connected the reason for the expulsion decision to the public interest pursued:

> 57. Dans la présente espèce, le requérant s'est vu imposer la mesure en cause au motif que son séjour était irrégulier, l'intéressé étant demeuré sur le territoire de l'Etat après

[162] ibid para 102.
[163] *Nunez* (n 127), para 90.
[164] *Rahmani and Dineva* (n 127).

> l'expiration de son autorisation de séjour. La Cour rappelle que la possibilité pour les Etats de procéder à l'éloignement d'étrangers en situation irrégulière constitue un important moyen de dissuasion contre les violations de la législation en matière d'immigration et que la mise en œuvre d'une telle législation par le biais de mesures administratives de reconduite à la frontière ne pose pas, en soi, de problème au regard de l'article 8 de la Convention (voir, *mutatis mutandis*, *Nunez*, précité, § 71). La Cour considère dès lors que l'infraction à la législation sur le séjour des étrangers est un élément important à prendre en considération dans l'appréciation de la proportionnalité de la mesure en cause. En outre, force est de constater qu'en l'espèce le requérant s'est trouvé dans cette situation en raison de son défaut de diligence, puisqu'il disposait d'un permis de séjour valable jusqu'en janvier 2005 et qu'il n'a pas entrepris les démarches nécessaires pour en demander la prolongation en temps voulu. La Cour note à cet égard que si le requérant affirme qu'il aurait demandé, en janvier 2005, la prolongation de son permis de séjour et que celle-ci aurait été refusée au motif qu'il n'avait pas payé l'amende imposée un an auparavant, ces allégations ne sont pas étayées et sont même contredites par les constatations faites par les juridictions internes (paragraphe 12 ci-dessus, *in fine*).[165]

Consequently, in addition to examining the reason for denying residence, the Court evaluated whether the applicant had a good excuse for having infringed immigration regulations. Unlike in the case of *Alim*, however, in this case the Court found that there was no good excuse.

The impact on the applicant's family life and the importance of general deterrence

An interesting feature of the *Rahmani* case in terms of weighing the public interest is the significance attached to the fact that applying for a visa was all that was required for re-establishing the applicant's authorised residence in Russia. The Court interprets this fact as reflecting on the weight to be attached to the individual interest: since there was no reason to believe that the application for a new visa would be denied, the expulsion decision could not be said to heavily interfere with the applicant's family life:

> 58. Concernant ensuite la question de savoir dans quelle mesure la vie familiale des intéressés se trouverait entravée par l'exécution de l'arrêté litigieux, la Cour observe que la mesure de reconduite à la frontière prise à l'encontre du requérant n'est pas assortie d'une interdiction du territoire. Dès lors, si cette mesure est exécutée, rien ne semble empêcher le requérant de demander un nouveau visa d'entrée, puis un permis de séjour sur la base de son mariage avec une ressortissante bulgare (voir le droit interne applicable, paragraphes 29-30 ci-dessus) et de s'installer en Bulgarie de manière légale. La Cour observe à cet égard que le requérant avait obtenu en janvier 2004 un permis de séjour d'un an sur la base de son mariage avec la requérante, dont il n'a toutefois pas demandé le renouvellement en temps utile (voir le paragraphe précédent). A aucun moment il ne s'est vu refuser la délivrance d'un titre de séjour sur le fondement de son mariage ni retirer

[165] ibid para 57.

> un titre existant. Dans ces circonstances, la Cour n'est pas convaincue que l'exécution de la mesure prise à l'encontre du requérant aurait pour conséquence de rendre impossible l'exercice de la vie familiale sur le territoire de la Bulgarie ou de provoquer une séparation prolongée du couple. Elle relève en outre que ne sont pas en jeu en l'espèce des enfants mineurs dont l'intérêt primordial se trouverait affecté par la mesure litigieuse (voir, par contraste, *Nunez*, précité, §§ 78-85; *Rodrigues da Silva et Hoogkamer*, précité, §§ 41-44).
> 59. Au vu de ces observations, et sans avoir besoin de se pencher plus avant sur la question de savoir s'il existe des obstacles insurmontables à l'exercice de la vie familiale des requérants ailleurs qu'en Bulgarie, la Cour estime que l'exécution de la mesure de reconduite à la frontière prise à l'encontre du requérant ne porterait pas une atteinte disproportionnée au droit à la vie familiale des intéressés.[166]

It is self-evident that if a person has secure prospects of re-entering the country any time soon, this determines the extent to which an expulsion measure interferes with that person's family life. At the same time, however, the occurrence of secure prospects to re-enter reflects the weight of the *public* interest: why bother to expel a person if it is sure that the mere request for a new visa will enable that person to re-enter the country? Since the Court nevertheless considers the expulsion decision *not* to be disproportionate, apparently, the public interest at issue is not concerned with whether or not *this particular person* is allowed to remain in the country. Instead, the public interest in expelling a person who is expected to return shortly exists in the very ability to sanction national procedural rules of immigration law, so that *other people* are discouraged from infringing those rules. Or in terms of the Court:

> 'la possibilité pour les Etats de procéder à l'éloignement d'étrangers en situation irrégulière constitue un important moyen de dissuasion contre les violations de la législation en matière d'immigration.'[167]

Again, the Court's scrutiny does not extend to an evaluation of any substantive objections that may exist against the applicant's presence in the host State. First of all, the Court does not undertake an examination of such aspects. In addition, the occurrence of an obvious indication that there are no such objections – i.e. the circumstance that all it takes for the applicant to return is to apply for a residence permit – is disregarded as an aspect that may have any bearing on the weight of the public interest at stake.

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[166] ibid paras 58-59.
[167] ibid para 57.

2.6.1.7 Butt v Norway[168]

In *Butt v Norway*, it was not in first instance the applicants' own conduct that had prompted the decision to deny their residence. Instead, the public interest in controlling immigration existed in holding the applicants – two brothers – accountable for the infringement of immigration rules by their mother. The latter had failed to inform the authorities of the fact that not long after having been granted a residence permit for humanitarian reasons, she and her children had returned to Pakistan for more than three years before resettling in Norway. This was discovered when the father of the boys requested a residence permit for the purpose of family reunification, which was refused. The settlement permits of both the mother and the two sons were withdrawn on the ground that the permit had been granted on the basis of false information provided by the mother about her and the children's residence in Norway. It was also decided to refuse them further residence in Norway. The actual expulsion measures, however, were not executed at that moment because the mother had disappeared and it was considered inappropriate to expel the boys without their mother. About six years later – in the meantime the mother had been expelled to Pakistan where she had passed away two years later - after the youngest son had been convicted for a number of criminal offences; the authorities found that there were no longer any impediments for the two boys' expulsion.

As mentioned above, the public interest in denying residence to the boys entailed the identification of the two brothers with the conduct of their mother:

> 79. In this regard the Court has noted the general approach of the Borgarting High Court that strong immigration policy considerations would in principle militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that parents exploited the situation of their children in order to secure a residence permit for themselves and for the children (see paragraph 34 above). The Court, seeing no reason for disagreeing with this general approach, observes that during a police interview on 15 November 1996 the applicants' mother conceded that she had previously given incorrect information to the police and other institutions about her own and her children's stay in Pakistan during this period. Thus, it seems that her children's family life was created in Norway at a time when she was aware that their immigration status in the country was such that the persistence of that family life would, since their return in 1996, be precarious (see *Nunez*, cited above, §§ 71-76). That was also the case of their private life in the country. From the above considerations, it follows that the removal of the applicants would be incompatible with Article 8 only in exceptional circumstances.[169]

Thus, in principle, no significant weight can be attached to family life developed by children whose residence in the host country has been obtained through breaches of

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[168] *Butt* (n 127).

[169] ibid para 79.

immigration law conducted by their parents, *if otherwise* there would be a risk that parents exploit the situation of their children to obtain a residence permit.[170]

Incorrect application of a valid rule

Despite the obvious violations of the immigration Act committed by the applicants' mother, the Court found that expelling the applicants would violate Article 8 ECHR:

> 80. In assessing whether there were such exceptional circumstances, the Court observes in the first place that, as also held by the High Court, the need to identify children with the conduct of their parents could not always be a decisive factor; in the concrete case there had been no such risk of exploitation as mentioned above since the applicants had reached the age of majority and their mother had died.[171]

The Court observed that the national rule had been unjustly applied to the circumstances of the case.[172] Therefore, it did not accept the public interest as invoked by the national authorities. However, whereas the Court rejected that in the case at hand there was a risk of exploitation, the validity of the restrictive immigration criterion, as such, was left untouched. Indeed, the Court explicitly accepted the Norwegian criterion, but considered that *in this particular instance* it had been incorrectly applied.

Inconsistent application of valid rules

Besides the fact that the interest in identifying the two brothers with the conduct of their mother had ceased to exist, a second aspect was pointed out as detracting from the public interest. It concerned the same inconsistency in enforcing national immigration law earlier seen in *Nunez*: to claim the necessity of ensuring effective immigration control while waiting a considerable period of time before acting upon the discovery of breaches of immigration law:

> 81. Furthermore, already in connection with the application for family reunion, submitted by applicant's father in 1996, the immigration authorities were informed of the mother and the applicants' stay in Pakistan for most of the period from the summer of 1992 to

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[170] Note that is different than generally accepting that in view of the risk that parents may exploit the situation of their children to obtain a residence permit, in principle no significant weight can be attached to family life developed by children whose residence in the host country has been obtained through breaches of immigration law conducted by their parents. The *Butt* case shows that there must be an *actual risk* that parents benefit from the breaches of immigration law if their children would be granted residence in the host State.

[171] *Butt* (n 127) para 80.

[172] Note the referral made in this regard to the national High Court.

> early 1996. During the said police interview of 15 November 1996 the mother conceded that she had previously given incorrect information to the police and to other institutions about this in 1996 (see paragraph 79 above). However, without enquiring into the justification for the Directorate of Immigration's decision of January 1999 (upheld by the Immigration Appeals Board in August 1999) to revoke the applicants' and their mother's settlement permit, the Court has noticed the lapse of time between the said discovery in 1996 and the revocation of the permit in 1999 (see *Nunez*, cited above, paragraph 82).[173]

Another inconsistency reflecting on to the weight of the public interest entails that even on the national level the necessity of expelling the applicants had been explicitly disputed:

> 85. Also, the Court cannot but note the observation made by the High Court (in 2008) that, in view of the unusually long duration of the applicants' unlawful stay in Norway, it was questionable whether general immigration policy considerations would carry sufficient weight to regard the refusal of residence "necessary in a democratic society" (see paragraph 37 above).[174]

A striking feature in *Butt* – also seen in the previous cases discussed – is the carefulness with which the Court refers to decision making on the national level. This deferential attitude illustrates how decisions to expel a foreign national because of infringement of procedural immigration rules are consistently measured against the State's own, national standards. It seems that only the State itself may contradict that there is a sufficient public interest in denying residence for infringement of procedural immigration rules: either through an inconsistent or incorrect implementation of these rules, or by otherwise sending mixed messages regarding the need to expel the migrant.

It can be concluded from the above observations that the Court proves willing to endorse the importance invoked by States of ensuring effective immigration control. However, it does not seem to see any room for itself to independently provide a *negative* evaluation of national immigration criteria. The Court's assessment is thus confined to evaluating whether the national immigration criteria have been applied correctly and consistently, without compromising their validity as such. The consequence of this approach is that once it is established that the State acted consistently and correctly in sanctioning procedural rules of immigration law, this suffices to prove that there is a sufficient interest in denying residence, regardless of the nature of the procedural rules at stake.

In the final four cases to be assessed in this section, the Court left the public interest in denying residence unquestioned altogether. In the first of these cases it is

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[173] *Butt* (n 127) para 81.
[174] ibid para 85.

not even clear what exactly constituted the nature of the reason for denying residence.

2.6.1.8 Margoum v Belgium[175]

In *Margoum v Belgium*, after having been granted a provisional residence permit for the purpose of family reunification, the applicant's actual entry into Belgium had been refused on the basis of a SIS-alert. The basis for being registered in the Schengen Information System may involve criminal convictions, but this is not necessarily the case. In the description of the facts of this case it is only stated that five years before the applicant had applied for family reunification in Belgium, the applicant had been expelled from Germany to Morocco 'following an administrative problem'. At the risk of engaging in sexism and ageism at the same time[176], the fact that it concerned a 77 years old woman arguably constitutes a strong indication that it was not the protection of crime and disorder that had been at stake. In the Court's argumentation on the matter, the sole aspect mentioned in relation to the German decision to deny residence was that it had been made by the competent authorities:

> En l'espèce, la Cour constate que la requérante a précédemment établi sa vie familiale en Allemagne où elle a passé dix ans auprès de son époux. Leur vie conjugale fut apparemment interrompue à la suite d'une décision des autorités allemandes compétentes en matière de contrôle de l'immigration.[177]

The Court did not address the reason why the German authorities registered the applicant in SIS, or whether five years after that decision the reasons for denying residence were still urgent. The conclusion that the national authorities had not failed to strike a fair balance between the interests of the applicant and the public interest in controlling immigration was not based therefore on a case-specific evaluation of the weight of the public interest in denying residence.

2.6.1.9 Biraga v Sweden, Bolek v Sweden, and Mbuisa v the United Kingdom[178]

In all of the three cases at issue in this subsection, residence had been denied because the application for the residence permit had not taken place abroad. In all three cases, the Court explicitly indicated that it would assess whether the decisions concerned could be considered necessary in view of the purposes of Article 8(2) of the

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[175] *Margoum* (n 128).

[176] And of negligence, for failing to find out for which reason the applicant had been registered in SIS.

[177] *Margoum* (n 128), p. 4.

[178] *Biraga* (n 128); *Mbuisa* (n 128); *Bolek* (n 128).

Convention.[179] Yet, in none of these cases did the Court examine whether or how the obligation to apply for a residence permit abroad contributed to the public interest.

In both *Bolek* and *Biraga* the Court starts with emphasising that these cases did not concern the final decision to grant or to refuse a residence permit:

> 30. [T]he Court notes at the outset that what is at issue in the present case is not a final decision by the Swedish authorities to grant or to refuse the first applicant a residence permit based on family ties. No decision thereon has yet been taken.
> 31. The matter to be considered is whether it would be in breach of Article 8 of the Convention if the Swedish authorities implemented the order that the first applicant return to the DRC to apply for family reunion from there.[180]

The above quotation suggests that the Court confines the scope of its adjudication to evaluating the necessity of upholding the requirement *to apply for the permit abroad*, rather than examining whether refusing the permit altogether would violate Article 8 ECHR. However, the subsequent assessment of whether the interference was necessary in a democratic society implies that the eventual grant of a residence permit in fact *was* at stake. The Court attached great importance to whether the applicants were entitled to expect that at some point they would be granted a residence permit. Thus, in *Bolek* the Court pointed out that the applicant never had had a right of residence in the host State:

> 35. The Court reiterates that an important consideration is 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. Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional cases (see *Nunez v. Norway*, no. 55597/09, § 70, 28 June 2011).
> 36. In this respect, the first applicant has at no time been granted lawful residence in Sweden. Moreover, the applicants' family life was created after the first applicant's asylum request had been finally rejected by the Swedish migration authorities and there was an enforceable expulsion order against him. Thus, the first and second applicants knew already when they met that they would most probably not be able to establish and maintain their family life in Sweden.[181]

In *Biraga*, the fact that the applicant did not have a residence permit while he developed family life is discussed in a similar manner:

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[179] In *Mbuisa* and in *Bolek* the decisions concerned were qualified as an interference. In Biraga the Court considered it not necessary to determine whether the matter concerned consituted a positive or a negative obligation issue but still examined the case in view of Article 8(2) ECHR. *Biraga* (n 128), para 56.

[180] *Bolek* (n 128) paras 30-31. Compare *Biraga* (n 128), paras 52-53.

[181] *Bolek* (n 128) para 36.

> However, the question arises whether the interference was necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aims pursued (see, as a recent authority, *Üner v. the Netherlands* [GC], cited above, § 54).
> 57. In this assessment, the Court refers to the main decision taken thereon by the Migration Court on 29 August 2009, which became final on 23 September 2009 when leave to appeal to the Migration Court of Appeal was refused. In its balancing test the Migration Court noted that the third applicant did not have a residence permit in Sweden at the relevant time, thus the first applicant could not invoke the strong connection to her child to obtain a residence permit there. As regards the first applicant's relationship with the second applicant, the Migration Court found on the one hand that it spoke in the first applicant's favour that the couple had a child together. […]
> 58. Moreover, the Court notes that the first applicant at no time has been granted lawful residence in Sweden (cf. *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 43, ECHR 2006-) and it is not in dispute that the applicants' family life was created at a time when they were aware that the first applicant's immigration status was such that the persistence of that family life within Sweden would from the outset be precarious.[182]

In *Mbuisa*, the applicant did have a residence status while developing family life, but this was not considered sufficiently secure:

> 17. As regards Article 8, the Immigration Judge accepted that the applicant had private and family life with CB and her four children. It was not reasonable to expect CB and her children to leave the United Kingdom and live in South Africa with the applicant: they were all British citizens and two of them had contact with their natural fathers, who were in the United Kingdom. However, the applicant and CB had begun their relationship while knowing that the applicant had only temporary leave to remain in the United Kingdom.[183]

Apparently, even though the eventual right of residence was not at stake here, it proved relevant for the outcome of the case whether the applicants had legitimate expectations in being granted such right.

As seen in earlier cases, the legitimate expectations issue involves whether family life had been developed on the basis of a secure residence status and whether the national authorities had perhaps given mixed signals as to their determination to deny residence. As previously argued, the use of the 'legitimate expectations' argument has the effect that only weight can be attached to the individual interest in being granted leave to remain if this does not intervene with the public interest in ensuring effective immigration control.[184] Indeed, if, despite the express wish of the host State not to grant residence to a person, the Court would declare that such denial would

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[182] *Biraga* (n 128), paras 56-58.
[183] *Mbuisa* (n 128), para 17.
[184] See the discussion of the *Darren Omoregie* case in the text to note 137.

violate Article 8 ECHR in view of the substantial individual interest in being granted this very residence, this declaration would seriously affect the State's power to control immigration. The consequence of this particular constellation of arguments is that an established interest in upholding procedural immigration rules fixes the outcome of the case: under those circumstances denying residence will not result in a violation of Article 8 ECHR. Aspects relating to whether there are any concrete objections against the applicant's presence in the host State or that concern the consequences of denying residence for the persons concerned thus have become irrelevant.

Yet, not every case in which it is established that the applicant failed to comply with consistently applied national procedural rules inevitably results in the conclusion that there is no violation of Article 8 ECHR. Indeed, in the same way as in the cases discussed earlier, significance is attached to whether there was an excuse for non-compliance with the requirement at issue.[185] In *Biraga*, *Bolek*, and *Mbuisa*, the Court examined whether it could be reasonably asked from the applicant that he would return to his country of origin to apply for a residence permit. In this regard, attention was paid to the duration of the application procedures and to other impediments, such as the impact on the well-being of children if one of their parents would have to stay abroad for a certain period of time. Thus, in *Mbuisa*, the Court with referral to the national Migration Judge pointed out that:

> [w]hile the practical effect of the applicant leaving the country would be that he would be separated from CB and her children, this was likely to be short term, and there was no evidence that any application to re-enter the United Kingdom would involve a lengthy process. There was no evidence as to any particular degree of dependency by CB or her children on the applicant. The children were teenagers and no doubt adept at using modern means of communication, which they could use to remain in contact with the applicant for the time he would spend in South Africa.[186]

In *Bolek*, the Court evaluated the situation in the applicants' country of origin and the expected period of time the applicant would need to obtain his residence permit:

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[185] The reason why I consistently use the word 'excuse' and not 'reason' here, is to emphasise that the scope of the examination only regards circumstances indicating that it was reasonably not possible for the person concerned to comply with the requirement at issue, while the occurrence of a good reason may suggest that other aspects may be of relevance. For example, the circumstance that it may be pointless to comply with a certain requirement arguably poses a good reason not to comply with it, but it will not be regarded as a good excuse.

[186] *Mbuisa* (n 128), para 17.

> 37. Furthermore, the Court notes that the Migration Board and the Migration Court both found that the first and second applicants had not substantiated that they were in need of international protection. The second applicant had been granted a permanent residence permit in Sweden because of the third applicant's health and age which, according to the Migration Board, constituted impediments to expelling her, and the second applicant, to the DRC.
> 38. Against this background, it has not emerged that there are any impediments against the expulsion of the first applicant to his home country. There is nothing to suggest that the period expected for the examination of the first applicant's request for family unification in Sweden is excessively long. Moreover, it has not emerged that the first applicant would lack the possibility to be in contact with the other applicants via, *inter alia*, telephone or the internet during the period in question.[187]

Finally, in *Biraga* the Court referred to the Migration Court and its finding that the exemption from applying for a residence visa abroad was inapplicable to the case. These exemptions – included in the description of the relevant domestic law - were phrased as follows:

> 34. As regards the exemptions that can be made according to Chapter 5, Section 18, second paragraph, point 5 of the Aliens Act, the preparatory works to the provision (Government Bill 1999/2000:43, p. 55 et seq.) state that the main emphasis should be placed on the question of whether it is reasonable to require that the alien return to another country in order to submit an application there. Relevant elements, which may be favourable for the alien, may be whether he or she can be expected, after returning home, to encounter difficulties in obtaining a passport or exit permit and this is due to some form of harassment on the part of the authorities in the country of origin. It may also be [relevant, EH] whether the alien will be required to complete a long period of national service or service under unusually severe conditions. It may also be relevant whether the alien has to return to a country where there is no Swedish foreign representation and where major practical difficulties and considerable costs are associated with travelling to a neighbouring country to submit the application there.[188]

Thus, in all three cases the Court examined whether the applicant could be excused for failing to comply with the obligation to apply for a residence visa abroad. As discussed earlier, the establishment of whether there is a good excuse for non-compliance with a requirement leaves the validity of that requirement fully intact.

Considering the above, it is clear that the conclusion in these cases that the requirement to apply for a residence permit abroad indeed could be considered necessary in view of one of the aims of Article 8(2) ECHR, does not entail an evaluation of the public interest to be pursued by (sanctioning the failure to satisfy) this requirement. This is striking, given the fact that it is far from self-evident that

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[187] *Bolek* (n 128), paras 37-38.
[188] *Biraga* (n 128), para 34.

there is a sufficient public interest in denying residence to those who, as expressly considered by the Court, may relatively soon return to the host country in possession of a residence permit.[189] Again, the explanation for this can be found in the autonomous status of the interest in ensuring effective immigration control.

An instrumental approach to prospects of being granted residence

An interesting point relating to the interest in controlling immigration in these three cases concerns the manner in which the prospects of being granted a residence permit are used for different purposes. In one and the same case, the Court seems to present three different factual starting points as to the likeliness of whether a residence permit will be granted to the applicant.

Firstly, the Court makes a firm statement that no decision has yet been taken on whether the applicant's residence permit will be granted or refused. This suggests that it is yet unclear whether residence will be granted. Subsequently, however, the Court emphasises that the applicants had been aware all along of the unlikeliness of being able to establish and maintain their family life in the host state. In discussing the legitimate expectations issue, the Court apparently has a notion of the (lack of) prospects on whether the applicant will be granted a residence permit after all. Finally, the Court seems to take yet another starting point as regards the issuance of a residence permit, by submitting that the interference with the applicants' family life is only of minor importance, since the application abroad will not take too long. The latter position suggests it will be soon before the applicant is able to return to the host country with his residence permit.

Three different statements, notably serving one and the same purpose in the Court's argumentation. The significance of the first statement for the Court's argument is that it detracts from the weight of the individual interest: if it would have concerned a final refusal to grant a residence permit the impact of the decision on the applicants' family life would have been more substantial, which, in turn, would have been of significance in balancing the interests concerned.[190] The significance of the assertion that the applicants were aware of the fact that the chances of being granted family reunification in the host State is – as argued above – that it prevents decisive significance being attached to the individual interest in being granted residence. Finally, the significance of pointing out that it will not be too long before the applicant may return to the host State is to underscore the relative weight of the

[189] See also the discussion in this regard of *Rahmani and Dineva* in the text to note 168.

[190] In *Nunez*, for example, the circumstance that there was no guarantee that at the end of the two-year entry ban the mother would be able to return was put forward by the Court to substantiate the considerable weight to be attached to the individual interest. (*Nunez* (n 127), para 81).

individual interest at stake. In sum, the decisive importance of the individual interests at stake is negatively affected: firstly by the view taken that there is not yet a final decision on whether a residence permit will be granted; secondly by pointing out that there were no prospects of being granted a right to reside to begin with; and thirdly, by the consideration that it will not be long before the applicant may return with a residence permit.

2.6.1.10 Summary

The analysis of cases where a failure to comply with procedural rules of immigration law posed the main reason for denying residence gave a clear picture of the Court's approach to non-compliance with procedural immigration rules. In most of these cases, seven out of eleven, the Court evaluated the weight of public interest on a case-by-case basis – albeit in some cases by mainly referring to the interpretation of the national authorities. In its evaluation of the weight of the public interest, the Court has shown to appreciate the importance of enforcing national rules as part of the public interest in ensuring effective immigration control. However, the Court's evaluation of the public interest in ensuring effective immigration control remained strictly affirmative. Aspects put forward detracting from this particular public interest never concerned the validity of national rules as such but always regarded an inconsistent or incorrect application of otherwise valid rules.[191] The consistency with which procedural immigration rules were applied is established under the heading of whether the applicants were entitled to expect any right of residence would be conferred upon them in the future. This aspect involves firstly an examination of whether family life had been developed under vigour of a secure residence status. If this is not the case, the Court examines whether the national authorities have acted consistently regarding any prospects of future legal residence.[192] If it appears that family life has been developed against the consistently expressed wishes of the host state, as a rule, no decisive importance is attached to the individual interest in being granted residence.[193] The exception to this rule is the occurrence of a good excuse for non-compliance with the rules at issue.[194] Attaching

[191] This was the case in *Nunez* (n 127) and in *Butt* (n 127).

[192] It was only in the case of *Alim* that the Court considered that 'given the nature of the proceedings which concerned a possible breach of registration or residence regulations for foreigners, the Court accepts that the pertinence of the matters relating to or affecting family life might not be immediately clear for the applicant at that point in the proceedings'. *Alim* (n 127), para 91.

[193] This was the case in *Darren Omoregie* (n 126); *Kamaliyevy* (n 126); *Antwi* (n 127); *Rahmani and Dineva* (n 127); *Biraga* (n 128); *Bolek* (n 128); and *Mbuisa* (n 128).

[194] This was the case in *Alim* (n 127).

decisive importance to the latter aspect again allows the Court to refrain from compromising the validity of national procedural rules of immigration law. For it is only in this particular case that the person may be exempted from satisfying the criterion: the message remains that in principle national procedural rules of immigration law are to be followed.

A final observation concerns the fact that the public interest in upholding procedural rules of immigration law serves as an autonomous justification for denying residence. Irrespective of whether the case involved an interference in the sense of Article 8(2) ECHR, the Court refrained from addressing whether there were any substantive objections against the presence of the foreign national in the host state. *A fortiori*, in cases where it was contended that – if only the procedural requirements were satisfied – a residence permit would surely be obtained, this proved no reason for the Court to question the significance to be attached to the public interest.

In sum, the Court's approach to procedural rules of national immigration law may be characterised as an approach with a rather narrow scope of judicial scrutiny. Indeed, the Court has not drawn conclusions that compromise the validity of procedural immigration rules. First of all, the Court has only made confirmative comments in relation to national immigration policies. Secondly, if it is established that national procedural rules of immigration law were applied correctly and consistently, for the Court this implies there is a sufficient public interest in controlling immigration. If there is a good excuse for non-compliance with national rules, there is room for decisive importance to be attached to the individual interest in being granted residence but this will also leave the validity of the national rules unaffected.

The following section looks at cases in which, in addition to a failure to comply with procedural rules of immigration law, one or more substantive objections against the applicant's presence in the host State were invoked to justify denying residence. I examine whether the occurrence of such substantive aspects affect the weight of the public interest in upholding procedural immigration rules.

2.6.2 Infringement of procedural rules as one among other reasons for denying residence

In the previous section it was observed that the generic interest in upholding procedural immigration rules is treated by the Strasburg Court as autonomously capable of justifying a State's decision to deny residence.[195] The following cases

[195] It is restated here that the term 'generic' signifies that the interest in denying residence does not encompass substantive objections against a person's presence in the host state: while procedural rules, such as the requirement to obtain a visa before entry, may serve to

contained additional, substantive reasons for the host State to deny residence. In this section, I examine the Court's approach to the weight of the public interest in each of these cases.[196] I investigate whether in establishing the public interest the Court includes the substantive objections invoked against the applicant's presence in the host state.

2.6.2.1 Solomon v the Netherlands[197]

In *Solomon* the reason for denying the applicant's request for family reunification was that the applicant had failed to prove his identity. In addition, he had not supplied the necessary documents to prove that he was not already married. In discussing whether the refusal to grant the request had violated Article 8 ECHR, both these aspects were left entirely unaddressed by the Court. Instead, the case was decided in view of the fact that the relationship between the applicant and the person with whom he wished to reside had not developed while in possession of a secure right of residence:

> In the present case the Court takes into consideration that the applicant was never given any assurances that he would be granted a right of residence by the competent Netherlands authorities. He was allowed to await the Deputy Minister's decision on his asylum request in the Netherlands. After asylum was denied him, his request for a stay of expulsion was refused by the competent court on 22 December 1994. From then onwards, the applicant's residence in the Netherlands, which was already precarious, lost what little foundation it had had until then. Family life between the applicant and his Netherlands national partner – and later, with their child – was developed after this date. The Court is of the opinion that in these circumstances the applicant could not at any time reasonably expect to be able to continue this family life in the Netherlands (cf. the Bouchelkia judgment cited above, § 53; and *Baghli v. France*, no. 34374/97, § 48, to be published in ECHR 1999). The Netherlands authorities were therefore entitled to consider the interference in question to be "necessary in a democratic society".[198]

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establish that there are no substantive objections against a person's presence in the host state, the mere fact that a person has not satisfied procedural rules does not imply that such substantive objections exist.

[196] At this point the purpose is to get a clear view on how the generic public interest in controlling immigration is perceived by the Strasbourg Court compared to its approach to specified public interests. Therefore, in this section I will not separately deal with the Court's approach to denying residence for failure to comply with individual interest-related criteria. This particular category of cases is discussed in section 3.7, where the relation between the generic public interest in controlling immigration and the Court's approach to individual interest-related criteria will be examined in detail.

[197] *Solomon v the Netherlands* (dec.) App No 44328/98 (ECtHR, 5 September 2000).

[198] ibid p. 6.

It has been submitted earlier that the examination of legitimate expectations as regards the issuance of a residence permit, comes down to verifying whether the applicant has developed family life against the consistently expressed will of the host State. The legitimate expectations argument, however, does not involve an assessment of the reasons *why* the State has not been willing to grant a residence status.

The conclusiveness of the legitimate expectations aspect in *Solomon* implies that the applicant's irregular residence per se determined the outcome of the case. This aspect deemed irrelevant not only whether there were substantive objections against the applicant's residence in the host State but also the weight of the individual interests at stake. Therefore, it cannot be said that in *Solomon* the public interest in controlling immigration *outweighed* individual interest in being granted residence. Rather, the public interest categorically set aside the individual interest in being granted residence as a potential factor of significance.

2.6.2.2 Benamar v the Netherlands[199]

The case of *Benamar* concerns the refusal to grant a residence permit to four children to reside with their mother in the host State. The mother had left their country of origin some years earlier. Besides the fact that the mother had failed to apply for provisional residence permits for her children before bringing them to the Netherlands, the authorities had put forward that the applicant had not provided for adequate housing for the children.[200] In discussing the merits of the case, the objection relating to the inadequate housing remained unaddressed. The failure to obtain a provisional residence permit, however, played a prominent role. Due to the failure to obtain a provisional residence permit and the irregular residence as its immediate result, the Court took the view that no decisive weight could be attached to the circumstances that the children had been living with their mother in the Netherlands for a number of years:

> The fact that the children have been staying with their mother in the Netherlands since 1997 does not impose a positive obligation on the State to allow the children to reside there since they had illegally entered the Netherlands, i.e. without holding a provisional residence visa. Having chosen not to apply for a provisional residence visa from Morocco prior to travelling to the Netherlands, the applicants were not entitled to expect that, by

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[199] *Benamar v the Netherlands* (dec.) App No 43786/04 (ECtHR, 5 April 2005).

[200] Furthermore, in view of the Dutch government, given the period of time that had passed between the mother's arrival in the Netherlands and the moment she had arranged for her children to join her, it was assumed that the ties between the mother and her children had severed so that there was no longer a basis to claim residence in terms of family reunification. This issue will be discussed elaborately in section 2.7.

> confronting the Netherlands authorities with their presence in the country as a *fait accompli*, any right of residence would be conferred on them.[201]

That the period of residence spent with their mother in the host State did not create a positive obligation was obviously not due to a lack of interest of the children and their mother in being granted family reunification in the Netherlands. Rather, the problem was that this interest could not be qualified as a *legitimate* interest. Non-compliance with the requirement to obtain a provisional residence visa thus weighed heavily in deciding on the *Benamar* case. Equally, it cannot be stated that the Court evaluated the weight of the public interest in denying residence. It would have been possible to argue, for example, that despite the breach of immigration rules, the authorities had opportunity to examine whether there were substantive objections against issuing a residence permit. Indeed, within two weeks after the children's arrival, an application for such permit had been made. The absence of any evaluative remarks with regard to the breach of procedural immigration rules – either positively or negatively – implies that the Court established the very fact that the public interest in controlling immigration was at stake; and not the weight that should be accorded to that interest in the case at hand.

Again the conclusion is that while both procedural and substantive reasons for denying residence were put forward, it was the generic interest in controlling immigration that determined the outcome of the case. Furthermore, again the public interest in controlling immigration did not *outweigh* the interest in being granted residence, but rather it *set aside* the individual interest as a relevant factor.

2.6.2.3 Rodrigues Da Silva and Hoogkamer v the Netherlands[202]

In *Rodrigues Da Silva and Hoogkamer* it was found against the applicant that she had resided in the Netherlands for a long period of time before taking steps to regularise her stay. Furthermore, the authorities invoked economic reasons for refusing a residence permit. According to the authorities:

> the interests of the economic well-being of the country outweighed the interests of the first applicant. Although the first applicant did not claim welfare benefits, she did not pay taxes or social security contributions either, and there were sufficient numbers of nationals of European Union member States or aliens residing lawfully in the Netherlands available to fill the post she was occupying.[203]

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[201] *Benamar* (n 199), p. 8-9.

[202] *Rodrigues da Silva and Hoogkamer v the Netherlands* (ECtHR, 31 January 2006) ECHR 2006-I.

[203] ibid para 17.

As observed in section 2.5.1, these aspectes were left unaddressed in the Court's examination. The Court did, however, discuss the violations of procedural immigration rules.

Ambiguity as regards the prospects of a residence permit being granted

Despite the fact that the applicant's family life in the host State had developed without a residence status, the Court did not accept that there was a sufficient reason for denying residence. Notably, there was no disagreement between the Court and the national authorities on the seriousness of the applicant's conduct:

> 43. Whilst it does not appear that the first applicant has been convicted of any criminal offences (see *Berrehab*, cited above, § 29, and *Cılız v. the Netherlands*, no.29192/95, § 69, ECHR 2000-VIII), she did not attempt to regularise her stay in the Netherlands until more than three years after first arriving in that country (see paragraphs 9 and 13 above) and her stay there has been illegal throughout. The Court reiterates that 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 (see *Chandra and Others v. the Netherlands* (dec.), no. 53102/99, 13 May 2003). Nevertheless, the Court finds relevant that in the present case the Government indicated that lawful residence in the Netherlands would have been possible on the basis of the fact that the first applicant and Mr Hoogkamer had a lasting relationship between June 1994 and January 1997 (see paragraph 34 above). Although there is no doubt that a serious reproach may be made of the first applicant's cavalier attitude to Dutch immigration rules, this case should be distinguished from others in which the Court considered that the persons concerned could not at any time have reasonably expected to be able to continue family life in the host country (see, for example, *Solomon*, cited above).
> 44. In view of the far-reaching consequences which an expulsion would have on the responsibilities which the first applicant has as a mother, as well as on her family life with her young daughter, and taking into account that it is clearly in Rachael's best interests for the first applicant to stay in the Netherlands, the Court considers that in the particular circumstances of the case the economic well-being of the country does not outweigh the applicants' rights under Article 8, despite the fact that the first applicant was residing illegally in the Netherlands at the time of Rachael's birth. Indeed, by attaching such paramount importance to this latter element, the authorities may be considered to have indulged in excessive formalism.[204]

The Court considers that the applicant should be distinguished from someone who was not entitled to expect that any right of residence would be conferred upon her. The reason for this is that according to the Dutch government, lawful residence in the Netherlands would have been possible if only she had applied for a residence permit earlier. The conclusion that the national authorities had "indulged in

[204] ibid paras 43-44.

excessive formalism" thus is based on the *ambiguity* displayed on the national level as regards whether the applicant should be denied residence.

In its conclusion, the Court also points out the far-reaching consequences for the applicant and her child to underpin its conclusion that in this case the public interest did not outweigh the applicant's rights under Article 8 ECHR. However, given the consistent predominance attached to the public interest in controlling immigration, it is my contention that crucial for the significance attached to the individual interests at stake in this case, was the aforementioned ambiguity on the national level. This element removed the obstacle of immigration control that otherwise would have precluded decisive importance being attached to the individual interests at stake.

2.6.2.4 Konstatinov v the Netherlands[205]

In *Konstatinov*, in addition to not having obtained a provisional residence visa, it was found against the applicant that she had committed criminal offences and that her partner, who served as a sponsor, had not fulfilled the income requirement. As expected on the basis of the observations made so far, the offences committed by the applicant were addressed as to their seriousness[206] while the Court refrained from evaluating the failure to satisfy the income requirement as a sufficient reason for denying residence.[207]

The failure to obtain a provisional residence permit was discussed in evaluating whether the applicant had been entitled to expect that any right of residence would be conferred upon her:

> […] Another 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 be precarious from the outset. 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 (see *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 39, ECHR 2006-..., with further references).
> 49. Turning to the circumstances of the present case, the Court notes that the applicant has never held a Netherlands provisional admission or residence title and that the relationships relied on by her were created at a time and developed during a period when the persons involved were aware that the applicant's immigration status was precarious and that, until Mr G. complied with the minimum income requirement under the domestic immigration rules, the persistence of that family life within the Netherlands would remain precarious. This is not altered by the fact that the applicant's second request for a residence permit for stay with Mr G. filed on 1 November 1991 was left undetermined for a period of more than seven years because her file had been mislaid by the responsible immigration

[205] *Konstatinov v the Netherlands* App No 16351/03 (ECtHR, 26 April 2007).
[206] See section 2.2.
[207] See section 2.5.

> authorities, as – like in 1990 in respect of her first request for a residence permit for stay with Mr G. – one of the main reasons why this second request was rejected on 27 November 1998 by the Deputy Minister was because Mr G. failed to meet the minimum income requirement.[208]

It can be seen from the above text that the issue of non-compliance with national immigration law (this regards both the provisional residence permit and the income requirement) is not discussed in terms of seriousness or in any other way that establishes the weight of the public interest in denying residence. Instead, the Court merely observes *that* the applicant resided in the Netherlands without a residence status and that the national authorities had not acted inconsistently in this respect. Indeed, it had been clear all along to the applicant that she would not be allowed to reside in the Netherlands, since the initial cause for withholding a residence permit – the sponsor's insufficient means of subsistence, for which there was no excuse – had not ceased to exist.

It thus appears that in *Konstatinov* only the criminal offences were evaluated in relation to the weight of the public interest, albeit marginally:

> The Court further notes that, between 4 September 1992 and 8 November 2005, the applicant has amassed various convictions of criminal offences attracting a prison sentence of three years or more, thus rendering her immigration status in the Netherlands even more precarious as this entailed the risk of an exclusion order being imposed, which risk eventually materialised. On this point the Court reiterates that, where the admission of aliens is concerned, Contracting States are in principle entitled to expel an alien convicted of criminal offences (see *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-...).[209]

A closer look at the marginal discussion of the crimes committed reveals that the point was to underscore the precariousness of the applicant's residence status rather than to substantiate a particular interest in the prevention of crime. In other words, although the Court does seem to 'weigh' these criminal convictions, it is unlikely that if the offences would have been less serious this could have resulted in a different outcome. Indeed, the applicant's irregular residence status and the lack of prospects of being granted lawful residence in the future, combined with a failure to satisfy income requirements for which there was no excuse, would still pose paramount obstacles for a violation of Article 8 ECHR.

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[208] *Konstatinov* (n 205), para 48-49.

[209] ibid para 51.

In view of the foregoing, it appears that in *Konstatinov* two factors were of potential significance for the outcome of the case.[210] These are a) that there was no good excuse for failure to satisfy the income condition, and b) that there were no legitimate expectations as regards being granted a right of residence. As explained above, neither of these two factors establishes the *weight* of the public interest; they only signify the fact that the public interest is in fact at stake. Hence, again the public interest has not *outweighed* the individual interest in being granted residence. Rather, its mere occurrence categorically set aside the individual interest in being granted residence as a potential factor of significance.

2.6.2.5 Gezginci v Switzerland[211]

In *Gezginci*, a case discussed earlier under the heading of economic reasons for denying residence, the reasons put forward to deny residence to the applicant entailed the following: besides twice having entered Switzerland irregularly, the applicant had committed a number of offences and most importantly, he had not become economically integrated. As to the crimes committed, the Court reasoned that they could not in themselves justify the applicant's expulsion.[212] Furthermore, as seen earlier, the lack of economic integration was discussed in evaluating the ties the applicant had developed in Switzerland compared to those he had developed in Romania and Turkey. This aspect was thus primarily framed as an aspect representing the individual interest in denying residence.[213]

As regards the failure to comply with the non-substantive rules of immigration law, the Court examines a range of aspects relating to the public interest in controlling immigration. Firstly, the applicant's irregular entry appears to be counterbalanced by the circumstance that – despite his irregular entry - the applicant had afterwards been granted a residence permit, which had been renewed a number of times. Nevertheless, it was pointed out that on these occasions the applicant had been cautioned to improve his conduct and organise his finances, which did not have the intended effect. Moreover, after he finally had been denied renewal of his permit, he had not contested that decision yet neither left Switzerland:

> 68. S'agissant de la durée du séjour du requérant en Suisse, la Cour note que, né en 1954, il arriva illégalement dans ce pays en novembre 1978 et y travailla d'abord sans autorisation. Après un séjour de quelques mois en Turquie, il revint en Suisse, où il obtint

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[210] A factor is considered potentially significant for the outcome of the case if it is not ruled out on beforehand that different circumstances relating to this factor can be of influence for the outcome of the case.

[211] *Gezginci v Switzerland* App no 16327/05 (ECtHR 9 December 2010).

[212] ibid para 66.

[213] See section 2.5.3.

> une autorisation de séjour en août 1980. Par la suite, cette autorisation fut prolongée chaque année. Fin 1992, l'intéressé quitta la Suisse et se rendit en Roumanie pendant un certain temps. En août 1993, la police des étrangers du canton d'Argovie l'informa que son autorisation de séjour avait expiré. Le 10 août 1993, le requérant obtint néanmoins le prolongement de son autorisation de séjour, à la condition qu'il ait un comportement pénalement irréprochable et qu'il soit indépendant financièrement. En janvier 1994, il quitta à nouveau la Suisse pendant plusieurs mois. Cependant, son autorisation de séjour fut une nouvelle fois prolongée en janvier 1995 et en février 1996. Une fois le requérant disparu de sa commune à partir d'avril 1996, par une décision du 28 avril 1997, son autorisation de séjour ne fut pas renouvelée. Par décision du 12 août 1998, le Conseil d'Etat du canton d'Argovie rejeta un recours introduit par l'intéressé. Cette décision devint définitive faute d'avoir été contestée. Par une décision du 15 octobre 2003, l'office des migrations du canton d'Argovie rejeta la demande d'autorisation de séjour pour raisons humanitaires formulée par le requérant le 24 septembre 2003. Ce jugement devint définitif par l'arrêt rendu par le Tribunal fédéral le 2 décembre 2004, qui fait l'objet de la présente requête. Le requérant n'a cependant jamais quitté la Suisse et y réside encore actuellement.[214]

Subsequently, the fact that all in all, the applicant had resided some thirty years in Switzerland was counterbalanced by the circumstance that the applicant had frequently travelled abroad. In addition, it is noted that, in part, the extensive duration of the applicant's stay was due to the fact that the national authorities had shown consideration for the applicant's medical situation:

> 69. Compte tenu de ce qui précède, la Cour observe que le requérant a séjourné régulièrement en Suisse au moins pendant 18 ans, abstraction faite des périodes pendant lesquelles il s'est rendu à l'étranger. Si l'on se place au moment de l'exécution de la mesure litigieuse, comme le fait habituellement la Cour dans les affaires qu'elle examine alors que le requérant n'a pas encore été expulsé (*Maslov c. Autriche*, précité, § 91 et, *mutatis mutandis*, *Neulinger et Shuruk c. Suisse* [GC], no 41615/07, § 145, 6 juillet 2010), la durée totale du séjour de l'intéressé en Suisse avoisine même une trentaine d'années.
> 70. Certes, il s'agit manifestement là d'un séjour d'une durée très longue. La Cour observe néanmoins que le requérant n'est pas parvenu à contrer l'allégation du Gouvernement selon laquelle il s'est rendu à l'étranger à plusieurs reprises (voir l'arrêt *Kaya c. Allemagne*, no 31753/02, § 65, 28 juin 2007).
> 71. Par ailleurs, la Cour est également sensible à l'argument du Gouvernement, selon lequel le départ du requérant, initialement fixé au 15 mars 1999, n'est pas intervenu à cette date, pour permettre à celui-ci de suivre un traitement médical dans un premier temps, puis en raison de la procédure engagée afin de déterminer son droit à des prestations de l'assurance-accidents ou de l'assurance-invalidité. La Cour estime que le séjour du requérant s'est ainsi considérablement prolongé du fait de la grande compréhension dont les autorités ont fait preuve à l'égard de l'intéressé.[215]

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[214] *Gezginci* (n 211) para 68.
[215] ibid paras 69-71.

In sum, it may be argued that the public interest in controlling immigration has certainly been established on the basis of the circumstances of the case at hand. In line with what has been exposed so far, this evaluation of the public interest in controlling immigration revolved around the issue whether the national authorities had acted *consistently* in the implementation of national rules of immigration law.

Again, we see the generic interest in controlling immigration is treated as an autonomous public interest. Indeed, the circumstance that the offences committed by the applicant were of only limited weight was not included in evaluating the importance of enforcing the procedural rules of immigration law. In concluding on the case, the Court is explicit about the predominant aspects in this case:

> 80. Au vu de ce qui précède, et en particulier compte tenu de la nature irrégulière du séjour du requérant en Suisse depuis 1997, de l'absence de volonté de sa part de s'intégrer en Suisse, de son manque de respect des règles suisses et ce malgré les avertissements des autorités compétentes, ainsi que du fait que le lien avec son pays d'origine ne semble pas être complètement rompu, la Cour estime que l'Etat défendeur peut passer pour avoir ménagé un juste équilibre entre les intérêts de l'intéressé et de sa fille d'une part, et son propre intérêt à contrôler l'immigration d'autre part.[216]

Again, the generic interest in controlling immigration is a decisive factor in Article 8 ECHR immigration cases.

2.6.2.6 Hamidovic v Italy[217]

The final case discussed here is that of *Hamidovic*. In this case, the request for renewal of the applicant's residence permit had been refused because of the criminal offences she had committed. Seven years later, the applicant was arrested and it was decided to expel her for residing irregularly in Italy. The Court started out its examination by addressing the nature of the criminal offence and considered that the offence was not likely to be characterized as "serious" as defined in the case law of the Court:

> 43. Se tournant vers le cas d'espèce, la Cour relève tout d'abord que la requérante a été condamnée une fois pour mendicité avec utilisation de mineurs à une peine de réclusion et que cette peine a par la suite été remplacée par une amende. Elle note encore que l'article 671 du code pénal, prévoyant l'infraction litigieuse, a été abrogé par la loi no 94 du 15 juillet 2009. La Cour estime que cette infraction n'est pas de nature à être qualifiée de « grave » au sens de la jurisprudence de la Cour (*Kaftaïlova*, précité, § 68 ; *Ezzouhdi c. France*, no 47160/99, § 34, 13 février 2001, et, *mutatis mutandis*, *El Boujaïdi*, précité, § 41). La Cour note de surcroît que les procédures pénales entamées à l'encontre de la

[216] ibid para 80.

[217] *Hamidovic v Italy* App No 31956/05 (ECtHR, 4 December 2012).

> requérante à la suite de son appréhension en 1995 pour mendicité ont été classées sans suite (voir paragraphe 18 ci-dessus).[218]

The circumstance that the applicant had resided irregularly in Italy was not discussed directly in relation to the weight of the public interest in denying residence. Instead, this argument was entangled in the Court's examination of the consistency the national authorities had shown in their intention not to authorise residence to the applicant.

Ambiguity as regards the prospects of being granted a residence permit

The applicant's irregular residence was counterweighed by the fact that the applicant had held a residence permit in the past. Moreover, at the time of the Strasbourg judgment the applicant had obtained a residence permit. The case therefore was to be distinguished from cases in which the applicant was not entitled to expect any right of residence would be conferred:

> 45. La Cour ne perd pas de vue que la requérante résidait de façon irrégulière en Italie au moment où elle a été touchée par l'arrêté d'expulsion et qu'elle ne pouvait pas ignorer la précarité qui en découlait (*Dalia*, précité, § 54; *Useinov c. Pays-Bas* (déc.), no 61292/00, 11 avril 2006; *Syssoyeva et autres c. Lettonie* (radiation) [GC], no 60654/00, §94, CEDH 2007-I, et, *mutatis mutandis*, *Mawaka c. Pays-Bas*, no 29031/04, § 61, 1er juin 2010). Il n'en demeure pas moins que la requérante a obtenu un permis de séjour pendant une courte période en 1996-1997 et que, d'après les informations reçues par le gouvernement défendeur, elle est à présent titulaire d'un permis de séjour valable jusqu'au 14 décembre 2013. La Cour estime donc que la requérante n'était pas dans une situation où elle ne pouvait à aucun moment raisonnablement s'attendre à pouvoir continuer sa vie familiale dans le pays hôte (*Rodrigues da Silva et Hoogkamer*, précité, § 43, et *Solomon c. Pays-Bas* (déc.) no 44328/95, 5 septembre 2000).[219]

The obstacle of immigration control that arose from the applicant's irregular residence had thus been removed by pointing out the ambiguity on the national level.

In *Hamidovic* it appears that the weight of the public interest in controlling immigration was established on the basis of the circumstances of the case at hand. However, the applicant's irregular residence was not in itself considered insufficient justification for denying residence. Neither was the nature of the committed offences such to conclude that there was no sufficient interest in denying residence. The conclusiveness of the inconsistency displayed on the national level with regard to the applicant's residence status implies that again the Court does not establish the *weight* of the public interest in controlling immigration, but merely whether or not it

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[218] ibid para 43.

[219] ibid para 45.

is at stake. The rule that people who reside irregularly should be expelled remains uncompromised.

2.6.2.7 Summary

It seems that in cases featuring breaches of procedural immigration rules, the additional occurrence of substantive aspects is not of relevance for the outcome of these cases. In three of the six cases, the substantive reasons for denying residence were not discussed at all.[220] In another case, discussing the substantive aspects (the commission of crimes) did not only establish the weight of the prevention of crime, but additionally served to point out the precariousness of the applicant's residence status.[221] While the commission of crimes may support the conclusion that denying residence is in accordance with Article 8 ECHR, it does not work the other way around: a lack of seriousness of the crimes committed does not in itself result in the conclusion that denying residence would violate Article 8 ECHR.[222] A violation in these cases always coincides with a problem raised in relation to the enforcement of procedural immigration rules.[223]

Thus, the outcome of all six cases seems to hinge on the breaches of procedural immigration law. In this regard, the Court's approach corresponds to its approach described in relation to cases in which procedural aspects posed the main reason for denying residence: the Court does express itself in evaluative terms in relation to breaches of procedural immigration rules but its remarks consistently reaffirm the validity of the national rules at stake.[224] In none of the cases in which the Court concluded that Article 8 ECHR had been violated, was this due to the fact that the failure to comply with national procedural rules as such was not enough to justify denying residence. Importantly, the cases in which the Court most explicitly condemned the applicant's violations of the national procedural rules at stake, the conclusion was that denying residence *would* violate Article 8 ECHR. The weight of the public interest in denying residence seems, therefore, inversely proportional to the outcome of the case.

An aspect that *did* prove indicative for the outcome of a case - *i.e.* instead of the seriousness of the violations of procedural immigration rules - is an inconsistent

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[220] This was the case in *Solomon* (n 201); *Benamar* (n 199); and in *Da Silva and Hoogkamer* (n 206).

[221] This was the case in *Konstatinov* (n 205).

[222] See in particular *Gezginci* (n 211), where the fact that the offences committed by the applicant were only of secondary importance, did not raise questions as to the necessity of denying residence to the applicant.

[223] See the discussion of *Da Silva and Hoogkamer* and *Hamidovic* above.

[224] See *Da Silva and Hoogkamer* (n 206), *Gezcinci* (n 211), and *Hamidovic* (n 217).

attitude displayed by the national authorities as to whether residence should be denied in the case at hand. In the two instances where this was the case, the Court concluded that denying residence would violate Article 8 ECHR.[225] As argued before, an inconsistent implementation of national immigration rules leaves untouched the validity of the rules as such. In addition to conducting a 'consistency assessment', the Court pays attention to the person's own responsibility for non-compliance with the national procedural rules at issue.[226] Contrary to the cases discussed in the previous section (2.6.1), in none of the cases discussed here did the Court accept such excuses.

Closely related to the aforementioned consistency-aspect is the issue of whether the applicants were entitled to expect that any right of residence would be conferred upon them, which again proved to be of paramount importance. Indeed, in cases where it was established that no such entitlement existed – *i.e.* in which the national authorities had been consistent in expressing the view that residence would not be granted – no decisive importance was attached to the individual interest in being granted residence.

2.6.3 Overview: the Court's approach to infringement of procedural immigration rules

The analysis of cases featuring infringement of procedural immigration rules has identified some clear patterns in the Court's approach to the public interest in denying residence. In addressing the public interest, the Court has shown to appreciate the importance of enforcing procedural immigration rules, and further, it has evaluated the seriousness of the applicants' conduct in relation to such rules. However, the Court's evaluation remained strictly affirmative. Arguments detracting from the public interest in upholding procedural immigration rules never concerned the validity of national rules as such. They always regarded an inconsistent or incorrect application of otherwise valid rules,[227] or a confirmation of a statement in this regard made by the national authorities themselves.[228]

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[225] Both in *Da Silva and Hoogkamer* and in *Hamidovic* the ambiguousness of the national authorities as regards whether or not the applicant was to be granted a residence permit proved decisive for the final conclusion that Article 8 ECHR was violated.

[226] Note in this regard the emphasis placed in *Benamar* on the fact that the applicant had 'chosen not to apply for a provisional residence visa from Morocco prior to travelling to the Netherlands', and in *Da Silva Hoogkamer* on the applicant's 'cavalier attitude to Dutch immigration rules'.

[227] This was the case in *Nunez* (n 127), in *Butt* (n 127), in *Da Silva and Hoogkamer* (n 206), and in *Hamidovic* (n 217).

[228] This was the case in *Butt* (n 127) and in *Alim* (n 127).

As regards the consistency with which national immigration rules were applied, it appears the Court attaches importance to whether the applicants were entitled to expect any right of residence would be conferred upon them. This aspect involves firstly an examination of whether family life had been developed under vigour of a secure residence status. If this is not the case, the Court examines whether the national authorities acted consistently in expressing the view that residence would not be granted in the future. If it appears that family life has been developed against the consistently expressed wishes of the host State, as a rule, no decisive importance is attached to the individual interest in being granted residence.[229] The exception to this rule is the occurrence of a good excuse for non-compliance with the rules at issue.[230] Attaching decisive importance to the latter aspect allows the Court to refrain from compromising the restricting capacity of procedural immigration rules. For it is only in this particular case that the person may be exempted from satisfying the criterion; the message remains that, in principle, national procedural rules of immigration law are to be followed.

A final observation concerns the fact that the public interest in upholding procedural rules of immigration law serves for the Strasbourg Court as an autonomous justification for denying residence. In cases exclusively dealing with procedural immigration rules, the Court refrained from addressing whether there were any substantive objections against the presence of the foreign national in the host State. *A fortiori*, in cases where it was contended that – if only the procedural requirements were satisfied – a residence permit would surely be obtained, this proved no reason for the Court to question the significance to be attached to the public interest. In cases additionally featuring substantive reasons for denying residence, these substantive aspects either remained unquestioned, or they were incapable of tipping the scale. In cases where the Court established that the substantive objections against the applicant's presence in the host State were only minor, this circumstance never in itself raised the question of the necessity of enforcing the procedural immigration rules at issue. Indeed, the conclusion that denying residence would violate Article 8 ECHR always coincided with a problem relating to procedural immigration rules.

As stated above, the Court's approach to procedural immigration rules may be characterised as an approach with a rather narrow scope of judicial scrutiny. When it comes to breaches of procedural immigration rules the Court does not seem to

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[229] This was the case in *Darren Omoregie* (n 126), *Kamaliyevy* (n 126), *Antwi* (n 127), *Rahmani and Dineva* (n 127), *Biraga* (n 128), *Bolek* (n 128), *Mbuisa* (n 128), *Solomon* (n 201), *Benamar* (n 199), *Konstatinov* (n 205), and *Gezginci* (n 211).

[230] This was the case in *Alim* (n 127).

establish the *weight* of the public interest on a case-by-case basis. Rather, the Court establishes the very fact that the public interest in upholding procedural immigration rules is at stake, without evaluating the weight that *in the given case* should be attached to it. In case of correctly and consistently applied procedural rules only a good excuse for non-compliance may result in a violation of Article 8 ECHR. This implicates that the very occurrence of the interest in upholding these procedural rules poses a categorical obstacle for the Court to conclude that Article 8 ECHR could be violated. The outcome of such a case is therefore not determined by the relative importance of being able to uphold the rules at issue, or by the weight of the individual interests that are at stake.

An inconsistent application (or acting upon breaches) of national immigration rules may occur in relation to the view regarding whether residence should be denied to the person concerned. This aspect was decisive in *Da Silva and Hoogkamer*, where the Court attached importance to the fact that the Dutch government had indicated that lawful residence in the Netherlands would have been possible if only the applicant had applied for a residence permit at the relevant time. Similarly, in the cases of *Hamidovic* and *Gezginci* the Court observed that despite the applicants' irregular entry or residence, the national authorities nevertheless had afterwards granted them a residence permit.[231] Ambiguity as regards the issue of whether a person should leave the host country may furthermore stem from allowing a person to remain in the host State for a considerable period of time before acting upon infringements of immigration law. In *Nunez* and *Butt*, it was this aspect that paved the way for attaching decisive importance to the applicants' interest in being granted residence. In most cases, however, the Court observed that the applicant was not entitled to expect that any right of residence would be conferred upon him. With this observation, the Court confirms the consistent attitude of the national authorities in having enforced national immigration rules. An example of incorrect application of national immigration rules can be found in *Butt*.

As mentioned above, if the Court confirms that procedural immigration rules have been implemented consistently and correctly, this apparently establishes a sufficient public interest in denying residence to the person(s) concerned. In such cases, no decisive weight is attached to the individual interest in being granted residence, *unless* there was a good excuse for non-compliance with the rules at issue. In eight out of the fifteen 'immigration control' cases, aspects relating to the

[231] Whereas in *Hamidovic* this aspect sufficed to attach decisive weight to the individual interest in being granted residence, in *Gezginci* there proved to be more hurdles of immigration control than just the applicant's irregular entry in the host country, so that eventually in that case no decisive weight was attached to the applicant's interest in being granted residence.

occurrence of a good excuse for non-compliance are explicitly addressed. Of those eight, only in one case, *Alim*, the Court accepted that the applicant could not be held fully responsible for non-compliance with the rule at issue. In the other seven instances the Court emphasized the applicants' own responsibility in not satisfying procedural requirements.[232] This took place by stressing that the applicant had failed to take the necessary procedural steps; by stating that the applicant had knowingly circumvented the rules; or, by observing that there were no circumstances on the basis of which the applicant could not reasonably be required to comply with the conditions concerned.

2.7 Individual interest-related criteria

2.7.1 Introduction

In the final category of cases, the reasons for denying residence are not formulated in terms that represent a public interest in denying residence. Instead, the criteria at issue here relate to the particulars concerning the *individual* interest at stake. For the purpose of this research, individual interest-related criteria are only understood as such, if a failure to comply with them poses a stand-alone reason for denying residence. They are thus to be distinguished from what I will call 'complementary' individual interest-related aspects. The latter type of aspects, to be discussed in detail in subsection 2.7.2.4, connect to the weight of the individual interest in being granted residence as a possible counterweight to the public interest in denying residence. By way of illustration, the proportionality of an expulsion decision in reaction to the commission of armed robbery may include an evaluation of whether there are insurmountable obstacles for family members to follow the applicant to their country of origin. The absence of such insurmountable obstacles, however, obviously cannot, in itself, pose the reason for denying residence.

2.7.1.1 Types of individual interest-related criteria

Three types of individual interest-related conditions are distinguished here. The first type of conditions relates to the strength of ties to the host country. An example can be found in the case of *Abdulaziz,*[233] in which only 'citizens of the United Kingdom and Colonies who, or one of whose parents, had been born in the United Kingdom' were eligible for family reunification. A similar type of restriction can be found in

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[232] *Kamaliyevy* (n 126); *Rahmani* (n 127); *Biraga* (n 128); *Mbuisa* (n 128); *Bolek* (n 128); *Benamar* (n 199); *Da Silva Hoogkamer* (n 206).

[233] *Abdulaziz, Cabales and Balkandali v the United Kingdom* (ECtHR, 28 May 1985) Series A no. 94.

Gül,[234] where the applicants lacked the specific residence status that would have made them eligible for family reunification.[235] Another example of insufficient ties to the host State is the case of *Biao* (I),[236] where family reunification was refused because the applicants' aggregate ties to Denmark were considered not to be stronger than those to their country of origin.[237] Further examples of insufficient ties to the host State can be found in *Mohamed*,[238] where the fact that the applicant could not prove he had habitually resided in Mayotte obstructed his chances for a residence permit, and in *Osman*,[239] where a period of more than 12 consecutive months abroad had caused the expiring of the applicant's residence permit. In *Hasanbasic*,[240] it was held against the applicant that he had announced to the Swiss authorities his definitive departure to his country of origin. For this reason, his settlement permit had been dissolved, as a result of which a subsequent request for a residence permit was not treated as one concerning the renewal of an existing permit but as an application for a new residence permit. Finally, I consider as restrictions relating to strength of ties to the host State, the aspects put forward in *Gezginci*,[241] entailing that the applicant had frequently spent time abroad and that he was not economically integrated in Switzerland.

The second type of individual interest-related conditions relates to the ties between the foreign national and the family members in the host State he wishes to reside with. In *Mbuisa*[242] for example, it had been put forward that the spouses had not fulfilled the requirement of having lived together for at least two years. Other examples are cases in which residence is denied because family ties that perhaps once existed were considered severed. A series of cases of this type entailed the refusal of family reunification requested by parents who had settled in the host country themselves and subsequently tried to arrange for their children to join them there. The argument put forward to reject the application was that in the period of time that had lapsed between the parents' departure from their country of origin and the moment at which they had decided to undertake steps to be reunited with their

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[234] *Gül v Switzerland* App no 23218/94 (ECtHR, 19 February 1996).

[235] The applicants did not have a permanent right of residence and for this reason were not considered eligible for family reunification.

[236] *Biao v Denmark (I)* App No 38590/10 (ECtHR, 25 March 2014).

[237] The condition that was at issue in *Biao,* also featured in *Priya v Denmark* (dec.) App No 13594/03 (ECtHR, 6 July 2006).

[238] *Mohamed v France* (dec.) App No 21392/09 (ECtHR, 25 March 2014).

[239] *Osman v Denmark* App no 38058/09 (ECtHR, 14 June 2011).

[240] *Hasanbasic v Switzerland* App no 52166/09 (ECtHR, 11 June 2013).

[241] *Gezginci v Switzerland* App no 16327/05 (ECtHR, 9 December 2010).

[242] *Mbuisa* (n 128).

children, the family ties between the parents and the children had severed.[243] In three cases, lack of sufficient family ties was caused by divorce between spouses: because of the separation - the parent concerned was no longer considered to have close ties with their children.

A final type of individual interest-related reason for denying residence regards matters of proof. It may concern a failure to prove the existence of a legally valid marriage between spouses who pursue family reunification, such as in *Afonso and Antonio*,[244] or contradictory or false information having been provided as regards the existence of certain family relations, which was at issue in *Taher*,[245] and *Magoke*.[246]

2.7.1.2 The different interests connected with individual interest-related criteria

Since in the cases at issue here, residence is denied for reasons that reflect the *individual* interest, it is insufficient to simply examine whether the Court evaluates the reason for denying residence in the light of the public interest. This does not mean, however, that we may just shift our focus to whether and how the Court in these cases establishes the individual interest in being granted residence. The reason for this is that the purpose of individual interest-related criteria in national immigration policies is not primarily to protect the individual interest.[247] On the contrary: the inclusion of individual interest-related criteria foremost aims to

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[243] *Ahmut v the Netherlands* (ECtHR, 28 November 1996) Reports of Judgments and Decisions 1996-VI; *Knel and Veira v the Netherlands* (dec.) App No 39003/97 (ECtHR, 5 September 2000); *P.R. v the Netherlands* (dec.) App No 39391/98 (ECtHR, 7 November 2000); *J.M. v the Netherlands* (dec.) App No 38047/97 (ECtHR, 9 January 2001); *Mensah v the Netherlands* (dec.) App No 47042/99 (ECtHR, 9 October 2001); *Adnane v the Netherlands* (dec.) App No (ECtHR, 6 November 2001); *Şen v the Netherlands* App No (ECtHR, 21 December 2001); *Ebrahim and Ebrahim v the Netherlands* (dec.) App No (ECtHR, 18 March 2003); *I.M. v the Netherlands* (dec.) App No (ECtHR, 25 March 2003); *Chandra and Others v the Netherlands* (dec.) App No 13 May 2003); *Ramos Andrade v the Netherlands* (dec.) App No (ECtHR, 6 July 2004); *Benamar v the Netherlands* (dec.) App No (ECtHR, 5 April 2005); *Magoke v Sweden* (dec.) App No (ECtHR, 14 June 2005); *Tuquabo-Tekle and Others v the Netherlands* App No 60665/00 (ECtHR, 1 December 2005); *Olgun v the Netherlands* (dec.) App No 1859/03 (ECtHR, 10 May 2012).

[244] *Afonso and Antonio v the Netherlands* (dec.) App no 11005/03 (ECtHR, 8 June 2003).

[245] *Taher v Sweden* (dec.) App No 25709/05 (ECtHR, 29 July 2007) .

[246] *Magoke* (n 243).

[247] In some cases the restriction inevitably aims at protecting the interest of the individuals concerned. The restriction, for example, that persons who are under age may not engage in family reunification on the basis of marriage, obviously aims at protecting the best interests of under aged persons. E.g. *Z.H and R.H. v Switzerland* App No 60119/12 (ECtHR, 8 December 2015).

quantitatively restrict immigration.[248] The individual interest-related condition, therefore, signifies the point where restricting immigration is considered to inappropriately affect the personal bonds of individuals.[249] Thus, although these conditions generally do not distinguish between foreign nationals who do pose a threat to the public interest, and those who do not, upholding such conditions nevertheless pursues a public interest.[250] In some cases, however, non-compliance with an individual interest-related criterion does indicate a public interest in denying residence to the person concerned in particular: in the case of *Gezginci*, for example, the lack of the applicant's economic integration in Switzerland is both connected to the lack of a significant individual interest in being granted residence and to the public interest in protecting the national economic well-being. For this reason, the *Gezginci* case is also discussed under the heading of income-related requirements.

A different link between imposing individual interest-related criteria and a substantive public interest in denying residence exists in *Abdullaziz*. In this case, with regard to family reunification a birth-criterion had been introduced that applied only to women pursuing family reunification, since it was assumed that male spouses posed a threat to the labour market.[251] Although the Court in this case does examine the impact of the birth-criterion on the labour market in order to establish whether the measure could be justified, the criterion *per se* remained outside the scope of scrutiny: it was only its restricted applicability to women that was examined. With regard to Article 8 ECHR, taken alone, the Court considered that denying residence to the applicants' husbands would entail no 'lack of respect' for family life and hence, no breach of Article 8 ECHR.[252] In reaching this conclusion, the failure to satisfy the birth-criterion was left unaddressed. In considering the alleged violation

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[248] See for examples of cases where this rationale is expressly stated, *Abdulaziz* (n 233), paras 20-21, and *Chandra* (n 243), p. 4. See furthermore Yves Pascouau and Henri Labayle *Conditions for Family Reunification under Strain* (European Policy Centre 2011).

[249] In *Abdulaziz* for example, the restriction of persons being eligible for family reunification to those who satisfied the abovementioned 'birth criterion' was justified by 'the concern to avoid the hardship which women having close ties to the United Kingdom would encounter if, on marriage, they were obliged to move abroad in order to remain with their husbands.' *Abdulaziz* (n 233), para 87.

[250] In this research, restrictive conditions that as such do not distinguish between persons who pose a threat to the public interest, and those who do not, are said to pursue a generic interest in restricting immigration, because the interest in upholding such conditions does not vary according to the person concerned.

[251] The birth criterion – that only applied to women – entailed that only 'citizens of the United Kingdom and Colonies who, or one of whose parents, had been born in the United Kingdom' were eligible for family reunification.

[252] ibid paras 65, 69.

of Article 14 ECHR taken together with Article 8 ECHR, the Court examined whether application of the 'birth criterion' only to women would result in discrimination on the ground of sex.[253] The Court discussed the assertion that refusing male spouses residence in the UK would be beneficial to the labour market, and found this assertion unconvincing.[254] The criterion of 'being a citizen of the United Kingdom and Colonies who, or one of whose parents, had been born in the United Kingdom', however, was not dismissed.[255] As regards the question whether the birth criterion discriminated on the ground of birth, the Court acknowledged that the criterion established a difference of treatment on the ground of birth but considered that this difference was justified:

> there are in general persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it. The difference of treatment must therefore be regarded as having had an objective and reasonable justification and, in particular, its results have not been shown to transgress the principle of proportionality.[256]

Although it is apparent that the Court is supportive of giving special treatment to those whose link with a country stems from birth within it, the above remark does not constitute an evaluation of the measure to deny family reunification to those

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[253] The Court rejected that the birth criterion amounted to a distinction on the ground of race: 'reinforcement of the restrictions on immigration was grounded not on objections regarding the origin of the non-nationals wanting to enter the country but on the need to stem the flow of immigrants at the relevant time. That the mass immigration against which the rules were directed consisted mainly of would-be immigrants from the New Commonwealth and Pakistan, and that as a result they affected at the material time fewer white people than others, is not a sufficient reason to consider them as racist in character: it is an effect which derives not from the content of the 1980 Rules but from the fact that, among those wishing to immigrate, some ethnic groups outnumbered others.' (*Abdulaziz* (n 233), para 85).

[254] *Abdulaziz* (n 233) paras 79-80.

[255] For the same reason, the Court's comment on whether the 'birth criterion' could be justified in view of the aim to advance public tranquillity can be said not to regard that criterion as such. The remark was directed at the circumstance that it only applied to women: 'The Court accepts that the 1980 Rules also had, as the Government stated, the aim of advancing public tranquility. However, it is not persuaded that this aim was served by the distinction drawn in those rules between husbands and wives.' *Abdulaziz* (n 233), para 81. Dembour has pointed out that 'rather than opening up possibilities for family reunion, the *ABC* litigation resulted in the admission of *all* foreign spouses being made difficult. The British government chose to eliminate the discrimination identified by the Court by applying their rules on foreign spouses equally to both male and female migrants.' Dembour 2015 (n 21) 115.

[256] *Abdulaziz* (n 233) para 88.

failing to satisfy the birth criterion. Indeed, the Court does not argue here that there is a good reason for denying family reunification to people who do not satisfy the birth criterion. Instead, it asserts that there are generally good reasons for making a distinction in allowing family reunification rights between individuals who do satisfy the birth criterion and those who do not satisfy the birth criterion [sic].[257]

In the following sections, the analysis of the Court's approach to individual interest-related criteria is conducted in view of two perspectives: I first discuss how the Court establishes the weight of the individual interest in being granted residence; and then, how it establishes the public interest in denying residence in these cases.

It will be revealed that in balancing the interests, the Court does not accept individual interest-related criteria as being fully representative of the scope the individual interest in being granted residence. The Court has developed a list of complementary aspects to evaluate the individual interest at stake in a given case. It seems therefore, as if the Court, without explicitly scrutinising national criteria, still autonomously decides which aspects are relevant in determining the scope of the individual interest in being granted residence. However, it turns out that the Court has never decided a case in favour of the individual interest where this would have compromised the validity of individual interest-related criteria. Similar to what we have seen in relation to procedural immigration rules, Article 8 ECHR is considered violated only if the individual interest-related criterion at issue has been applied incorrectly or inconsistently, or if there was a good reason for non-compliance. Thus, if the public interest in upholding individual interest-related criteria is at stake, it is categorically ruled out that predominant weight is attached to the individual interest in being granted residence.

In some cases, in addition to individual interest-related criteria, also procedural immigration rules are at stake. The analysis suggests that even if a violation of Article 8 ECHR would not compromise the validity of the individual interest-related criteria, the Court nevertheless refrains from attaching decisive importance to the individual interest where this would compromise the validity of the *procedural* immigration rules at issue. In these cases the Court will only conclude that denying residence violates Article 8 ECHR if, with regard to both individual interest-related criteria and procedural immigration rules, the national rules were applied incorrectly or inconsistently, or in case of a good excuse for non-compliance. Consequently, the individual interest in being granted residence cannot effectively outweigh the public interest in upholding procedural rules or in upholding individual interest-related criteria.

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[257] For an extensive critical analysis of the *Abdulaziz* case, see Dembour 2015, chapter IV (n 21).

2.7.2 The individual interest represented in individual interest-related criteria

In the paragraphs below, I first discuss the cases in which the Court addressed the issue of correct and consistent application of individual interest-related criteria. This entails an evaluation of whether the facts of the case indeed allow for the conclusion that the criterion at issue was not satisfied (section 2.7.2.1). Next, I discuss the cases in which the Court examined whether a good excuse existed for non-compliance with the individual interest-related criterion (section 2.7.2.2). Subsequently, I address a number of cases in which the issue of correct application of the national criterion overlaps with that of a good excuse for non-compliance (section 2.7.2.3). After having discussed the Court's approach to national individual interest-related criteria as such, I go on to investigate how individual interest-related criteria fit in the context of balancing the individual interest against the public interest. For this purpose, I examine how individual interest-related aspects that make up the national restrictive criterion, are complemented with additional aspects representing the individual interest in being granted residence (section 2.7.2.4).

2.7.2.1 A correct and consistent application of individual interest-related criteria

In a number of cases the Court examines whether the national authorities were correct in their assumption that the applicant did not comply with the national criterion at stake. One example is the case of *Biao v. Denmark,*[258] where the reason for denying a residence permit to the applicant's spouse was that "it could not be established that the spouses' aggregate ties with Denmark were stronger than their aggregate ties to Ghana". This 'attachment requirement', as it was called, required the ties of both applicant and foreign spouse to be stronger to Denmark than to their country of origin.[259] The Court verified whether indeed, as the Danish authorities had contended, the applicants' ties to their country of origin were stronger than those to Denmark:

> 55. The first applicant had ties with Togo, of which he was previously a national and where he resided until the age of six and again from the age of 21 to 22. He also had ties with Ghana, whose language he speaks and where he resided for fifteen years from the age of 6 to 21, and where he attended school for ten years. Finally, he had ties with

[258] *Biao* (n 236).

[259] Since on the basis of this criterion family reunification is only possible after it is established that the aggregate ties to Denmark are stronger than to their country of origin, this requirement seems to principally preclude family reunification with persons from abroad (note the pleonasm). The Danish rules do however provide for exceptions regarding the application of the attachment requirement. Accordingly, family reunification will most likely only be possible for those persons who fall within the ambit of one of those exceptions.

> Denmark, which he entered in July 1993 at the age of 22. Having married a Danish national, he was issued with a permanent residence permit. He divorced in 1998. The first applicant learnt Danish and had steady employment from five years into his period of residence. He was granted Danish nationality in 2002. In the period from 1998 to 2003 the first applicant visited Ghana four times and the last time he married a Ghanaian national there, namely the second applicant. Accordingly, the first applicant had strong ties to Togo, Ghana and Denmark.
> 56. The second applicant was born and raised in Ghana. On 28 February 2003, when she was 24 years old and had been married to the applicant for a week, she requested family reunion. Her request was refused by the Aliens Authority on 1 July 2003. One or two months later, she entered Denmark on a tourist visa. She and the first applicant moved to Sweden on 15 November 2003, where on 6 May 2004 they had a son, who was born Danish. The second applicant stayed in Denmark for approximately four months and she does not speak Danish. Accordingly, at the relevant time the second applicant's ties to Ghana were very strong and she had no ties to Denmark but for being newly wed to the first applicant, who lived in Denmark and had acquired Danish citizenship.[260]

One of the spouses, unsurprisingly, had shortly before her application for family reunification lived in another country for a considerable period of time. The Court thus was able to confirm that the spouses' aggregated ties to Denmark were not stronger than those to Ghana.[261] The Court did not evaluate whether the attachment criterion, as such, provided a reasonable basis to determine the eligibility for family reunification in the host State.[262]

In *Gül*, the applicants did not have a permanent right of residence and for this reason were not considered eligible for family reunification.[263] With regard to this crucial aspect, the Court confined itself to observing that the applicants indeed did not satisfy the criterion at issue:

> Furthermore, although Mr and Mrs Gül are lawfully resident in Switzerland, they do not have a permanent right of abode, as they do not have a settlement permit but merely a

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[260] *Biao* (n 236) paras 55-56.

[261] See similarly, *Priya* (n 237).

[262] As mentioned earlier, in 2016, the Court has ruled in *Biao (II)* that by upholding the attachment criterion, or 28-year rule, Denmark had violated Article 14 in conjunction with Article 8 ECHR (*Biao v Denmark (II)* [GC] App no 38590/10, ECHR 2016). However, as noted and heavily criticised by a.o. Judge Pinto de Albuquerque in his Concurring Opinion, the Court did not dismiss the attachment criterion *as such*. Instead, the Court's conclusion was confined to the application of the requirement only to Danish nationals who were not of Danish ethnic origin and not to Danish nationals who were of Danish ethnic origin. For this reason, the discussion of the attachment requirement in this research has not lost its relevance; nor has the 2016 *Biao (II)* case altered the conclusions made in relation to the first ruling in *Biao* in 2014.

[263] *Gül* (n 234).

> residence permit on humanitarian grounds, which could be withdrawn, and which under Swiss law does not give them a right to family reunion (see paragraph 18 above).[264]

The reasonableness of the criterion that only a permanent right of residence could give a right to family reunification remained unquestioned.

In a few cases, the Court argued that the facts of the case did *not* allow for the conclusion that the requirements at issue were not, or no longer satisfied. In *Sezen*, for example, the Court rejected a six-month period in which the spouses had not cohabited as giving sufficient cause to conclude that the applicants' marriage had permanently broken down:

> 48. The principal element which strikes the Court in the present case, however, is the fact that the applicants' marriage was deemed to have permanently broken down when the couple had merely ceased cohabiting for some six months in 1995/1996 and despite them making it clear to the authorities of the respondent State that cohabitation had been resumed and that there was no question of their marriage having broken down. Dutch law did not permit the first applicant's residence permit to be revoked or an exclusion order to be imposed at the time of his conviction, since he had held a strong residence status at that time (see *Yılmaz v. Germany*, no. 52853/99, § 48, 17 April 2003). Yet by ruling – four years after that conviction (paragraph 44 above) and notwithstanding the fact that a child had been conceived during the time the spouses were not living together – that the marriage had permanently broken down, the authorities were able to conclude that the first applicant had lost his indefinite right to remain and, subsequently, to refuse him continued residence on the basis of the criminal conviction. By that time the first applicant had served his sentence and, as illustrated by the fact that he obtained gainful employment and that a second child was born to him and his wife, had begun rebuilding his life.[265]

The rule that a permanent breakdown of a marriage may lead to a withdrawal of a residence permit was not rejected as such. It was only its application in the case at hand that had been considered problematic because the facts of the case showed that there had not been such breakdown.[266]

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[264] ibid para 41.

[265] *Sezen v the Netherlands* App No 50252/99 (ECtHR, 31 January 2006), para 48.

[266] See similarly, the case of *Berrehab*, where the national court had contended that the four meetings a week the father had with his child were not sufficient to constitute family life within the meaning of Article 8 ECHR. The Court, however, contested that conclusion: 'Certainly Mr. Berrehab and Mrs. Koster, who had divorced, were no longer living together at the time of Rebecca's birth and did not resume cohabitation afterwards. That does not alter the fact that, until his expulsion from the Netherlands, Mr. Berrehab saw his daughter four times a week for several hours at a time; the frequency and regularity of his meetings with her (see paragraph 9 in fine above) prove that he valued them very greatly. It cannot therefore be maintained that the ties of "family life" between them had been broken.' *Berrehab v the Netherlands* App no 10730/84 (ECtHR, 21 June 1988), para 21.

Similarly, in *Hasanbasic* the Court contested the conclusion of the Swiss authorities, but not the rule as such. The Swiss authorities had considered that a person, who had been absent from Switzerland for four months following a period of lawful residence of 23 years, was to be regarded as applying for a 'new' residence permit rather than for renewal of an existing residence status. According to the Court, the circumstance that before his temporary departure the applicant had announced his 'final' departure from Switzerland, did not mean that he was no longer a person who in fact was settled in Switzerland:

> 57. La Cour observe d'emblée que les deux requérants ont régulièrement résidé en Suisse durant une période considérable. Le requérant est y arrivé en 1986, la requérante dès 1969. La durée de leurs séjours s'élevait donc, au moment de l'arrêt du Tribunal fédéral rendu en 2009, respectivement à 23 et 40 ans. En outre, la requérante possède depuis 1979 un permis d'établissement pour la Suisse, donc un titre dont la nature est plus stable qu'une simple autorisation de séjour. Par ailleurs, il n'est pas contesté que depuis un temps important, la Suisse constitue le centre de vie privée et familiale des requérants.
> La Cour constate également que les requérants séjournèrent en Suisse de façon ininterrompue, abstraction faite de la période de quatre mois, entre août et décembre 2004, à la suite de laquelle les autorités internes ont rejeté la demande de regroupement familial de la requérante (paragraphe 14 ci-dessus). La présente affaire se distingue sur ce point sensiblement de l'affaire *Gezginci* (précitée, §§ 69 et 70), dans laquelle le requérant s'est rendu à l'étranger à plusieurs reprises pour des périodes prolongées.[267]

The Court rejected the application of the rule in the case at hand, without disagreeing with the practice that different assessment standards are applied according to the question whether a person is settled in the host State.

2.7.2.2 A good excuse for not satisfying the individual interest-related criterion

In some cases the Court evaluated whether the applicant could be held responsible for not satisfying the criterion at issue. In the case of *Gezginci*, one of the reasons for expulsion had been that the applicant was not integrated into the Swiss labour market. In discussing the alleged lack of sufficiently strong economic ties with Switzerland the Court pointed out that the applicant simply lacked the will to stick to a job:

> 76. Par ailleurs, à l'instar du Gouvernement, la Cour estime que l'intéressé a clairement démontré par son comportement qu'il ne pouvait et ne voulait pas s'intégrer au monde du travail. Il est avéré que le requérant a très souvent changé de travail, a accumulé des dettes importantes et dépend des allocations chômage et de l'assistance publique.
> […]

[267] *Hasanbasic* (n 240), para 57.

> 80. Au vu de ce qui précède, et en particulier compte tenu de la nature irrégulière du séjour du requérant en Suisse depuis 1997, de l'absence de volonté de sa part de s'intégrer en Suisse, de son manque de respect des règles suisses et ce malgré les avertissements des autorités compétentes, ainsi que du fait que le lien avec son pays d'origine ne semble pas être complètement rompu, la Cour estime que l'Etat défendeur peut passer pour avoir ménagé un juste équilibre entre les intérêts de l'intéressé et de sa fille d'une part, et son propre intérêt à contrôler l'immigration d'autre part.[268]

By placing emphasis on the applicant's own will, his own actions, the Court thus ruled out the occurrence of a valid excuse for not having been economically integrated.

An example of a case in which the Court did accept a good excuse for non-compliance with the national criterion is *Osman v Denmark*.[269] In this case, the applicant's residence permit had lapsed after she had spent more than twelve months abroad – the applicant had been sent away by her parents. Further, it was found that the applicant was not eligible for family reunification with her parents in Denmark since she was seventeen years old and the applicable provision only extended a right to family reunification to children below the age of fifteen. Both with regard to the applicant's absence and with regard to the maximum age criterion, the Court argued that these aspects could not be held against the applicant. As regards the applicant's period of residence abroad, it was observed that the national authorities had failed to take into account that this had taken place against the applicant's will:

> 71. The Ministry of Refugee, Immigration and Integration Affairs addressed some of these issues in its decision of 1 October 2007. It stated, among other things, "neither [the applicant] nor her parents contacted the immigration authorities during her stay abroad, and it has not been substantiated that illness or other unforeseen events prevented such contact. Although the distance from Hagadera to Nairobi is significant [485 km] and it can be assumed that [the applicant] did not have the means to travel to Nairobi, the Ministry finds that these circumstances did not prevent [the applicant's] parents from contacting the immigration authorities before [the applicant's'] departure, which was planned. ...It is stated for the record that it was not [the applicant's] decision to leave Denmark and stay away so long.
> […]
> 73. Moreover, the applicant's view that her father's decision to send her to Kenya for so long had been against her will and not in her best interest, was disregarded by the authorities with reference to the fact that her parents had custody of her at the relevant time.[270]

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[268] *Gezginci* (n 241), para 76, 80.
[269] *Osman* (n 239).
[270] ibid paras 71, 73.

The Court did not reject a twelve-month period as a valid criterion to establish the lapse of a foreign national's residence permit, but concluded that *in this case* the applicant could not be held responsible for the fact that she had been abroad for more than twelve months.[271] The age maximum was countered by the fact that the applicants could not have foreseen the amendment that had taken place during the applicant's absence. Due to this amendment, family reunification with children was no longer possible with children older than fifteen years:

> 75. Finally, in May 2003, when the applicant was fifteen years old and sent to Kenya, even if section 17 of the Aliens Act set out that the applicant's residence permit may lapse after twelve consecutive months abroad, the applicant could still apply for a residence permit in Denmark by virtue of Section 9, subsection 1(ii) of the Aliens Act in force at the relevant time. The latter provision was amended, however, as from 1 July 2004, when the applicant was still in Kenya, reducing the right to family reunification to children under fifteen years old instead of eighteen years old. The Court does not question the amended legislation as such but notes that the applicant and her parents could not have foreseen this amendment when they decided to send the applicant to Kenya or at the time when the twelve month lime-limit expired.[272]

The Court thus found that the applicant could be excused for not satisfying the age requirement. The requirement as such, however, was explicitly not brought into question.

2.7.2.3 Culpable severance of close family ties – Overlap of consistency and a good excuse

A specific type of case entails those in which residence is denied because family ties that once existed are considered ended States have invoked this argument to deny residence in cases where parents who had left their country of origin, afterwards requested for permission to be re-joined with their children in the host country. Ceased family ties were also invoked in cases where the relationship between spouses had ended and the request for residence of the foreign national parent was aimed at residence with the child. In both type of cases, it was generally held against the parents that there were no longer close family ties between these parents and their children and that the parents had failed to make sufficient efforts to maintain such close family ties.[273] The Court's examination in relation to this aspect of allegedly

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[271] See for a case where an excuse for staying abroad a considerable period of time was not accepted, *Ebrahim and Ebrahim* (n 243).

[272] *Osman* (n 239), para 75.

[273] This is only different in the case of *Berrehab* (n 266), where the issue of sufficient efforts to maintain family ties was not held against the applicant. In this case, the national court

'culpable ceased family ties' hinges on whether the parents indeed had failed to make sufficient efforts to maintain close ties with their children. Hence, the question whether the national rule had been applied consistently overlaps with the question whether there was a good excuse for not having maintained close family-ties.
A clear example is the case of *Chandra*, in which one of the central issues is the applicant's own responsibility in the cause and duration of the separation between her and her children:

> The mother chose to leave Indonesia and settled with a Netherlands national, leaving her four children behind in the custody of her then husband. The children were then 12, 11, 8 and 7 years' old respectively. On 2 April 1993 she was granted a residence permit in the Netherlands for the specific purpose of living with her partner, which permit did not include any residency rights for the children. It was only on 12 May 1997 that the mother applied for permission for her children to join her in the Netherlands. The children were then 17, 16, 13 and 11 years' old respectively.[274]

A comparable manner of blaming the parent for the course of events can be found in *Ramos Andrade*:

> The Court observes that when the applicant left the Cape Verde Islands in November 1986 to settle, marry and start a new family in the Netherlands, she decided voluntarily to leave S., who was 20 months' old at the time and completely dependent on others. She went along with her new husband's wishes to the effect that S. should not come to the Netherlands to form part of their new family unit. Even after the break-up of her marriage, in 1989, the applicant did not take any steps to have S. join her until October 1992, and an official application for a provisional residence visa for S. was not filed until April 1993. Altogether, it was only after six and a half years that the applicant took steps to take up the care and daily responsibility for her daughter.[275]

In some cases, the Court found that the parents should *not* be held accountable for the allegedly severed family ties. In *Tuquabo-Tekle*, for example, it was found that the applicants had in fact tried their best to be reunited with their (step) daughter:

> 45. Turning to the particular circumstances of the case, the Court notes that the Government's submissions centre on their contention that the applicants could have applied for Mehret to come to the Netherlands much sooner, and that, in the absence of sound reasons for their not having done so, it had to be assumed that Mehret's staying

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had contended that the four meetings a week the father had with his child were not sufficient to constitute family life within the meaning of Article 8 ECHR in the first place.

[274] *Chandra* (n 243).

[275] *Ramos Andrade* (n 243). Further examples of cases in which the applicants were held responsible for the failure to maintain personal ties are *Ahmut* (n 243) and *Benamar* (n 243).

> with her grandmother and uncle in Eritrea was intended to be a permanent arrangement. However, the Court has previously held that parents who leave children behind while they settle abroad cannot be assumed to have irrevocably decided that those children are to remain in the country of origin permanently and to have abandoned any idea of a future family reunion (see *Şen v. the Netherlands*, no. 31465/96, § 40, 21 December 2001). Indeed, it appears clearly from the facts of the present case that Mrs Tuquabo-Tekle always intended for Mehret to join her. Thus, as soon as she had been granted leave to remain in Norway, she took steps in order to be reunited with her children. Having obtained the Norwegian authorities' permission, she managed to be reunited with her son Adhanom but did not succeed in bringing Mehret to Norway at that time, owing to circumstances beyond her control (see paragraph 9 above).
> 46. The Court further notes that the Government have not disputed that Mrs Tuquabo-Tekle and her husband made efforts to obtain a passport for Mehret and accommodation suitable for the number of persons which their family would comprise if Mehret joined them. The Court accepts that any delays which occurred stemmed from the applicants' sincerely held belief –in which they were apparently supported by their legal representative – that it was not possible to apply for family reunion in the Netherlands until these matters had been taken care of, rather than from any decision on their part that Mehret should stay in Eritrea. Similarly, the fact that, according to the Government, Mrs Tuquabo-Tekle and her husband were not required to take these steps does not detract from the aim manifestly underlying their efforts: to be (re)united with Mehret in the Netherlands.[276]

As explained earlier, the question of a proper excuse for non-compliance with restrictive immigration rules leaves the restrictive power of the rules at stake intact. Establishing whether a parent had a good excuse for leaving his country, or whether he could be held accountable for the duration of the period of time before applying for family reunification with his children, leaves unquestioned the appropriateness of qualifying the family ties between parents and children as being severed on the basis of these aspects.[277]

In cases where the alleged severance of ties between the parents and their children was a result of the parents' divorce, the issue of whether the parent had made sufficient efforts to maintain close family ties with his child played a significant role in the decision to deny residence. Here too, the Court evaluates whether the parent failed to take sufficient steps to maintain close family ties with their children.

An example is the case of *Cılız*.[278] On the national level it had been held against the applicant that after the divorce the applicant had not maintained close ties with

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[276] *Tuquabo-Tekle* (n 243), paras 45-46.

[277] Interestingly, in none of the cases where it was found that the applicant indeed could be held responsible for their departure and the lapse of time before the application for family reunification, the Court explicitly confirmed that the close family ties were broken.

[278] *Cılız v the Netherlands* App no 29192/95 (ECtHR, 11 July 2000).

his child. The Court, however, observed that the national authorities had in fact made it extremely difficult for the applicant to maintain such ties:

> 68. While the respondent Government argued that, prior to his expulsion, the applicant had had ample time to demonstrate that close ties existed between himself and his son and that he had failed to do so, the Court observes that the domestic courts dealing with the request for a formal access arrangement nevertheless deemed it appropriate to adopt a more cautious approach. Recognising that the applicant was in principle entitled to access to his son, the Amsterdam Court of Appeal ordered on 1 June 1995 that supervised trial meetings were to be organised by the Child Care and Protection Board in order to clarify the applicant's position *vis-à-vis* his son. This did not, however, prevent the Netherlands authorities from taking the applicant into detention on 31 October 1995 with a view to his expulsion without any such trial meeting having taken place (see paragraphs 25 and 27 above). The Court, like the Commission, observes that the delay in organising these trial meetings, which was due to the workload of the Child Care and Protection Board, can in no way be attributed to the applicant who in fact attempted to have matters expedited by requesting that an organisation other than that Board be appointed to make the necessary arrangements (see paragraph 26 above).
> […]
> 71. In the view of the Court, the authorities not only prejudged the outcome of the proceedings relating to the question of access by expelling the applicant when they did, but, and more importantly, they denied the applicant all possibility of any meaningful further involvement in those proceedings for which his availability for trial meetings in particular was obviously of essential importance. It can, moreover, hardly be in doubt that when the applicant eventually obtained a visa to return to the Netherlands for three months in 1999, the mere passage of time had resulted in a *de facto* determination of the proceedings for access which he then instituted (see the W. v. the United Kingdom judgment cited above, p. 29, § 65).[279]

Again, the validity of the national criterion as such is not at stake. The Court does not reject the national policy in which residence is denied to foreign national parents of children residing in the host State, if there are no longer close family ties between that parent and his child. It is only in the case at hand that the criterion cannot be held against the applicant.

2.7.2.4 Aspects complementing the individual interest in being granted residence

The fact that as observed above, the Court does not question the content of individual interest-related criteria does not necessarily mean that the Court's scrutiny of the

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[279] ibid paras 68, 71. See furthermore, the case of *Olgun*: 'The Court does not ascribe the same importance as the Government to the limited nature of the contact existing between the applicant and E. after 1996. It must be remembered that the applicant returned to Turkey to perform his compulsory military service, and that after the applicant's release from military service Ms Ö. failed to give her full co-operation.' *Olgun* (n 243), para 45.

individual interest is limited to the scope of the national criterion at issue. Indeed, it is the Court's standing practice that in balancing the competing interests, a number of (complementary) aspects relating to the individual interests at stake should be addressed that Consequently, account should be taken of the extent to which family life is effectively ruptured; the extent of the ties in the Contracting State; and whether there are insurmountable obstacles to the family living in the country of origin.[280] In cases where children are involved, particular regard must be had to their age, the situation they would encounter in the family member's country of origin; and the extent to which they are dependent on their parents.[281]

In every case where residence was denied for non-compliance with individual interest-related criteria, the Court included a discussion of one or more of the aforementioned complementary aspects. In the case of *Magoke* for example, the refusal to allow family reunification between a father and daughter was based on the fact that the applicant had not proved that they had lived together in their country of origin. In addition, the applicant allegedly had not made sufficient effort to be reunited with his daughter sooner. The Court established that the applicant had indeed not proven that he and his daughter had lived together in the country of origin. Moreover, the Court stressed that the applicant could be held accountable for the separation between him and his daughter as well as for its duration. Subsequently, the Court addressed a number of additional aspects relating to the interest of the persons concerned in being granted family reunification in the host State:

> It is true that the applicant has stated that he has kept in contact with his daughter through telephone calls and letters and that he has been paying for her school fees and living expenses. The Court sees no reason to doubt this information. In his submissions to the Court, the applicant has also stated that Esther's mother cannot take care of her, as the mother's husband has refused to accept this arrangement. No evidence has been submitted in this regard, however, and it should be noted that the applicant, in November 1998, stated to the Swedish authorities that the mother was unable to take care of Esther for financial reasons. This information is consistent with the affidavit given by the mother on 4 August 1999. The Court does not find it unreasonable to expect that Esther be taken care of by her own mother, especially if the applicant continues to provide financial support for her.
>
> Furthermore, it follows from information given by the applicant that he has several siblings in Tanzania. Thus, there appears to be other people than the mother who could provide care for Esther in Tanzania.
>
> Turning to the interests of Esther, the Court notes that she was apparently – like the applicant – born in the town of Shinyanga and lived there until January 2001, when she was eight and a half years old. Thus, while she appears to be presently living in Dar es Salaam, a possible move to Shinyanga, 700 km away from Dar es Salaam, cannot be

[280] See a.o. *Da Silva and Hoogkamer* (n 206), para 39.

[281] *Tuquabo-Tekle* (n 243), para 44.

> considered a great difficulty. Moreover, Esther has lived all her life in Tanzania and has most of her relatives in that country. She is rooted in that country and has apparently never visited Sweden.[282]

The above shows that the individual interest-related aspects addressed here were not already embodied in the individual interest-related criteria held against the applicant. The scope of aspects addressed to determine the interest being granted residence therefore exceeds the scope of the individual interest-related criterion. It seems therefore, that without having to scrutinise the merits of the national criterion at issue, the Court has room to determine for itself which aspects are relevant in establishing the individual interest in being granted residence.

If the Court may extend the scope of the individual interest beyond the scope of the individual interest-related criterion through the inclusion of complementary aspects, this has consequences for the factors that are decisive for the outcome of a case. The outcome of a case would not conclusively depend on whether the national criterion was correctly and consistently applied, or whether there was a good reason for non-compliance with the criterion at issue. Indeed, the latter aspects (establishing whether the public interest in upholding national immigration criteria is at stake) could then be countered by complementary individual interest-related aspects, such as an insurmountable obstacle to develop family life in the country of origin, or aspects concerning the best interests of the children involved. Upon close scrutiny, however, it emerges that despite addressing these complementary aspects, the Court nevertheless does not independently determine the weight to be attached to the individual interest in being granted residence.

No self-standing significance of the interest in being granted residence

The following overview includes every case in which the Court has concluded that denying residence for non-compliance with individual interest-related aspects would violate Article 8 ECHR. It is significant that in every case where the Court substantiates such conclusion by pointing out 'complementary' individual interest-related aspects, the Court additionally found that the individual interest-related criterion was applied inconsistently or incorrectly, or it accepted a good excuse for non-compliance with that criterion.

In *Berrehab*, the Court argued that the best interests of the applicant's child implied that the applicant's expulsion would violate Article 8 ECHR. In addition, it observed that the national authorities had unjustly considered that the family ties between them had been broken:

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[282] *Magoke* (n 243).

> Certainly Mr. Berrehab and Mrs. Koster, who had divorced, were no longer living together at the time of Rebecca's birth and did not resume cohabitation afterwards. That does not alter the fact that, until his expulsion from the Netherlands, Mr. Berrehab saw his daughter four times a week for several hours at a time; the frequency and regularity of his meetings with her (see paragraph 9 in fine above) prove that he valued them very greatly. It cannot therefore be maintained that the ties of "family life" between them had been broken.[283]

In *Cılız*, the Court concluded that by denying residence, the national authorities had failed to take into account the applicant's interests as safeguarded by Article 8 ECHR.[284] In addition, the Court countered the allegation that the applicant 'had hardly shown a genuine interest in the upbringing and well-being of the child and had hardly maintained any factual family ties at all'. It found that the applicant had in fact been prevented from maintaining such close family ties. In other words, the applicant had a good excuse for not satisfying the condition of sufficiently close ties.

In the case of *Şen*, the conclusion that denying residence to the applicants' (step)daughter would violate Article 8 ECHR, seemed to be dictated by the consequences for the other children involved who had been born and raised in the host State.[285] However, the Court also disputed the national authorities' conclusion that the family ties between them had been broken. The Court was not convinced that the parents had abandoned the idea of family reunification with their (step) daughter. Furthermore, to explain for the period of time that had lapsed before making the request for family reunification, the applicants had put forward that this was due to marital problems, an excuse which was not disputed by the Court.[286]

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[283] *Berrehab* (n 266), para 21.

[284] *Cılız* (n 278).

[285] *Şen* (n 243).

[286] A much made comparison in academic literature, between *Şen* and *Ahmut*, commonly focuses on the consequences of denying residence for the persons concerned. In view of these consequences, it has been argued that the Court also in Ahmut should have concluded that denying residence to the child violated Article 8 ECHR. This focus is not strange, since the Court itself too explains the difference between the outcome in these cases explicitly on the basis of the consequences of denying residence for the persons concerned (*Şen* (n 243), para 40). Focusing however on the public interest in upholding national restrictive criteria, we see that different from the facts in the *Şen* case, in *Ahmut* the child did not move to the Netherlands as a result from an autonomous wish of the parent to be reunited with the child. This took place only after it appeared that in Marocco Souffiane could no longer be taken care of by someone else. In *Ahmut* the applicant could therefore not prove that he had not abandoned the idea of family reunification. Additionally, this circumstance indicated that the parent in *Ahmut* could not be excused for the duration of the separation between him and his child. Furthermore, contrary to the *Şen* case, in *Ahmut* the ties between the applicants and their child in part had been

In *Tuquabo-Tekle*, the best interests of the children involved prevailed, *after* the Court had established that the applicant could not be held accountable for her departure from her country of origin, nor for the fact that it had taken a considerable period of time before the request for family reunification with her daughter had been made.[287]

In *Sezen*, the Court considered that the applicant's family members could not be expected to follow him to his country of origin. It was also pointed out that the authorities had unjustly concluded that a temporary separation of six-months had resulted in a permanent break down of the marriage.[288]

In *Osman*, the Court attached importance to the fact that the applicant had spent the formative years of her childhood and youth in Denmark, that she spoke Danish, that she had received schooling in Denmark, and that all her close family remained in Denmark. Furthermore, it was observed that in refusing the applicant's re-entry in Denmark, the national authorities had disregarded the applicant's best interest as a child. Nevertheless, these considerations were made in addition to pointing out that the applicant could not be held accountable for the facts that were held against her readmission: the applicant's absence from Denmark for more than twelve months had taken place against her will and the change in legislation with regard to the maximum age of family reunification with children could not be foreseen.[289]

Finally, in the case of *Hasanbasic*, the Court concluded that the decision to deny residence was disproportionate, in particular, having regard to the considerable duration of the applicants' stay in Switzerland and their undisputed social integration in that country. Yet, this took place in addition to the rejection of what was considered by the Court one of the main arguments of the domestic authorities for refusing to renew the applicant's residence permit: his alleged intention to leave permanently. The Swiss authorities had argued that by formally expressing his intention to leave Switzerland permanently, the applicant had renounced his residence status so that the request made to renew his residence permit after four months was to be considered as a request for a new residence permit. According to the Court, however, the facts of the case could not justify the conclusion that he was not to be considered as a person having settled in Switzerland.[290]

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developed on the basis of unauthorised residence in the Netherlands. Accordingly, it appears that the crucial difference between *Şen* and *Ahmut* exists in the circumstance that in the latter case the public interest in upholding both individual interest-related criteria and procedural immigration rules prevented paramount weight being attached to the individual interest in being authorised residence.

[287] Tuquabo-Tekle (n 243).

[288] *Sezen* (n 265).

[289] *Osman* (n 239).

[290] *Hasanbasic* (n 240).

The above overview shows that every time the Court emphasises 'complementary' individual interest-related aspects to substantiate its conclusion that denying residence for non-compliance with individual interest-related criteria would violate Article 8 ECHR, without exception this coincides with either the conclusion that the national criterion had not been applied in conformity with the facts, or with the conclusion that the applicant had a good excuse for non-compliance with that criterion. Therefore, the complementary aspects addressed by the Court did never *autonomously* determine the outcome of the case. The conclusion to be drawn from this is that despite the inclusion of such complementary aspects in balancing the competing interests, the scope of the individual interest in being granted residence is still determined by the scope of national individual interest-related criteria. Once it is confirmed that the national criterion was applied consistently and that there was no good excuse for non-compliance with that criterion, the complementary aspects relating to the individual interest cannot result in the conclusion that no fair balance was struck between the competing interests. The foregoing discussion suggests that the public interest in upholding individual interest-related criteria is the predominant factor in these cases. In the following subsection I further elaborate on this assertion.

2.7.3 The public interest in upholding individual interest-related criteria

As explained above, the main rationale of allowing entry and residence only to those foreign nationals who have developed certain ties with (persons residing in) the host State is to *per se* restrict immigration. Since individual interest-related criteria generally do not distinguish between foreign nationals whose residence is (not) detrimental to the public interest, upholding these criteria thus serves an unspecified, or *generic* interest in controlling immigration. In this section, individual interest-related conditions are discussed in their capacity as representatives of the public interest in controlling immigration, whereby the public interest is perceived as the very interest in upholding restrictive entry and residence criteria as set out by the national authorities. The case of *Abdulaziz* will be discussed separately. The reason for this is that in this case the Court does connect the legitimacy of the decision to deny residence to a substantive public interest: the interest in protecting the labour market. Nevertheless, it will turn out that not the individual interest-related criterion itself is examined here in view of the public interest, but the fact that female residents had only imposed this criterion with regard to family reunification.

Section 2.7.2 demonstrated that for the outcome of cases featuring non-compliance with individual interest-related criteria, it is decisive whether national criteria are consistently applied and whether a good excuse for non-compliance existed. The Court thus has refrained from scrutinising the validity of national individual interest-

related criteria. Indeed, the conclusion that in a concrete case the authorities have inconsistently acted in applying the national criterion does not preclude the application of that same rule in future cases. Similarly, attaching relevance to the fact that the applicant can be excused for failing to satisfy the criterion does not prevent the same criterion is being enforced in another case.

In addition, complementary aspects relating to the individual interest in being granted residence – *i.e.* those that are addressed in addition to those already embodied in the national criterion for entry or residence – were shown to lack the capacity to autonomously determine the outcome of the balancing the interests at stake. The significance thereof perhaps may best be explained by illustrating what would happen if the Court *would* allow these complementary aspects to determine the outcome of the case. Imagine for example, that in the *Gül* case the Court would have considered that because of the insurmountable obstacles to develop family life in Turkey, denying residence to the applicants' son would violate Article 8 ECHR. This would imply a violation being accepted, *despite* the fact that the applicants did not hold the proper residence status to be eligible for family reunification. The consequence of this would be that in addition to those individuals who do satisfy the permanent residence-criterion, family reunification would also have to be granted to those who are able to show that there are insurmountable obstacles to pursue family life in their country of origin, *regardless* their residence status in the host State. Undeniably, this would impair the restrictive effect of (and hereby the public interest in upholding) the criterion that only foreign nationals with a permanent residence right are eligible for family reunification. That the Court confines to verifying whether the national criterion is applied correctly - and therefore without allowing complementary aspects to be of decisive importance for the outcome of the case, thus secures that the Court does not compromise the restricting power of the national criterion at issue.

Now imagine that in *Ahmut* the Court found a proved violation of Article 8 ECHR, even though the applicants could be held accountable for the lapse of time between their departure from their host country and their application for family reunification with their eldest child. And, that the reason for such conclusion would be that in the mean time the parents had developed strong ties in the host State. The consequence of this would be an expansion of the scope of foreign nationals eligible for family reunification with their children. Indeed, family reunification would have to be granted in every case in which parents have developed strong ties in the host State, irrespective of whether the parents could be held accountable for (the duration of) the separation with their children. Those complementary individual interest-related aspects cannot determine the outcome of the case means, therefore, that the restricting capacity immigration criteria consistently maintain preserved.

The consistency with which the Court confines its scope of scrutiny in a manner that leaves unquestioned individual interest-related criteria as set out by national authorities, justifies the conclusion that the public interest in upholding individual interest-related criteria plays a predominant role in the Court's approach to these criteria. Once it is established that the public interest in upholding these criteria is 'at stake' i.e. if the Court risks diminishing the restricting capacity of the criterion at issue - it is categorically ruled out that decisive weight is attached to the individual interest in being granted residence. Notably, as will be discussed in chapter 4, it is not said that this mechanism is necessarily an intended one.[291]

The following section addresses another aspect that has proven to be of decisive importance for the outcome of cases featuring individual interest-related criteria: the public interest in upholding procedural rules of immigration law.

2.7.4 Procedural aspects of immigration law as additional obstacles

In section 2.6 it was argued that if the public interest in upholding procedural rules of immigration law is at stake – that is, if the national rules were applied correctly and consistently and if there is no good excuse for non-compliance with the rules at issue and that therefore a violation would affect the restricting capacity of the rule at issue – it is categorically ruled out that denying residence is considered to violate Article 8 ECHR. Importantly, the case law analysis has shown that the Court's evaluation whether procedural rules of immigration law are complied with is not restricted to cases where non-compliance with procedural rules is explicitly invoked by the national authorities to justify denying residence. Indeed, in accordance with the checklists developed by the Court for assessing Article 8 ECHR immigration cases, issues of immigration control are taken into account as a general rule.

To show the significance of the interest in upholding procedural rules of immigration law in the cases under review here, I have separately examined the cases in which procedural aspects were not explicitly put forward as a reason for denying residence. This examination reveals that irrespective of whether the interest in upholding procedural rules of immigration law was invoked explicitly, without exception, this aspect was of predominant significance for the outcome of the case. This means that in none of the cases where it was established that family ties were (in part) developed on the basis of irregular entry or residence in the host State, has the Court concluded that Article 8 ECHR was violated.[292] Notably, even if it was established that the individual interest-related criterion no longer posed an obstacle

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[291] Section 4.4.1.

[292] The cases in which procedural aspects played a role without having been explicitly included in the reasons for denying reidence are: *Ahmut* (n 243); *Mensah* (n 243); *Adnane* (n 243); *Ebrahim and Ibrahim* (n 243); and *Biao (I)* (n 236).

for attaching decisive weight to the individual interest – for example because of a good excuse for non-compliance with that criterion – the public interest in upholding procedural rules would pose a separate hurdle to be passed. A case worth noting in this regard is that of *Olgun*.[293] The applicant was denied a residence permit effectively removing the chance to remain in contact with his child, for the reason that he had, in the past, failed to make sufficient efforts to maintain close ties with his child. The Court disagreed with the national authorities as to the question whether the applicant could be held fully accountable for not having kept close contacts with his child:

> 45. The Court does not ascribe the same importance as the Government to the limited nature of the contact existing between the applicant and E. [the applicant's child, *EH*] after 1996. It must be remembered that the applicant returned to Turkey to perform his compulsory military service, and that after the applicant's release from military service Ms Ö. [the applicant's former spouse, *EH*] failed to give her full co-operation.[294]

The Court thus accepted a good excuse for not satisfying the individual interest-related criterion as set out by the host State. However, another issue obstructed the applicant's interest in being granted residence in the host State with his child, namely the fact of the applicant's irregular residence in the host State:

> 46. It appears however that the applicant has not at any time been lawfully resident in the Netherlands. He seems to have entered the country for the first time in 1988, on a one-month visa.
> 47. The applicant married Ms Ö. in Turkey after returning there. He and his wife entered the Netherlands entirely without a visa; E. was born there in July 1992. All three were illegal residents at that time.
> 48. The applicant and Ms Ö. were divorced in Turkey. The applicant returned to that country in 1996 and remained there until he re-entered the Netherlands in 1998, this time on a one-month temporary visa which he outstayed.
> 49. The inescapable conclusion is that the present case is characterised by multiple breaches of immigration law and that the applicant has not at any time had family life in the Netherlands as a lawful resident. Nor is it apparent that the applicant was ever given any assurances that he would be granted a right of residence by the competent Netherlands authorities; he could therefore not at any time reasonably expect to be able to continue this family life in the Netherlands (cf. *Useinov v. the Netherlands* (dec.), no. 61292/00, 11 April 2006). [295]

The above shows that the public interest in upholding procedural rules of immigration law and the public interest in upholding individual interest-related

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[293] *Olgun* (n 243).
[294] ibid para 45.
[295] ibid paras 46-49.

criteria, are two separate obstacles for attaching decisive importance to the individual interest. Both must be 'removed' in order to create room for concluding that denying residence would violate Article 8 ECHR.

2.7.5 Summary

The Court's approach to individual interest-related immigration criteria is quite similar to its approach to procedural rules of immigration law. The Court includes in its argumentation, complementary individual interest-related aspects, *i.e.* aspects that go beyond the scope of the individual interest-related criteria held against the claimants. The Court seems to conduct an independent evaluation of the weight to be attached to the individual interests at stake. However, upon close scrutiny it becomes clear that these complementary aspects do not have the capacity to autonomously determine the outcome of a case. For Article 8 ECHR to be considered violated, it is crucial that either the national criterion at issue was applied incorrectly or inconsistently, or a good excuse existed for non-compliance with that criterion. The Strasbourg case law thus consistently preserves the restricting capacity of individual interest-related criteria, without complementary aspects being of separate influence on whether Article 8 ECHR is violated.

Whereas individual interest-related criteria are not formulated in terms of any public interest to be protected, there is an inevitable public interest in upholding these criteria. Their application is a powerful tool for the restriction of legal immigration. Looking at the Court's approach to individual interest-related criteria from a public interest-perspective, the public interest in upholding individual interest-related criteria has been shown to function as an obstacle for concluding that denying residence would violate Article 8 ECHR. Once it is established that this interest is at stake – i.e. if it is established that the individual interest-related criterion was applied correctly and consistently, and if there is no excuse for non-compliance – no paramount weight is attached to the individual interest in being granted residence.

The occurrence of procedural aspects of immigration control has proven to be an additional obstacle for concluding that Article 8 ECHR would violate 8 ECHR, even if such aspects were not explicitly put forward to deny residence.

2.8 Overview of the ECtHR's approach to national reasons for denying residence

In this chapter I have presented the findings of a systematic content analysis of Strasbourg Article 8 ECHR immigration cases. The purpose of this analysis has been to identify the extent to which the Court establishes the weight of the public interest

in upholding national legal restrictions on the basis of the circumstances of the case at hand.

Section 2.2 has demonstrated that with regard to *criminal convictions* the Court takes a case-by-case approach to the public interest, which generally entails an evaluation of the seriousness of the applicant's conduct or the risk of the applicant re-offending. The Court does not necessarily submit to the evaluation of the facts as conducted by the national authorities. In other words, there is room to disagree on whether the facts indeed posed a sufficient reason for denying residence to the person concerned.

Section 2.3, featuring cases where the applicant was accused of posing a *threat to national security*, showed that it was not always possible for the Court to evaluate the weight of the reason at issue. Indeed, in this category of cases it was often the absence of any concrete allegations that had raised the complaint in Strasbourg in the first place. In most of these cases, therefore, the Court cannot be said to have evaluated the weight of the reason to deny residence on the basis of the circumstances of the case at hand. Nevertheless, the reason why in those cases the Court concluded that Article 8 ECHR had been violated was the very failure of the national authorities to undertake such evaluation. In this regard, the Court stipulated that the individual must be able to challenge the executive's assertion that national security is at stake. Moreover, in the cases where this was possible, the Court *did* establish the weight of the public interest in denying residence, in a similar manner as in cases dealing with criminal convictions.

In section 2.4 only one case was discussed, in which the applicant allegedly posed a *threat to national health*. Here, the Court conducted an extensive scrutiny of the extent to which refusing entry to a person who proved to be HIV-positive indeed contributed to the protection of national health.

With regard to national legal restrictions connected to crime, national security and national health, the Court has thus shown consistent in evaluating the circumstances of the case in view of the public interest in denying residence to the person concerned.[296] With regard to the other three categories of reasons – *i.e.* non-compliance with income-related criteria; non-compliance with procedural immigration rules, or with individual interest-related criteria - the analysis produced different results.

Section 2.5 discussed cases featuring *non-compliance with income-related criteria*. In these cases the Court refrains from evaluating whether in view of the public interest the circumstances of the case at hand posed a sufficient justification for denying residence. In a substantial number of cases the failure to comply with

[296] And to dismiss decisions as being in violation with Article 8 ECHR in cases where such evaluation proved impossible in the first place.

income requirements is not mentioned at all in the Court's argumentation. In cases where the Court does address the failure to comply with income-related criteria, the Court generally approves of the use of income requirements, without, however conducting an evaluation of the circumstances invoked by the national authorities in view of the public interest.[297] It has been argued that a mere reiteration of the facts without an autonomous assessment, that is, without any appreciative remarks that might indicate the weight to be attached to these facts, implies that the Court does not establish the *weight* of the public interest in upholding these criteria. Rather, the Court's focus seems to be whether the persons concerned have tried their best to satisfy the conditions at issue or whether they had a good excuse for non-compliance. Such an evaluation, however, does not constitute an evaluation of the weight of the reason for denying residence. On the contrary, attaching significance to the occurrence of a good excuse for non-compliance implies that the individual interest is favoured *despite* a certain public interest in denying residence to the person concerned.[298]

Section 2.6 discussed cases featuring *infringement of procedural rules of immigration law*. At face value, an ambiguous picture emerged as to whether the Court evaluated the weight of the interest in denying residence in these cases. In eleven out of eighteen cases the Court evaluated the circumstances put forward by the national authorities in view of the public interest in ensuring effective immigration. It addressed the seriousness of the breaches of immigration law, and in some cases explicitly mentioned the importance of enforcing the rules at issue in view of the public interest in controlling immigration. However, there does not seem to be a directly proportional relationship between the Court's remarks relating to the seriousness of the breaches of immigration law, and the outcome of the fair balance assessment. These remarks are not indicative of whether denying residence to the person concerned is considered to violate Article 8 ECHR. Instead, it turned out that more reliable indicators for the outcome of these cases are the consistency and correctness with which these rules are applied on the national level, and whether the applicant could be excused for violating these rules. More in particular, it appeared that only in cases where it is established that the national rules had been applied incorrectly or inconsistently, or where the applicant had a good excuse for non-compliance with the rules at issue, denying residence could result in a violation of

[297] For a discussion of the one seeming exception to this general rule, the case of *Palanci*, see section 2.2.5.

[298] I thank Jeroen Maljaars for pointing out that the circumstance that a person is (permanently) unable to fulfil the income criterion indicates an increased interest in denying the applicant's residence in view of protecting the national economic well-being.

Article 8 ECHR. I have argued that as a direct consequence of this practice, the validity of national procedural rules of immigration law remains uncompromised.

Thus, even though the Court does use evaluative terms in relation to the circumstances put forward to deny residence, their function is not to measure the weight of the public interest in upholding the procedural immigration rules at issue. Instead, if this public interest was at stake, this automatically posed an insurmountable obstacle for the individual interest to be of decisive importance.

The analysis furthermore revealed that family or private life developed without a (secure) residence status posed an obstacle for attaching decisive weight to the individual interest in being granted residence, even if this aspect had not been explicitly put forward as a reason for denying residence. I found that a claim to protect family life in the host State has no chance of success if (one of) the persons concerned resided in the State against the express wishes of the authorities. Only if the national authorities had been ambiguous as to whether the person concerned eventually would be granted a secure residence status, could this be different. A phrase commonly used in this regard is that the applicant was 'not entitled to expect that any right of residence would be conferred upon him'. Since the aspect of legitimate expectations does not include an evaluation of the reason *why* authorisation to reside had been refused, it cannot be said to constitute an evaluation of the weight of the interest in upholding procedural rules of immigration law.

Finally, section 2.7 discussed the Court's approach to residence being denied for *failure to comply with individual interest-related criteria*. Self-evidently, no explicit evaluation took place of these reasons in view of the public interest. However, it emerged nevertheless that the public interest in upholding individual interest-related criteria determined whether decisive weight could be attached to the individual interests at stake. If it is established that the criteria were applied consistently and correctly and if there was no good excuse for non-compliance – it is ruled out that denying residence would violate Article 8 ECHR. Consequently, the complementary aspects addressed by the Court in addition to its evaluation of individual interest-related criteria can have no autonomous capacity to determine the outcome of the evaluation. In view of the finding in section 2.6 relating to the decisive importance of family life being developed while the applicants were not entitled that family reunification would be granted to them, I have verified whether this aspect of 'legitimate expectations' was here also of decisive importance for the outcome of the case. It appeared that the legitimate expectations aspect indeed posed a

categorical obstacle so that no decisive weight could be attached to the individual interest, unless the national authorities had acted ambiguously in this regard.[299]

I further expound the results of the case-law analysis in Chapter 4. First, chapter 3 zooms in on the factors that emerged in sections 2.6 and 2.7 as indicative for the outcome of the case.

[299] In relation to the legitimate expectations aspect, the occurrence of a good excuse will not be relevant, since this aspect deals with whether the national authorities have acted consistent in expressing the view that residence would not be denied.

Chapter 3 Revisiting Article 8 ECHR immigration-cases in view of indicative factors

3.1 Introduction

The aim of the case-law analysis in chapter 2 has been to identify the nature and scope of the Court's scrutiny of the various reasons for denying residence to foreign nationals. In section 2.6, in which infringement of procedural rules of immigration law were discussed, it emerged that the occurrence of certain aspects not only attracted a certain argumentative approach, but also proved indicative for the outcome of that case. A violation of Article 8 ECHR occurred only in cases where it was observed that national procedural rules were applied inconsistently or incorrectly, or if a good excuse for non-compliance with these rules was accepted. In every other case, denying residence would not violate Article 8 ECHR. In section 2.7, dealing with cases featuring non-compliance with individual interest-related criteria, again an (in)consistent or (in)correct application of national criteria and a good excuse for non-compliance proved indicative for the outcome of individual cases. In cases where both individual interest-related aspects and procedural aspects of immigration law were at issue, the latter – even if not explicitly invoked by the authorities to substantiate denying residence – proved to be predominant: a good excuse for non-compliance with an *individual interest-related criterion* was 'trumped' by an established public interest in upholding *procedural immigration rules*.[300]

These findings call for revisiting the cases I discussed in the preceding sections. It may be that a correlation between the aforementioned indicative factors and the outcome of a case is not restricted to cases featuring procedural rules of immigration law and those featuring individual interest-related criteria. The first hypothesis in this regard relates to cases featuring income-related grounds for denying residence. In section 2.5 I have observed that the Court generally keeps to a mere reiteration of the facts put forward by the national authorities to substantiate the failure to satisfy

[300] *Olgun v the Netherlands* App No 1859/03 (ECtHR, 10 May 2012).

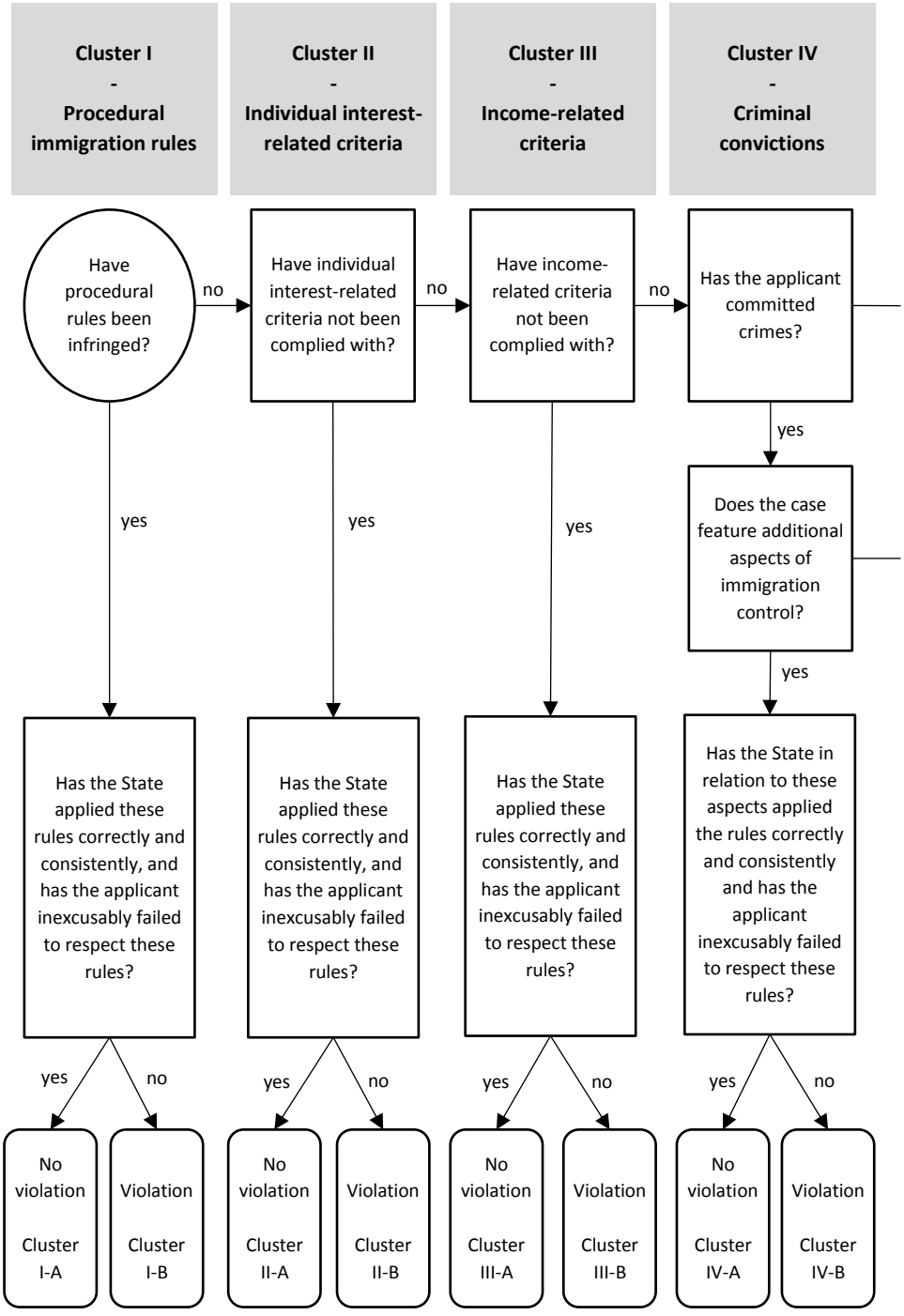
the criterion at issue. The *evaluation* the Court undertakes in these cases, is restricted to whether the applicant had a good excuse for non-compliance with the requirement at issue and generally does not extend to the weight of the public interest. This suggests that here too, the outcome of a case corresponds with whether or not the national criteria at issue were applied correctly and consistently or whether or not there was a good excuse for non-compliance.

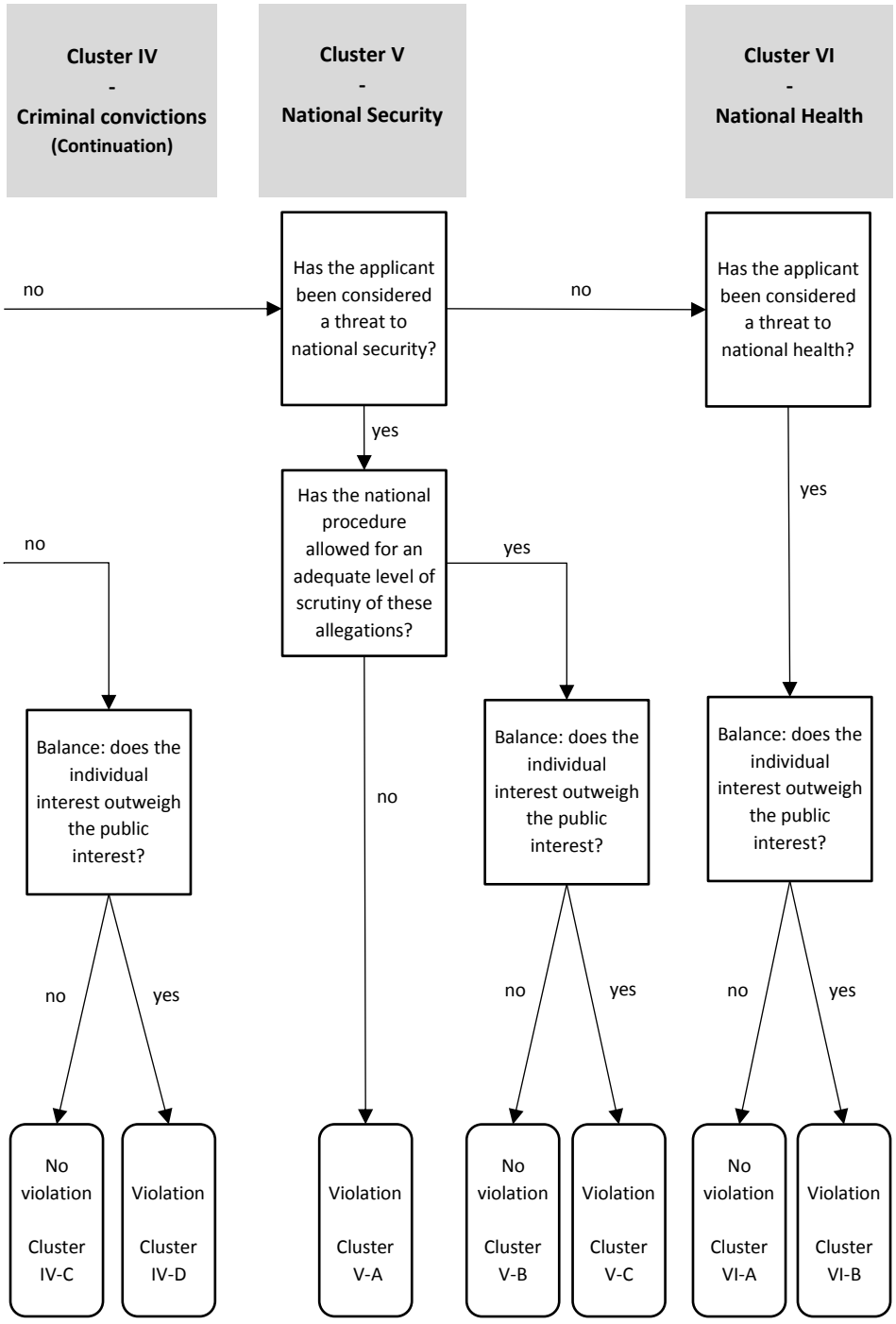
The hypothesis is different in respect of the remaining three reasons for denying residence, – *i.e.* the commission of offences; posing a threat to national security or a threat to national health. I expect that revisiting these cases will not show a strict relation between the outcome of a case and the correct and consistent application of national rules or a good excuse for non-compliance. First of all, with regard to these three reasons, the Court has shown to be consistent in evaluating the circumstances of the case in view of the weight public interest. The Court has shown that it is not bound to follow the evaluation of the circumstances of the case made in this regard on the national level. In other words, with regard to these three categories of reasons there is room to disagree with the national authorities as regards the weight to be attached to the facts that were put forward to justify denying residence. Yet, I also expect that if besides criminal offences, a case additionally features infringement of procedural immigration rules, non-compliance with individual interest-related criteria or income-related criteria, these latter categories of reasons determine the outcome of the case. Of course, it is very well possible that, even in the absence of the aforementioned three categories of reasons, we may find that inconsistent or incorrect application of national immigration law, or the absence of individual accountability for non-compliance with national rules – for example in relation to for example the commission of crimes – still prove to be factors of significance.

3.2 Article 8 ECHR immigration cases in a flowchart

The result of revisiting the cases that made part of the case-law analysis in chapter 2 are presented in a flowchart, that appoints each case to one of the six distinguished clusters. A simple version of this flowchart is displayed on the following pages. A more detailed version that shows which case is appointed to which cluster is separately inserted in the book.

Article 8 ECHR Immigration Cases in a Flow Chart


Cluster I
-
Procedural immigration rules
Cluster II
-
Individual interest-related criteria
Cluster III
-
Income-related criteria
Cluster IV
-
Criminal convictions
Have procedural rules been infringed?
no
Have individual interest-related criteria not been complied with?
no
Have income-related criteria not been complied with?
no
Has the applicant committed crimes?
yes
Does the case feature additional aspects of immigration control?
yes
yes
yes
yes
Has the State applied these rules correctly and consistently, and has the applicant inexcusably failed to respect these rules?
Has the State applied these rules correctly and consistently, and has the applicant inexcusably failed to respect these rules?
Has the State applied these rules correctly and consistently, and has the applicant inexcusably failed to respect these rules?
Has the State in relation to these aspects applied the rules correctly and consistently and has the applicant inexcusably failed to respect these rules?
yes
no
yes
no
yes
no
yes
no
No violation
Cluster I-A
Violation
Cluster I-B
No violation
Cluster II-A
Violation
Cluster II-B
No violation
Cluster III-A
Violation
Cluster III-B
No violation
Cluster IV-A
Violation
Cluster IV-B


Cluster IV
-
Criminal convictions
(Continuation)
Cluster V
-
National Security
Cluster VI
-
National Health
no
Has the applicant been considered a threat to national security?
no
Has the applicant been considered a threat to national health?
yes
yes
Has the national procedure allowed for an adequate level of scrutiny of these allegations?
no
yes
no
Balance: does the individual interest outweigh the public interest?
Balance: does the individual interest outweigh the public interest?
Balance: does the individual interest outweigh the public interest?
no
yes
no
yes
no
yes
No violation
Cluster IV-C
Violation
Cluster IV-D
Violation
Cluster V-A
No violation
Cluster V-B
Violation
Cluster V-C
No violation
Cluster VI-A
Violation
Cluster VI-B

The flowchart distinguishes six main clusters of cases (I-VI) that correspond to the six categories of reasons identified in chapter 2 – but in a different order:

Cluster I	Procedural immigration rules
Cluster II	Individual interest-related criteria
Cluster II	Income-related criteria
Cluster IV	Criminal convictions
Cluster V	National security
Cluster VI	National health

In the flowchart a correlation comes to the fore between the aforementioned indicative factors and the outcome of a case. This correlation is of an empirical nature, based on the systematic content analysis of the case law as discussed in chapter 2. It is therewith not said that this correlation is an intended one, in that it would correspond to conscious, normative considerations.[301] If below it is asserted that a certain outcome is the *logical* consequence of the occurrence or absence of certain factors, such remark is thus meant in an empirical and not in a legal/normative sense.

Cluster I - Infringement of procedural immigration rules

The flowchart starts with verifying whether a case can be decided under the heading of cluster I (procedural immigration rules). If no procedural aspects of immigration law are at issue, the flowchart directly leads us to cluster II. If the facts of the case do show the emergence of infringement of procedural immigration rules, it is established whether these rules were applied consistently and correctly, and whether the applicant has inexcusably failed to respect these rules. If this is indeed the case, denying residence will not violate Article 8 ECHR (cluster I-A). Conversely, if the Court considers that the rules have been applied *in*correctly or *in*consistently, or if it accepts a good excuse for non-compliance, the conclusion will be that Article 8 ECHR is violated. These cases are enlisted under cluster I-B.

Revisiting the Article 8 ECHR immigration cases in view of the indicative factors has revealed a far greater number of cases in which procedural aspects of immigration law play a decisive role than I initially thought. Section 2.7 already showed that in cases featuring non-compliance with individual interest-related criteria, the occurrence of additional procedural aspects – even if not put forward by the national authorities as a reason for denying residence – proved to be of predominant significance for the outcome of these cases. It now appears that this holds true for every other reason for denying residence.

[301] I have no reason to believe that the Strasboug Court consciously decides Article 8 ECHR immigration cases on the basis of the underlying decision-model.

For instance, the outcome of cases like that of *Konstatinov*,[302] initially categorised as an income requirement case, and that of *Üner*,[303] presented as a criminal conviction case, all follow the decision-model that has shown to apply to procedural aspects of immigration law. In *Konstatinov* the applicant had failed to comply with the requirement to obtain a provisional residence permit, and she had resided irregularly in the host State. In fact, the applicant had never satisfied the conditions to be granted lawful residence, nor was there a good excuse for non-compliance.[304] Given the decision-model based on the indicative factors, it follows that denying residence is not considered to violate Article 8 ECHR. In *Üner*, the applicant had re-entered the host State after having been deported for criminal convictions. This created a procedural aspect of immigration law in addition to the 'original' reasons for denying residence. Again, in accordance with the systematic approach based on the indicative factors, the Court ruled that there was no violation of Article 8 ECHR. In every case where procedural aspects of immigration law are at issue, the outcome of the case is consistent with the decision-model as identified in section 2.6.

It is not self-evident that incorrect or inconsistent application of national procedural rules or a good excuse for non-compliance should always lead to the conclusion that denying residence violates Article 8 ECHR. There may be other reasons for denying residence. Still, only in the case of *Da Silva and Hoogkamer*,[305] the State's inconsistent approach to the applicant's unlawful residence made that the remaining reasons for denying residence objectively could no longer provide a sufficient reason for denying residence. Indeed, the argument that the applicant did not pay taxes and social contributions and the argument that she occupied a job in the place of other persons lawfully residing in the Netherlands, were both directly connected to the applicant's unlawful residence. In the remaining violation-cases of cluster I-B, however, it is not inconceivable that other reasons put forward could have autonomously carried sufficient weight to justify denying residence. Nevertheless, this situation does not occur in any of the cases that made part of the analysis. It is therefore left out in the flowchart.

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[302] *Konstatinov v the Netherlands* App No 16351/03 (ECtHR, 26 April 2007).

[303] *Üner v The Netherlands* [GC] (ECtHR, 18 October 2006) ECHR 2006-XII.

[304] The applicant's sponsor did not have sufficient resources. With regard to this latter aspect, the Court separately established that the national authorities had not acted inconsistent and that there was no indication that the sponsor was incapable of satisfying the sufficient resources condition. For a detailed discussion of this case, see section 2.6.2.4.

[305] *Rodrigues Da Silva and Hoogkamer v the Netherlands* (ECtHR, 31 January 2006) ECHR 2006-I.

Cluster II - Non-compliance with individual interest-related criteria

In cases where procedural immigration rules are not at issue, the flowchart directly leads to cluster II (non-compliance with individual interest-related criteria). The path to be followed from here is essentially the same as described above: if non-compliance with individual interest-related criteria is not at issue, the flowchart leads to cluster III. If the facts of the case do show the emergence of non-compliance with individual interest-related criteria, the decision-model on the basis of the indicative factors applies. If the Court establishes that the national rules were applied consistently and correctly and if there is no good excuse for non-compliance, denying residence is considered not to violate Article 8 ECHR. These cases are enlisted under cluster II-A. In every other case the Court concludes that denying residence will violate Article 8 ECHR. These cases are enlisted under cluster II-B.

Again, 'removing' the obstacle for attaching decisive weight to the individual interest in being granted residence consistently results in a violation of Article 8 ECHR. In two cases of cluster II-B, the very establishment of an incorrect or inconsistent application of individual interest-related criteria precluded that decisive weight was attached to the other reasons put forward for denying residence. In *Sezen*,[306] the unjust assumption that the applicants' marriage had broken down on the basis of a six-month separation, affected the significance that could be attached to the offences that were committed before that separation. If the authorities had correctly applied the individual interest-related criterion, the applicant would have kept his settlement permit. In that case, as was explicitly stated, the offences could not have lead to his expulsion.[307] A similar situation is at issue in the case of *Hasanbasic*.[308] The authorities had stopped regarding the applicant as a settled immigrant after he had announced his definitive return to his country of origin, while in fact he had only been absent for four months. Accepting that this entailed an inconsistent application of national rules, inevitably affected the significance to be attached to the remaining grounds that were invoked. If the authorities had treated the applicant correctly, that is, as a settled immigrant, the other reasons in themselves would not have resulted in his expulsion. Before the applicant's temporary absence from the host State there was never any sign that because of his financial situation or his criminal record he was at risk of losing his residence status.[309] In the remaining cases of cluster II-B, no additional reasons had been put forward by the State to

[306] *Sezen v the Netherlands* App No 50252/99 (ECtHR, 31 January 2006).
[307] ibid para 48.
[308] *Hasanbasic v Switzerland* App no 52166/09 (ECtHR, 11 June 2013).
[309] That such circumstances would have been put forward by the Swiss authorities follows from cases such as *Gezginci* and *Palanci*, discussed in section 2.5.

justify denying residence. The alternative of a violation after the occurrence of an inconsistency, incorrectness or good excuse is therefore left out of the flowchart.

Cluster III - Non-compliance with income-related criteria

If no procedural aspects of immigration law or individual interested-related criteria are at stake, it is evaluated whether the case may be decided within cluster III (non-compliance with income-related criteria). If non-compliance with income-related criteria is not at issue, the flowchart leads to cluster IV. If the facts of the case do show the emergence of non-compliance with income-related criteria, the decision-model on the basis of the indicative factors applies. If the Court establishes that the national rules were applied consistently and correctly and if there is no good excuse for non-compliance, denying residence is considered not to violate Article 8 ECHR. These cases are enlisted under cluster III-A. In the alternative, the Court concludes that denying residence will violate Article 8 ECHR. This one case is enlisted under cluster III-B. In the latter instance, again, Article 8 ECHR is violated despite the occurrence of other reasons for denying residence.

The systematic approach following the indicative factors brings clarity in a number of cases featuring income-related reasons for denying residence. In *Haydarie*,[310] for example, it becomes obvious – at least in terms of consistency – that despite the fact that both the authorities and the Court had acknowledged that there were insurmountable obstacles to pursue family life in the applicant's country of origin, this aspect was not decisive for the outcome of the case. The circumstance that the income requirement had been applied correctly and that the applicant had no good excuse for non-compliance, precluded decisive importance to be attached to the individual interest. The conclusion that denying residence to the children of an acknowledged refugee did not violate Article 8 ECHR is therewith consistent with the logic that follows from a scheme in which only the indicative factors determine the outcome of a case. Likewise, in *Palanci*, *Gezginci*, *Konstatinov*, and *Udeh*, the occurrence or absence of a good excuse for non-compliance explains the outcome of the case.[311] In the former three cases the Court rejected that the applicants had a good excuse for lacking sufficient resources. 'Consequently' denying residence was not considered to violate Article 8 ECHR. In *Udeh*, in which the Court *did* find that

[310] *Haydarie v the Netherlands* (dec.) App no 8876/04 (ECtHR, 20 October 2005).

[311] *Konstatinov* and *Gezginci* are placed in different clusters in the flowchart. *Konstatinov* in cluster I-A because of the applicant's irregular residence, and *Gezginci* in cluster II-A because I found that the lack of economical ties with the host country better fits in with non-compliance with individual interest-related criteria than with income-related criteria. For the analysis, the different placement is not of relevance.

denying residence would violate Article 8 ECHR, it was accepted that the applicant had put great effort to improve his financial situation.[312]

Finally, the fact that in a considerable number of cases the issue of non-compliance with income requirements is left unaddressed altogether (e.g. *Chandra*; *Gül*) makes perfect sense; again, to be sure, in view of the decision-model based on the indicative factors. These cases contain aspects that connect to clusters I and II. On that basis, the decision-model already 'precluded' that Article 8 ECHR would be violated. A discussion of income-related aspects therefore would not have been of separate relevance.

Cluster IV - Criminal convictions

If none of the reasons falling under the heading of clusters I-III is at issue, the flowchart continues in cluster IV (criminal convictions). If the case features criminal convictions, the next aspect to be addressed is the occurrence of 'additional aspects of immigration control'.

'Additional aspects of immigration control'

'Additional aspects of immigration control' are at issue, firstly, if the commission of offences is in some way interlaced with procedural aspects of immigration law, that is, if offences were committed while the residence status of the applicant was of a precarious nature. This is self-evidently the case if offences were committed while the applicant was not in the possession of a (secure) residence permit; but also if offences are committed after a person is warned that further offences (or behaviour that is otherwise considered inappropriate) may be sanctioned with withdrawal of his residence permit; or, finally, if offences were committed after the applicant had been informed of a(n) (intended) decision to revoke his residence permit.[313]

If crimes are committed while the residence status of the applicant was of a precarious nature, the Court generally concludes – there are two exceptions - that denying residence does not violate Article 8 ECHR.[314] The first exception is the case

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[312] For a detailed discussion of these cases, see section 2.5.

[313] Cases in which irregular entry or residence as such are held against a person are placed in Cluster I.

[314] *Headley and Others v the United Kingdom* App No 39642/03 (ECtHR, 1 March 2005); *Davydov and Others v Ukraine* App Nos 17674/02 and 39081/02 (ECtHR, 1 July 2010); *Mccalla v the United Kingdom* App No 30673/04 (ECtHR, 31 May 2005); *Angelov v Finland* (dec.) App No 26832/02 (ECtHR, 5 December 2006); *Tran v Norway* App No 34049/05 (ECtHR, 14 June 2007); *Joseph Grant v the United Kingdom* App No 10606/07 (ECtHR, 8 January 2009); *Onur v the United Kingdom* App No 27319/07 (ECtHR, 17 February 2009); *Narenji Haghighi v the Netherlands* App No 38165/07 (ECtHR, 14 April

of *Jakupovic*,[315] in which it was considered of relevance that the applicant at the time of his expulsion had been sixteen years of age:

> 29. [T]he Court considers that very weighty reasons have to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which has recently experienced a period of armed conflict with all its adverse effects on living conditions and with no evidence of close relatives living there.
> 30. The Government rely in this respect on the applicant's criminal record. The Court finds that this record, which is the essential element of justification for the expulsion, must be examined very carefully. It consists of two convictions for burglary. The Court cannot find that these convictions – even taking into account a further set of criminal proceedings which were discontinued after the victim had been compensated by the applicant – for which the Austrian courts had only imposed conditional sentences of imprisonment can be considered particularly serious as these offences did not involve elements of violence. The only element which may indicate any tendency of the applicant towards violent behaviour was a prohibition to possess arms issued in May 1995. Although the seriousness of such a measure should not be underestimated, it cannot be compared to a conviction for an act of violence, and there is no indication that such charges have ever been brought against the applicant.[316]

Arguably, the applicant's young age in *Jakupovic* may have counted as a circumstance that diminished the accountability for the applicant's actions in relation to the additional aspect of immigration control, which would render the outcome of this case consistent with the decision-model described in relation to clusters I-III. Another exemption to the rule that offences committed during a precarious residence status will not result in a violation is the case of *Omojudi*.[317] In this case, the Court noted that after the applicant had committed the offences in view of which he was expelled, he had been granted an indefinite residence permit:

> In the present case the applicant was granted Indefinite Leave to Remain following his conviction for relatively serious crimes involving deception and dishonesty. The Court attaches considerable weight to the fact that the Secretary of State for the Home Department, who was fully aware of his offending history, granted the applicant Indefinite Leave to Remain in the United Kingdom in 2005. […]

2009); *Andrews v the United Kingdom* App No 46263/06 (ECtHR, 29 September 2009); *Yesufa v the United Kingdom* App No 7347/08 (ECtHR, 26 January 2010); *Trabelsi v Germany* App No 41548/06 (ECtHR, 13 January 2012); *A.H. Khan v the United Kingdom* App No 6222/10 (ECtHR, 20 December 2011); *Abdi Ibrahim* App No 14535/10 (ECtHR, 18 September 2012); *Shala v Switzerland* App No 52873/09 (ECtHR, 15 November 2012); *El-Habach v Germany* App No 63867/11 (ECtHR, 22 January 2013).

[315] *Jakupovic v Austria* App no 36757/97 (ECtHR, 6 February 2003).

[316] ibid paras 29-30.

[317] *Omojudi v United Kingdom* App No 1820/08 (ECtHR, 24 November 2009).

> 43. Therefore, in the circumstances of the present case, the Court finds that for the purposes of assessing whether the interference with the applicant's family and private life was necessary in a democratic society, the only relevant offences are those committed after the applicant was granted Indefinite Leave to Remain.[318]

Although the applicant in *Omojudi* had committed further offences after the grant of an indefinite leave to remain, these were not considered sufficiently serious to autonomously justify his expulsion.[319] Importantly, however, given the inconsistency on the national level in relation to the additional aspect of immigration control the outcome of this case can be said to be consistent with the decision-model described in relation to clusters I-III.[320]

A second 'additional aspect of immigration control' in criminal conviction cases concerns the failure to have obtained the nationality of the host State. As such, not having obtained the nationality of the host State does not pose a reason for denying residence. Yet, having the nationality of the host State does prevent a person from being expelled for criminal convictions. In cases where the applicant had failed to obtain the nationality of the host State when arguably he was in the position to do so, this aspect becomes decisive in the Court's scrutiny.

In the case of *Sayoud*,[321] the host State had failed to recognise that the applicant in fact always had had the French nationality. As a result of this incorrect application of national rules, the expulsion decision was considered to violate Article 8 ECHR

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[318] ibid paras 42-43. In *A.A. v the United Kingdom* the applicant had invoked the same inconsistency, but in that case the Court accepted the governments position that at the time of granting indefinite leave to remain, it was not aware of the applicant's convictions. (*A.A. v the United Kingdom* App No 8000/08 (ECtHR, 20 September 2011), para 60).

[319] *Omojudi* (n 317), para 44.

[320] Illustrative for the starting point that offences during a precarious residence status in principle lead to a violation of Article 8 ECHR, is the dissenting opinion of Judges Caflisch, Kūris and Ress in the *Jakupovic* case: 'The decisive element [for disagreeing with the majority, EH], however, appears to be that, shortly after having been convicted for a second series of offences, in 1995, and a consecutive ten-year residence prohibition, the applicant committed a new series of burglaries for which he was, again, convicted. This is evidence of the applicant's callousness and of the contempt in which he held the laws and institutions of his host country, and also of the danger he presented to that country. To us, these elements should override any doubts one might otherwise have had regarding the proportionality of the measure. Accordingly, we see no violation of Article 8.'

[321] *Sayoud v France* App No 70456/01 (ECtHR, 26 July 2007).

for not being in accordance with the law.[322] In the cases of *Beldjoudi*[323] and *Mehemi*[324] the Court observed that the applicants could not be held accountable for not having obtained the French nationality when this was possible. The excuse for not having the French nationality stemmed from the fact that the applicants at the time were minors and that their parents had neglected to make the necessary administrative arrangements for the applicants. In *Beldjoudi*, the Court observed the following in this regard:

> 77. Mr Beldjoudi, the person immediately affected by the deportation, was born in France of parents who were then French. He had French nationality until 1 January 1963. He was deemed to have lost it on that date, as his parents had not made a declaration of recognition before 27 March 1967 (see paragraph 9 above). It should not be forgotten, however, that he was a minor at the time and unable to make a declaration personally. Moreover, as early as 1970, a year after his first conviction but over nine years before the adoption of the deportation order, he manifested the wish to recover French nationality;[325]

The case of *Jeunesse*, which because of the date restriction has not been included in the case-law analysis in chapter 2, is a recent example of a violation case in which significance has been attached to the fact that the applicant had lost the nationality of the host State not by her own choice:

> The Court further notes that the applicant held Netherlands nationality at birth. She subsequently lost her nationality when Suriname became independent. She then became a Surinamese national, not by her own choice but pursuant to Article 3 of the Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality.[326]

There are also cases in which the Court found that the applicant *could* be held accountable for not having obtained the host State's nationality when this was possible, among which, the case of *Baghli*:

> Furthermore, he retained his Algerian nationality and has never suggested that he cannot speak Arabic. He performed his military service in his country of origin and went there

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[322] ibid para 23-24.

[323] *Beldjoudi v France* (ECtHR, 26 March 1992) Series A no. 234-A.

[324] *Mehemi v France* (ECtHR, 26 September 1997) Reports of Judgments and Decisions 1997-V.

[325] *Beldjoudi* (n 323), para 77. See for the same argument *Mehemi* (n 324), paras 31-32.

[326] *Jeunesse v the Netherlands* [GC] App No 12738/10 (ECtHR, 3 October 2014), para 115. I thank Sander Schuitemaker for pointing out to me the occurrence of a good excuse in this particular case.

> on holiday several times. *It appears, too, that he never evinced a desire to become French when he was entitled to do so*.[327]

In the cases where the applicant could not be excused for not having obtained the nationality of the host State while this was possible, denying residence has not been found to violate Article 8 ECHR.[328]

In view of the foregoing, it seems that criminal conviction cases featuring 'additional aspects of immigration control' follow the decision-model based on the indicative factors. If with regard to these aspects the Court finds that the national authorities acted consistently and correct, and if there was no good excuse in relation to these aspects, Article 8 ECHR is not violated (cluster IV-A). If on the other hand the authorities acted inconsistent or incorrect with regard to the additional aspects of immigration control, or if the occurrence of this aspect could not be held against the applicant, the Court finds that denying residence does violate Article 8 ECHR (cluster IV-B).

Cases with no 'additional aspects of immigration control'

In cases where no additional aspects of immigration control are at issue, it seems that the outcome is determined by a balancing act. Arguably, the term 'balancing' is justified in this context, because in these cases there are no factors that fix the outcome of a case because of their mere occurrence. It appears therefore to be a matter of competing interests.[329] This does not mean, however, that an incorrect or inconsistent application of national rules or a good excuse for non-compliance is altogether irrelevant. In *Nasri*, for example, the commission of offences by the applicant was placed in the light of the fact that the applicant was handicapped, while the State had failed poorly in providing essential support in enabling the applicant and his parents to adequately deal with this handicap. In the description of the facts of the case, amongst others the following is noted:

> 8. On their arrival in France in 1965 Mr and Mrs Nasri wanted to enrol their son in kindergarten, but he was refused admittance on account of his handicap. They then sought to have him admitted to the Institut Saint-Jacques in Paris, a specialist establishment for the deaf and dumb. The institute could not however take him because of a lack of places and because his intellectual level was not regarded as sufficient. As a result Mr Nasri was not able to attend a school until 1968. n that year, after a social worker had intervened, he was admitted to the Centre audiométrique médico-psychopédagogique at Boulogne

[327] *Baghli v France* (ECtHR, 30 November 1999) ECHR 1999-VIII, para 48.

[328] This is the case in *Baghli* (n 327); *Benhebba v France* App No 53441/99 (ECtHR, 10 July 2003), paras 23-24.

[329] In Chapter 4 it is discussed in more detail how the Court's approach to Article 8 ECHR immigration cases relates to the notion of balancing.

> (Hauts-de-Seine) (a school specialising in hearing and speech difficulties). There he underwent therapy for his condition and received training adapted to his needs. On 11 December 1971 he was expelled for violent behaviour.
> 9. He then spent a further period with no schooling or training, which lasted until 1974, when he entered a training centre for the deaf and dumb at Tours (Indre-et-Loire). However, as his parents were unable to pay the boarding fees, he was returned to them after seven months.[330]

The lack of state-support in relation to the applicant's handicap reappears in the Court's conclusion on the proportionality of the expulsion measure:

> 43. Above all it is necessary to take account of Mr Nasri's handicap. He has been deaf and dumb since birth and this condition has been aggravated by an illiteracy which was the result in particular of largely inadequate schooling, even though this was to a certain extent attributable to the applicant since on account of his bad behaviour he was expelled from the establishments that he attended. Like the Delegate of the Commission, who relied on the expert reports concerning the applicant, the Court is inclined to the view that, for a person confronted with such obstacles, the family is especially important, not only in terms of providing a home, but also because it can help to prevent him from lapsing into a life of crime, all the more so in this instance inasmuch as Mr Nasri has received no therapy adapted to his condition.[331]

In addition to diminishing the applicant's accountability as regards the offences that had been committed, the Court furthermore pointed out the fact that with regard to the most serious offence that had been held against the applicant, he had not been the instigator and that moreover he had not re-offended. It therefore appears that the 'accountability-factor' in *Nasri* certainly influenced the Court's evaluation of the weight of the public interest in denying residence, although it did not replace the latter aspect altogether.

In a number of cases, there were inconsistencies with regard to the sanction that had been imposed: the expulsion order and/or the ban on entry. In two cases, *Moustaquim*[332] and *Bousarra*,[333] the applicant had been expelled against an explicit advice *not* to do so. Moreover, this advice came from a national authority that was especially designated to evaluate the appropriateness of expulsion decisions. In other words, in these cases the State had acted inconsistently, one may also say incorrectly, by disregarding the conclusions of its own authorities. In five other cases, the sanction-related issue concerned the impossibility of having reconsidered the

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[330] *Nasri v France* (ECtHR, 13 July 1995) Series A no. 320-B, paras 8-9.
[331] ibid para 43.
[332] *Moustaquim v Belgium* (ECtHR, 18 February 1991) Series A no. 193.
[333] *Bousarra v France* App No 25672/07 (ECtHR, 23 September 2010).

duration of the entry ban that had been imposed. In *Ezzouhdi*[334] and *Keles*,[335] the authorities had failed to respond to the applicant's request(s) to diminish or set a time-limit to an indefinite entry ban; and in *Yilmaz*[336] and in *Emre (I)*[337] the possibility for the applicant to make a request for limitation of the indefinite entry ban was absent or remained 'purely speculative' altogether.

Notably, in relation to the commission of crimes the young age of a person is not a decisive factor: not always if a young person commits crimes the Court concludes that denying residence violates Article 8 ECHR. This is different from what we have encountered in relation to additional aspects of immigration control.[338]

Finally, in cases with no additional aspects of immigration control, not every violation in criminal conviction cases is the result of an inconsistent or incorrect application of national rules, or of a good excuse for non-compliance. Even if it is established that the national authorities have acted consistently and correctly and that the applicant could be held accountable for his crimes, it is possible that decisive weight is attached to the individual interest in being granted residence. The individual interest in being granted residence thus may in itself outweigh the public interest in the prevention of crime.

Cluster V - National security

If a case does not feature any of the aspects entailed in the clusters I-IV, the flowchart continues with establishing whether residence has been denied because of an alleged threat to national security (cluster V). If this is indeed the case, the first step is to verify whether on the national level, it had been possible to subject the facts on which the alleged threat was founded to a meaningful scrutiny. If it was indeed impossible for the applicant to defend himself against the allegation that he posed a threat to national security, denying residence is inevitably considered to violate Article 8 ECHR (cluster V-A).[339]

If, on the other hand, such scrutiny did take place on the national level, arguably, the outcome is the result of a balancing act that either turns out in favour of the

[334] *Ezzouhdi v France* App No 47160/99 (ECtHR, 13 February 2001).
[335] *Keles v Germany* App No 32231/02 (ECtHR, 27 October 2005).
[336] *Yilmaz v Germany* App No 52853/99 (ECtHR, 17 April 2003).
[337] *Emre v Switzerland (I)* App No 42034/04 (ECtHR, 22 May 2008).
[338] The commission of crimes by a young person as such is thus to be distinguished from the situation in *Jakupovic*, where a minor committed further offences *during a precarious residence status*.
[339] For a detailed discussion of these cases, see section 2.3.

interest in protecting national security (cluster V-B)[340] or in the individual interest in being granted residence (cluster V-C).[341] A violation of Article 8 ECHR may occur despite the fact that the national rules have been applied correctly and consistently and in the absence of a good excuse for non-compliance. In that case, it is therefore not categorically ruled out that the individual interest in being granted residence outweighs the public interest in protecting national security. The indicative factors, however, are not without relevance. In *Kurić* the Court found that the applicants could not have foreseen the consequences of their untimely registration as a citizen of the newly independent Republic of Slovenia after the dissolution of the SFRY. Moreover, despite their efforts, the applicants had been unable to otherwise regularise their status in Slovenia, which was due to a failure of the legislature to enact the necessary provisions. In addition to the 'good excuse' aspect, the Court also evaluated the weight of the public interest at stake:

> 357. Allegedly, the "erasure" was a consequence of their failure to seek to obtain Slovenian citizenship. However, the Court points out that an alien lawfully residing in a country may wish to continue living in that country without necessarily acquiring its citizenship. As shown by the difficulties faced by the applicants, for many years, in obtaining a valid residence permit, the Slovenian legislature failed to enact provisions aimed at permitting former SFRY citizens holding the citizenship of one of the other republics to regularise their residence status if they had chosen not to become Slovenian citizens or had failed to do so. Such provisions would not have undermined the legitimate aims of controlling the residence of aliens or creating a corpus of Slovenian citizens, or both.[342]

Since none of the national security cases was apparently decided solely on the basis of the indicative factors, this alternative is not included in the flowchart.

Cluster VI - National health

Finally, if none of the reasons entailed in clusters I-V are at issue, the case is discussed under the heading of *cluster VI*. In the single case that is included here,

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[340] *Haliti v Switzerland* (dec.) App No 14015/02 (ECtHR, 1 March 2005). In this case the Court established that the national procedure contained sufficient safeguards against arbitrary decision making. It further accepted the governments assertion that there were sufficient grounds to believe that the applicant's activities jeopardised the international relations between Switzerland and a.o. the former Yugoslavic Republic of Macedonia; and finally, that the individual interest in being granted residence did not outweigh the interest in protecting national security.

[341] *Slivenko v Latvia* [GC] (ECtHR, 9 October 2003) ECHR 2003-X, discussed in section 2.3.

[342] *Kuric and others v Slovenia* App no 26828/06 (ECtHR, 13 July 2010), para 357.

Kiyutin v Russia,[343] the occurrence of so-called indicative aspects is not at issue. Arguably, the outcome of this case is based on a balancing assessment. The consideration that denying residence insufficiently contributed to the aim of protecting national health lead the Court to conclude that denying residence was not in accordance with Article 8 ECHR (cluster VI-B).

3.3 Predicting the outcome of Article 8 ECHR immigration cases?

In the beginning of this chapter I raised the question to which extent the outcome of Article 8 ECHR immigration cases corresponds to the occurrence of the so-called indicative factors: a correct and consistent application of the national immigration rules at issue and the good excuse for non-compliance with these rules. This resulted in a flowchart, in which on an empirical basis, each case has been appointed to a (sub)cluster of cases.

Leaving aside the 16 national security cases in which, due to secret procedures on the national level, the decision concerned was considered not in accordance with the law − we find that in 79 out of 135 cases, the outcome follows the decision-model based on the indicative aspects. Does this mean that in these 79 cases the outcome could be predicted on the basis of the aforementioned decision-model? I do not believe that this is the case. To a certain extent, whether national criteria have been applied consistently and correctly and whether the applicant can be held accountable is a matter of interpretation and of emphasis placed by the Court on certain circumstances. However, in a considerable number of cases there are just no circumstances indicating that the rules at issue are applied inconsistent or incorrect, or that there is a good excuse for non-compliance. In *Antwi*, for example, or in *Chandra*, the facts of the case immediately show that the decision-model will not result in a violation of Article 8 ECHR. To a certain extent, therefore, it is indeed possible to indicate the outcome of Article 8 ECHR immigration-cases.

These findings call for an explanation: why is it that the outcome of cases in clusters I-III strictly follow the decision-model based on the indicative factors, while this is different in the other three clusters? And what is the significance of the fact that precisely these three factors are of decisive importance for the outcome of individual cases? Furthermore, these findings raise the question of how the judicial approach in these cases relates to the fact that the Court consistently indicates that it is crucial to establish whether a fair balance was struck between the competing interests at stake. I will address these questions in the following chapter.

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[343] *Kiyutin v Russia* App no 2700/10, ECHR 2011.

Chapter 4 The ECtHR's approach expounded

4.1 Introduction

This chapter expounds the results of the systematic content analysis presented in the preceding chapters of Strasbourg Article 8 ECHR immigration cases. I will zoom in on the three main features of Strasbourg adjudication of the public interest in denying residence to foreign nationals.

The first feature entails that the Court's approach differs according to the various categories of reasons for denying residence. A dividing-line can be discerned between on the one hand procedural immigration rules, individual interest-related criteria and income-related criteria (in chapter 3 appointed to clusters I-III) and criminal convictions, national security and national health on the other (appointed to clusters IV-VI). When it comes to the latter three categories of reasons, the Court evaluates the facts underlying a claim that a foreign national should be denied residence because of criminal convictions, national security or national health. The Court may disagree on the seriousness of criminal offences; likelihood of re-offending; or, on whether the applicant poses a sufficient threat to national security or national health. The contrast with the approach to procedural immigration rules, individual interest-related criteria and income-related criteria, is striking. With regard to the latter three types of reasons, the Court does seem to evaluate the seriousness of the facts, but without exception, the Court remains strictly confirmative of the perspective put forward in this regard by the national authorities. The Court has not yet disagreed with the national authorities on whether non-compliance with such national rules indeed posed a sufficient reason for denying residence.

The second feature of the Strasbourg approach concerns the identified pattern of scrutiny in cases featuring one of the reasons appointed to clusters I-III. I have noticed that in these cases, the outcome corresponds to the question whether the rules at issue were applied correctly and consistently, or whether there was a good excuse for non-compliance. While a number of other aspects are addressed, such as the seriousness of offences or the existence of insurmountable obstacles to return to the country of origin, there is not a single case in which these other aspects were decisive

for the outcome. Time and again the outcome has shown to correspond to the occurrence of the aforementioned indicative aspects.

In cases where none of the reasons of clusters I-III are at issue, there is no strict correlation between the occurrence of indicative factors and the outcome of a case. Admittedly, in these cases (in the previous chapter appointed to clusters IV-VI) an inconsistent or incorrect application of national rules, or a good excuse for non-compliance is of influence on whether denying residence violates Article 8 ECHR. However, a violation of Article 8 ECHR may occur under different circumstances as well. Even in instances of a consistent and correct application of national rules and in the absence of a good excuse for non-compliance, the Court can decide that denying residence is not compatible with Article 8 ECHR. This is different, however, if cases appointed to clusters IV-VI feature 'additional aspects of immigration control'. If offences were committed during a precarious residence status, or if the question arose whether the applicant's nationality should prevent his expulsion, the indicative factors *are* decisive for the outcome of the case.

The third feature of the Court's approach to the public interest in denying residence explored in this chapter, relates to the observation that the Court accedes to a generic interest in controlling or restricting immigration as an independent justification for denying residence to foreign nationals. The very interest in deciding who is and is not allowed entry and residence into the host State, as well as in quantitatively restricting immigration, appear to operate as autonomous legitimate interests in the context of Article 8 ECHR. Consequently, no substantive objections against an individual's presence in any host State are necessary for a legitimate interest in denying entry or residence.

Outline of this chapter

Section 4.2 discusses how the Court's approach in Article 8 ECHR immigration cases relates to the margin of appreciation accorded to States in pursuing immigration policies. I contend that to the extent that the outcome of Strasbourg Article 8 ECHR immigration cases corresponds to the aforementioned decision-model, States enjoy a full margin of appreciation that extents both to setting out national restrictive criteria for entry and residence and to balancing the interests at stake in individual cases. Consequently, the outcome of these cases cannot be said to be the result of an evaluation of whether on the national level a fair balance was struck between the competing interests at stake.

The aim of section 4.3 is to clarify the dividing-line between cases in which the Court shows deference to national decision-making in the area of immigration and cases in which the Court does evaluate the weight of the competing interests. I will introduce a factual distinction between these cases that allows us to obtain a comprehensive picture of Strasbourg scrutiny in Article 8 ECHR immigration cases.

It concerns the distinction between aspects that only within the context of immigration can be relevant in deciding on a person's physical exclusion from society as a whole (immigration-specific aspects), and aspects that also in other policy areas determine whether a person may be physically excluded from society as a whole. I show that the aforementioned dividing-line between balancing and full margin cases corresponds with whether or not a case features immigration-specific aspects. Following this, I explain how the dividing-line found in Strasbourg case law reflects the limits of Strasbourg scrutiny, the crossing of which would compel the Court to interfere with States' prerogative to set out immigration-specific criteria for physical exclusion of individuals and to determine the relative weight of non-compliance with such criteria.

Section 4.4 discusses why despite a rather clear pattern of scrutiny in a substantial part of Article 8 ECHR immigration cases, the Court's approach at the same time can be qualified as inconsistent and lacking transparency. I explain the consequence of the Court's consistent presentation of cases as being the result of balancing while in fact in a substantive number of cases a full margin of appreciation applies. This practice has resulted in a distorted perception of the scope of Strasbourg's scrutiny. Moreover, preaching balancing while practicing deference to national immigration policies has created a potential bias in the political and legal discourse on the national level. Finally, I explain how the acceptance of an unspecified interest in controlling immigration as an autonomous justification for denying residence, creates a technical obstacle for the Court to provide protection against arbitrary decision-making.

I conclude in section 4.5 by explaining that criticism of the Court's approach to Article 8 ECHR immigration cases cannot easily be remedied within the boundaries of the current premises employed by the Court. I argue that to uphold the assertion, that cases in which both immigration and family or private life are at stake are *not* categorically excluded from the protection of Article 8 ECHR; this requires either substantive scrutiny of the public interest in denying residence, or acknowledgment of a concrete minimum threshold of substantive protection of an individual interest in being granted entry or residence. Otherwise, these cases simply do not fall within the scope of protection of Article 8 ECHR. Article 8 ECHR, as it allows for general exceptions to be made in view of pursuing the public interest, cannot provide protection, if both a minimum level of scrutiny of the public interest in denying residence and a minimum-level of protection of the individual interest in being granted residence are lacking. I conclude by explaining why the decision-model, on the basis of which the Court's scrutiny is effectively confined to examining the correct and consistent applications of national criteria, giving leeway only if the applicant cannot be held accountable for non-compliance with the criterion at issue, cannot count as judicial protection of the right to respect for family or private life under Article 8 ECHR.

4.2 The ECtHR's approach framed in terms of judicial deference

4.2.1 A full margin of appreciation in setting out restrictive immigration criteria and in balancing the interests at stake

In the context of international judicial scrutiny of State conduct, deference refers to the practice in which the international court refrains from substantively scrutinising decision-making by national authorities. The degree to which the Court defers to national decision-making may also be formulated in terms of the margin of appreciation that States enjoy in making such decision.[344]

To the extent that the Strasbourg Court in relation to national immigration criteria consistently expresses itself in a confirmative manner, this reflects a form of judicial deference: making only affirmative comments with regard to national immigration criteria produces no *critical* standards that can be used to evaluate these criteria.

Also the decision-model discussed in the previous chapters reflects deference being paid. If a violation of Article 8 ECHR can be accepted only if national criteria for entry or residence were applied incorrectly or inconsistently, or in case of a good excuse for non-compliance, irrespective of any substantive objections against an individual's presence in the host State, this inevitably leaves untouched the capacity of these national criteria to control or restrict immigration. This can be exemplified by taking a case in which residence has been denied for failure to obtain a provisional residence visa abroad. Imagine that the Court would acknowledge that the national authorities had correctly and consistently applied the immigration criterion at issue, but that the applicant had never caused any problems in the host State, so that the failure to obtain a provisional residence visa abroad did not amount to a sufficient reason for denying residence; and that for his reason, the decision to deny residence violated Article 8 ECHR. Clearly, this would oblige the State to reconsider failure to obtain a provisional residence visa abroad as a valid criterion for entry or residence. Indeed, in future cases, States would be compelled to grant residence in the absence of substantive objections against the applicant.

Now imagine that the Court in the same case, with acknowledgment of the correct and consistent application of the criterion by the national authorities, would consider that given the individual hardship caused by the decision to deny residence, the State had violated Article 8 ECHR. This conclusion would have forced the State to reconsider the relative weight attached to failure to obtain a provisional residence visa abroad. In future cases with similar individual interests at stake, the State would

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[344] George Letsas, *A Theory of Interpretation of the Human Convention on Human Rights* (Oxford University Press 2007), Lukasz Gruszczynski and Wouter Werner, *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford University Press 2014) 3.

no longer be allowed to prioritise enforcing this requirement. A Strasbourg conclusion that denying residence has violated Article 8 ECHR, *based on the weight of the competing interests in the case at hand*, would, in other words, affect the merits of the restrictive criterion at issue, or the ability to prioritise enforcing this criterion.

Conversely, a strict correlation between the so-called indicative factors and the outcome of a case as described in the previous chapters implies that States are *not* compelled to reconsider the validity of national criteria for entry or residence or the relative weight attached to non-compliance. Indeed, as argued in chapter 3, the Court's assessment of the (in)correct or (in)consistent application of criteria appointed to clusters I-III does not comprise an evaluation of any substantive objections against an individual's presence in the host State.[345] For this reason, such assessment does not comprise an evaluation of the validity of these critera or of the weight of the public interest in enforcing them.

Notably, the Court showing deference to States in setting out criteria for entry and residence does not make it inevitable that the public interest in upholding such criteria could never be outweighed by a more substantial individual interest in being granted residence. This is, however, nevertheless what happens in cases following the decision-model based on the indicative factors: if residence was denied for non-compliance with a correctly and consistently applied immigration criterion, a violation of Article 8 ECHR is only possible if the applicant had a good excuse for non-compliance with the rules at issue. Yet, as exemplified on various occasions in chapter 2, whether a person can be held accountable for non-compliance with restrictive immigration criteria cannot be put on a par with establishing the interest of this person in being granted residence. Consequently, in cases following the decision-model, the individual interest in being granted residence never in itself is the cause for such violation.

To refrain from substantive scrutiny with regard to both the public interest in denying residence in the case at hand and the individual interest in residence being granted means that in the cases at issue the Court practices deference. *A fortiori*, a judicial approach that consistently leaves untouched the validity of national immigration criteria and the (relative) weight of the competing interests at stake implies that States enjoy a full margin of appreciation in this regard.

The next section explains why, to the extent that Article 8 ECHR immigration cases follow the decision-model, the Court's qualification of its approach in terms of balancing the competing interests is inadequate.

[345] Section 3.2.

4.2.2 Subsumption rather than balancing competing interests

Balancing may be described as a method of judicial reasoning in which the conclusion on whether a decision is in accordance with legal norms involves assigning values to the relevant competing interests.[346] A crucial feature of balancing is that the interests that are at stake must be able to actually *compete* with each other.[347] This implies a manner of reasoning in which relevance is attached to aspects that have the potential to either diminish or increase the weight or value to be attached to the competing interests.[348] A judicial opinion that is based on the *categorical* rejection or prioritisation of a particular interest - i.e. irrespective of the value or weight to be attached to the other, competing interest - cannot be qualified as being based on a balancing exercise.[349] Rather, such reasoning may be qualified as what has been termed by Alexy as *subsumption*.[350]

In a subsumption-scheme, the fulfilment of one or more minor premises logically leads to a certain conclusion. To recall a well-known example: starting from the major premise that all human beings are mortal, the fulfilment of the minor premise entailing that Socrates is a human being leads to the logical conclusion that Socrates is mortal. In this scheme, no additional information is required to justify the conclusion that Socrates is mortal, nor can any additional information detract from the correctness of this conclusion. In a scheme of reasoning that is based on subsumption, the factors that are of relevance for the conclusion are restricted by the premises that make up the subsumption-scheme: aspects that are not covered by the premises of the subsumption-scheme do not have the capacity to affect what counts as the logically correct conclusion. Notably, the use of a subsumption-scheme does not mean that interests that are opposed to each other cannot equally play a role in

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[346] Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 The Yale Law Journal 943, 945; Robert Alexy, 'On Balancing and Subsumption: A Structural Comparison' (2003) 16 Ratio Juris 433,436.

[347] Aleinikoff speaks in this regard of a method of adjudication whereby 'each interest seeks recognition on its own and forces a head-to-head comparison with competing interests.' Aleinikoff (n 346) 945.

[348] Questions relating to the incommensurability of interests, *i.e.* questions that regard the issue whether it is even possible to establish a common metric as a basis for balancing do not fall within the scope of this research. Here, the aim is to establish whether the Court's argumentation involves assigning value to the interests at stake without categorically dismissing one of the interests at stake. For a discussion of the issues and literature relating to the incommensurability of interests in judicial balancing, see a.o. Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012) 58-66.

[349] Aleinikoff (n 346) 946.

[350] Alexy (n 346) 434.

establishing a logically correct conclusion. Indeed, it is very well possible to include premises in a subsumption-scheme that have the result that significance is attached to two opposing interests. Take for example a scheme entailing that a foreign nationals who commit murder should be expelled, unless the foreign national is an acknowledged refugee. This obviously concerns a subsumption-scheme, since the outcome of the case is the logical result of the fulfilment of the premises, but in which the minor premises refer to opposing interests (the public interest in the prevention of crime and the individual interest of acknowledged refugees not to be expelled).[351]

In a balancing scheme it is not possible to freely exclude aspects from being of relevance: ultimately, the interests at stake must be able to compete with each other and the establishment of the one interest may not in itself, that is, irrespective of the weight of the opposing interest, determine the outcome of the case. Of course, it is possible to restrict the scope of a balancing scheme by allowing only a limited range of competing interests to be taken into account. It may, for example, be decided that the right to respect for family life may be interfered with, only if this is necessary in view of the legitimate aims enlisted in Article 8(2) ECHR. Or, it could be decided that the relationship between unwedded partners does not constitute family life. Yet, in order to qualify as balancing, within the boundaries of the identified interests, it is crucial that the occurrence of one interest does not categorically rule out the significance of the other, opposing interest. As explained in the previous section, however, this is precisely what happens in cases following the decision-model. In section 4.4 I discuss the significance of the observation that the Court in a considerable number of cases applies a subsumption scheme rather than conducting a balancing act.

4.3 Defining the boundaries of Strasbourg scrutiny in Article 8 ECHR immigration cases

The Strasbourg Court has always been explicit in accepting a certain margin of appreciation for States in matters concerning immigration. However, since every case under consideration in this book concerns immigration, a margin of appreciation in this particular area cannot in itself explain for the pattern in Strasbourg scrutiny

[351] Battjes has recognised that despite the absolute character that is ascribed to the prohibition of refoulement under Article 3 ECHR, the public interest of receiving States is nevertheless a relevant aspect when the ECtHR decides on the scope of this provision. Hemme Battjes 'In search for a fair balance. The absolute character of the prohibition of refoulement under Article 3 ECHR.' (2009) 22 Leiden Journal of International law, 583.

of Article 8 ECHR immigration cases.[352] A distinction pointed out earlier in academic literature related to the intensity of scrutiny in Strasbourg immigration cases between admission and expulsion cases, or positive and negative obligation cases,[353] only partly accounts for the pattern identified. Of course, there is a substantive link between the distinction between positive and negative obligations and the distinctive approach to cases featuring non-compliance with procedural immigration rules, income criteria and individual interest-related criteria. Indeed, these criteria are most often at issue in situations where the foreign nationals concerned have not yet settled permanently in the host State. However, while in practically every admission case the outcome of the case corresponds to the decision-model based on the indicative factors, and in which therefore a full margin of appreciation applies, the same holds true for a considerable number of cases that are widely recognised as expulsion cases.[354] In addition, the concept of positive and negative obligations only accounts for a distinction as regards the rigour and specificity with which the Court scrutinises national decisions; not for a full margin of appreciation. In terms of the Court:

> 42. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.[355]

In search for a rationale for the distinctive approach in Strasbourg Article 8 ECHR immigration cases, it occurred to me that the dividing-line between balancing and full margin cases corresponds to a factual difference that exists between these two types of cases. A factual difference that concerns the occurrence of what I have termed immigration-specific aspects. Below, I illustrate the distinction between aspects that are immigration-specific and those that are not, after which I explain how the occurrence or absence of immigration-specific aspects in a case accounts for the distinctive judicial approach that is applied in that case.

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[352] The notion that States enjoy a certain margin of appreciation does not as such indicate a particular limit to judicial scrutiny.

[353] Although the Court has also been criticised for *omitting* to make such a distinction where this would have been appropriate. E.g. Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2015) 126; Thomas Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' (2009) 11 EJML 271, 291.

[354] These cases are generally found among criminal conviction cases, in the flowchart in clusters IV A, IV-B and some in cluster I-A, but also *Berrehab* (n 266) and *Sezen* (n 265) are examples of expulsion cases in which the decsion-model applies.

[355] *Tuquabo-Tekle* (n 243), para 42.

4.3.1 Aspects specific to immigration and those which are not

If a person has committed offences, or is considered a threat to national security or to national health, a "legitimate" formal response is to physically exclude this person from society as a whole. Within the context of immigration, physical exclusion from society means that the person concerned is deported or refused entry into the host State. Outside the immigration-context, this physical exclusion may exist in the person concerned being imprisoned or placed in quarantine. Relevant aspects in determining the weight of the public interest in a person's physical exclusion from society in these cases may concern the seriousness of the crimes that were committed; risk of re-offending; or the extent to which a disease is contagious. Both in- and outside the context of immigration, these aspects are relevant for determining the legitimacy of physically excluding a person from society. They concern, in other words, aspects that are not specific for (the context of) immigration control. If the Court in relation to these aspects conducts substantive scrutiny, arguably, it does not explicitly touch upon *immigration* policy. Moreover, a Strasbourg ruling that prohibits the State from denying residence to the foreign national who has committed an offence or who poses a threat to national security or national health would not deprive that State from physically excluding that person outside the immigration context: the convicted person can be sent to prison, and the contagiously diseased person can be placed in quarantine.

If, however, a State considers a person to lack sufficient income, or to lack sufficiently strong ties with (his family members residing in) the host State, or if a person fails to comply with rules that aim to establish his factual situation; it is only within the context of immigration that a formal response based on these very circumstances may exist in a person's physical removal from society as a whole. If the Court would establish the weight of the interest in upholding income criteria, individual interest-related criteria or procedural immigration rules, this would necessarily involve passing judgment on national immigration policy. Such evaluation cannot be mistaken for something else, simply because this particular sanction for this particular type of reason exclusively takes place within the context of immigration. Depriving the State of the possibility to deny residence in these cases would affect the ability to pursue the public interest in upholding the restrictive criterion at issue: most States cannot completely exclude resident foreign nationals from their social assistance schemes; and withholding the possibility of denying residence inevitably affects the pursuance of quantitatively restricting immigration and deterring foreign nationals from disregarding procedural immigration rules.[356]

[356] For critical accounts of expulsion of irregular migrants, see a.o. Antje Ellerman 'The Rule of Law and the Right to Stay: The Moral Claims of Undocumented Migrants' (2014) 42 Politics & Society 293; Albert Kraler, 'Fixing, Adjusting, Regulating, Protecting Human

What I argue here is that in some cases, the Strasbourg Court cannot conduct a substantive scrutiny of national immigration decisions without directly touching upon (the public interests pursued by) national immigration policies. As long as the Court's assessment of national decisions to deny residence is confined to aspects that are not specific for the context of immigration, arguably, it does not explicitly interfere with the prerogative of States to control immigration.[357] Moreover, in cases in which the reason for denying residence also outside the immigration context allows for a person's physical exclusion from society − a Strasbourg judgment entailing that residence may not be denied does not prevent that State from pursuing that person's physical exclusion from society in another, non-immigration context.

4.3.2 A comprehensive picture of Strasbourg scrutiny in Article 8 ECHR immigration cases

The significance of the distinction between aspects specific to immigration control and those that are not enables us to establish a comprehensive picture of Strasbourg case law. The distinction first of all accounts for the difference between on the one hand the Court's approach to procedural rules of immigration law, individual interest-related criteria, and income criteria; and on the other hand, its approach to criminal convictions, national security, and national health. In cases featuring the first three, immigration-specific reasons, substantive scrutiny of the criteria at stake or the manner in which the interests were balanced would inevitably affect States' prerogative of controlling immigration. Refraining from passing judgment on immigration-specific aspects may also explain the consideration of the Court in *Palanci* - in clear deviation from the approach it had just set out in *Hasanbasic* - that the applicant's failure to fulfil his financial obligations justified his expulsion in view of the public interest in protecting public order.[358] If the Court in the *Palanci* case had used the national economic well-being as ground for legitimation, it would have made an explicit evaluation of the circumstances under which denying residence is justified in an immigration-specific context. Putting forward the protection of public

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Rights - The Shifting Uses of Regularisations in the European Union' (2011)13 European Journal of Migration and Law 297; Bas Schotel, *On the Right of Exclusion: Law, Ethics and Immigration Policy* (Routledge 2012).

[357] A comparable mechanism may be discerned in Sassen's observation that in the context of the North American Free Trade Agreement, people providing services are not considered migrants, so that they will not be subjects of migration laws. Cited in Catherine Dauvergne 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 MLR 588, 591, n 9. We may also see it in the (artificial) distinction that in EU law is made between free movement and migration.

[358] *Palanci* (n 82), discussed in section 2.5.

order, a public interest not specific for immigration, allowed the Court to rule in line with its consistent practice not to substantively evaluate immigration-specific immigration policies.

The notion of immigration-specific aspects may also account for the Court's approach to cases in which residence has been denied for reasons that are not immigration-specific: cases featuring criminal convictions, national security and national health. It explains, for example, why the Court does not evaluate whether expulsion is an appropriate response to criminal convictions committed by foreign nationals; while it does see room to disagree on the seriousness of offences, on whether or not a person poses a threat to national security or national health, likelihood of re-offending, or on the proportionality of the duration of the period of exclusion. As opposed to the latter aspects, the specific measure of expulsion is not a measure that is generally applied in national policies aiming at the prevention of crime; it only is accepted in the context of immigration. Evaluating the appropriateness of expulsion as a response to criminal convictions committed by foreign nationals would therefore entail an explicit judgment passed on national immigration policy. Accordingly, the Court has always self-evidently accepted deportation as a legitimate response to criminal convictions committed by foreign nationals:

> The Court reiterates that it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences.[359]

The distinction between immigration specific aspects and non-immigration specific aspects further accounts for the fact that the outcome of every criminal conviction case featuring additional aspects of immigration control corresponds to the decision-model based on the indicative factors.[360] The fact, for example, that offences are committed *while the person concerned has a precarious residence status*, arguably distinguishes a 'regular' criminal conviction case from a case in which immigration-specific aspects are at stake. Similarly, the issue of whether a person has (or could have) obtained the nationality or citizenship of the host State, only within the context of immigration, can make the difference between whether or not this person may be physically excluded from society.

That the Court may conduct substantive scrutiny of the national decision only in cases that do not feature immigration-specific aspects, explains why in relation to the commission of crimes diminished accountability (*i.e.* a 'good excuse') such as

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[359] *Dalia v France* App No 26102/95 (ECtHR, 19 February 1998) para 52.

[360] Discussed in section 3.2.

suffering from mental illness, or being under age – in itself is no guarantee for a violation of Article 8 ECHR.[361] Indeed, an evaluation of whether a person may be held accountable for crimes to asses the legitimacy of his physical exclusion from society is *not* specific to the context of immigration. Accordingly, there is no strict correlation between the existence of a good excuse in relation to the crimes committed and the outcome of the case. In this regard, the Court is not bound by the manner in which the national authorities have balanced the competing interests at stake.

In sum, the incidence of immigration-specific aspects *i.e.* aspects that only in the context of immigration are of significance in deciding on a person's physical exclusion from society, arguably draws a case into an immigration-specific sphere; attracting a mode of reasoning whereby the Court refrains from substantive scrutiny of national decision making. This full margin of appreciation for States regards both setting out restrictive immigration criteria and balancing the competing interests in concrete cases.

As already mentioned in chapter 3, the foregoing does not necessarily mean that once it is established that immigration-specific aspects are at stake, the weight of the competing interests are completely irrelevant. To a certain extent, the conclusion that national rules of immigration law were applied inconsistently or incorrectly, or whether there was a good excuse for non-compliance is a matter of interpretation. It may very well be that in cases where denying residence would have harsh consequences for the individual concerned, the Court is more inclined to accept the occurrence of a good excuse or an inconsistency in national decision making. Yet, the Court is quite consistent in assigning the circumstances under which it finds one of the so-called indicative factors to be at issue. Thus, immigration-specific aspects as a rule are not held against those under age; incapacity for work creates an excuse in relation to income requirements; and making use of granted visitation rights establishes sufficient efforts to maintain family ties. In other words, the Court does not freely accept indicative factors to be relevant in relation to immigration-specific aspects once it establishes a considerable individual interest in being granted residence. Moreover, if a case does not feature elements relating to the indicative factors, it has no room for interpreting these aspects into the case.

[361] A rather harsh example thereof is the case of *Khan v Germany* App No 38030/12 (ECtHR, 23 April 2015).

4.4 A distorted perception of the scope of Strasbourg scrutiny

4.4.1 Preaching balancing while practicing full deference

The main issue with the Strasbourg approach is that the Court unswervingly presents its approach in Article 8 ECHR immigration cases as a balancing exercise. Accordingly, the Court addresses various aspects of the case related to the competing interests at stake, implying their potential capacity to influence the outcome of the case. In fact, however, many of these aspects do not relate to the indicative factors, which means that in cases featuring immigration-specific aspects they are not of decisive importance.[362]

In *Gül*, for example, the Court discusses at length the applicants' ties to Switzerland and the problems that the applicants would encounter if they had to return to their country of origin in order to be reunited with their son. Moreover, in its conclusion, the Court presents the issue as if the weight of the individual interest in being granted residence in fact is a decisive element:

> 42. In view of the length of time Mr and Mrs Gül have lived in Switzerland, it would admittedly not be easy for them to return to Turkey, but there are, strictly speaking, no obstacles preventing them from developing family life in Turkey. That possibility is all the more real because Ersin has always lived there and has therefore grown up in the cultural and linguistic environment of his country. On that point the situation is not the same as in the Berrehab case, where the daughter of a Moroccan applicant had been born in the Netherlands and spent all her life there (see the Berrehab judgment previously cited, p. 8, para. 7).
> 43. *Having regard to all these considerations, and while acknowledging that the Gül family's situation is very difficult from the human point of view*, the Court finds that Switzerland has not failed to fulfil the obligations arising under Article 8 para. 1, and

[362] Balancing in (international) judicial adjudication of constitutional rights, especially while at the same time granting States 'a certain margin of appreciation' has been criticised that it risks obscuring the relevance or irrelevance of the competing interests at stake. See, among many others, Aleinikoff (n 346), Endicott (n 26), Janneke Gerards, 'How to improve the necessity test of the European Court of Human Rights' (2013) 11 I-CON 466; Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 Modern Law Review 671; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 International Journal of Constitutional Law 468. Aleinikoff has noted in this regard that if the reasons for assigning weight to the various interests at stake are not disclosed, this has the result that judicial decision-making takes place in a 'black box'. Aleinikoff (n 346) 976.

> there has therefore been no interference in the applicant's family life within the meaning of that Article.[363]

With this explanation of the weight of the individual interest in being granted residence, which includes a comparison with the facts of the case of *Berrehab* – a case in which denying residence *had* violated Article 8 ECHR – the Court suggests that the individual interest in the case of *Gül* was just not sufficient to outweigh the public interest in denying residence. However, the decision-model based on the indicative factors immediately demonstrates that it was *not* the lack of sufficient interest in being granted residence that produced the outcome in *Gül*. The immigration-specific aspect in this case was that under Swiss law the applicants' residence status did not gave them the right to family reunification. In its judgment, the Court confirmed the correct application of this criterion:

> Furthermore, although Mr and Mrs Gül are lawfully resident in Switzerland, they do not have a permanent right of abode, as they do not have a settlement permit but merely a residence permit on humanitarian grounds, which could be withdrawn, and which under Swiss law does not give them a right to family reunion (see paragraph 18 above).[364]

Since an excuse for non-compliance with this immigration-specific criterion was not at issue, the inevitable conclusion in *Gül* was that denying residence would not violate Article 8 ECHR. The Court thus substantively evaluated aspects relating to the individual interest, while in fact these aspects could not have influenced the outcome of the case. By still addressing these aspects, however, the Court gave the impression that balancing the interests in this case did *not* fall within the margin of appreciation of States.

Another example is the case of *Antwi*, in which the Court suggested that there are fundamental differences between this case and that of *Nunez* as regards the individual interest in being granted residence:

> 100. Moreover, the Court considers that there are certain fundamental differences between the present case and that of *Nunez* where it found that the impugned expulsion of an applicant mother would give rise to a violation of Article 8 of the Convention. In reaching this finding, the Court attached decisive weight to the exceptional circumstances pertaining to the applicant's children in that case, which were recapitulated in the following terms in its judgment (cited above, § 84):
> "Having regard to all of the above considerations, notably the children's long lasting and close bonds to their mother, the decision in the custody proceedings [to move the children to the father], the disruption and stress that the children had already experienced and the long period that elapsed before the immigration authorities took their decision to order

[363] *Gül* (n 234) para 42-43.
[364] ibid para 41.

> the applicant's expulsion with a re-entry ban, the Court is not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention."
> 101. Unlike what had been the situation of the children of Mrs Nunez, the third applicant had not been made vulnerable by previous disruptions and distress in her care situation (compare *Nunez*, cited above, §§ 79 to 81).[365]

In accordance with the decision-model based on the indicative factors, the conclusion that denying residence would not violate Article 8 ECHR, logically follows from the circumstance that the applicant had developed family ties in breach of Norwegian immigration law, for which there was no good excuse, while the national authorities had not shown inconsistency in enforcing these rules. The Court considered that unlike in *Nunez*, the authorities had acted adequately in deciding to expel the applicant:

> 102. Also, the duration of the immigration authorities' processing of the matter was not so long as to give reason to question whether the impugned measure fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures (compare *Nunez*, cited above, § 82). On the contrary, in October 2005, only a few months after the discovery of the first applicant's fraud in July 2005, he was put on notice that he might be expelled from Norway. In May 2006 the Directorate ordered his expulsion and prohibition on re-entry and gave him until 24 July 2006 to leave the country.[366]

By elaborating on the precariousness of the individual circumstances, however, the Court gave the impression that the individual interest in being granted residence could have tipped the scales and that the interest in being granted residence in the *Antwi* case was just not sufficiently precarious. Again, by explicitly "measuring" the individual interest in being granted residence in a case featuring immigration-specific aspects, the Court gives the impression that balancing the competing interests in this case does not fall within the margin of appreciation of States - while it nevertheless is.[367]

An evaluation of immigration-specific aspects that *de facto* fall within the scope of the margin of appreciation also emerges in relation to the public interest in denying residence. In *Antwi*, the Court explicitly addresses the aggravated character of the applicant's conduct that had lead to his expulsion. However, as explained above, irrespective of the seriousness of the applicant's conduct, the consistent acting upon the discovery of fraud and the absence of a good excuse were sufficient in themselves to conclude that denying residence would not violate Article 8 ECHR. Likewise, I

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[365] *Antwi* (n 127) paras 100-101.
[366] ibid para 102.
[367] Notably, I have no reason to assume that this is a conscious strategy.

have noted that if criminal offences were committed while the applicant had a precarious residence status, this aspect draws the balancing of interests within the States' full margin of appreciation as a result of which the outcome of the case is a matter of subsumption and the Court refrains from substantive scrutiny. Yet, in these cases the Court evaluates the seriousness of the crimes committed and the individual interest in being granted residence in terms that suggest that under different circumstances the balancing act would have turned out differently.

Besides unjustly giving the idea that balancing the competing interests in these cases does not fall within the margin of appreciation, the distorted perception holds also regarding the Court's scrutiny of national immigration-specific criteria. As explained earlier, by substantively measuring aspects that fall under States' margin of appreciation, the Court gives the false impression that these aspects do *not* fall within the margin of appreciation. These evaluative comments on national immigration-specific exclusion policies thus obscure the fact that the Court does not scrutinise such policies. The Court gives the idea that judgment *is* being passed, both on the substance of national rules of immigration law and on the manner in which the interests have been balanced on the national level.

Considering the foregoing, cases featuring immigration-specific aspects do not lend themselves for meaningful analysis of the relative weight attached by the Court to the remaining, non-immigration-specific aspects of these cases: such as the age and adaptability of the children involved; whether there were insurmountable obstacles for the applicants to return to the country of origin; and severity of crimes. The 'evaluation' of such circumstances in cases featuring immigration-specific aspects cannot be compared to evaluative comments made in this regard in cases with no immigration-specific aspects. As evidenced by the vast body of literature on the Court's approach in Article 8 ECHR immigration cases, such analysis inevitably results in the conclusion that the Court's approach lacks consistency and transparency.[368]

4.4.2 A potential bias in the political and legal discourse on the national level

Connected to the previous point is the impact of the Strasbourg approach to the functioning of the margin of appreciation. The margin of appreciation functions as a

[368] Above n 26. Ciara Smyth has recognised that in some cases the individual interest (Smyth focuses on the best interests of the child) has 'no inherent weight' but that instead, the individual interest is 'ascribed more or less weight depending on the run of other factors'. She does not, however, recognise the concistency of the Court's approach in this regard. Ciara Smyth, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?' (2015) 17 European Journal of Migration and Law 70-103 at 97.

concept on the basis of which the task of substantive judicial scrutiny is appointed to either the Strasbourg Court or the national authorities.[369] The underlying idea of according States a certain margin of appreciation in relation to a particular policy area is that in certain policy areas the evaluation of the interests at stake should not take place in Strasbourg, but on the *national* level.[370]

By making explicit evaluative comments on national immigration policies, the Court has provided national authorities with explicit normative guidance for application within the national context. However, in relation to the public interest in upholding immigration-specific criteria for entry and residence the Court's "evaluative" comments have been strictly affirmative. Thus, the Court has been consistent in emphasising the necessity of States being able to ensure effective immigration control, as well as the importance of individuals complying with immigration rules and of deportation as a means of general deterrence.

Explicitly passing strictly affirmative judgment on national policies while in fact the relative weight of the public interest in upholding these policies is not decisive, creates the risk of a bias in political and legal discourse on the merits of immigration policies on the national level. Indeed, regardless the outcome of a case, national authorities will consistently find their policies backed-up by the Strasbourg Court. Self-evidently, this is of significance for the argumentative position of those questioning the validity of national rules of immigration law or their relative importance.

The Strasbourg Court making explicit approving comments with regard to immigration policies that in fact fall under the State's margin of appreciation, furthermore creates the risk of restricting the scope of Article 8 ECHR protection in immigration cases. With regard to these policies the Court effectively accords a full margin of appreciation to States, while at the same time it removes the incentive to subject these policies to critical political or judicial scrutiny on the national level, by explicitly approving them as being necessary to effectively pursue the public interest in controlling immigration. This may result in a lack of critical scrutiny on either level. Of course, given the distorted perception illustrated above, progressive national Courts may choose to draw different conclusions from Strasbourg judgments and equally find them backed up by Strasbourg considerations in Article 8 ECHR immigration cases.[371]

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[369] Letsas G, *A Theory of Interpretation of the Human Convention on Human Rights* (Oxford University Press 2007) 90.

[370] ibid 92.

[371] As the late Tomas Weterings has put it, these cases provide a pick-and-mix with something for everyone.

4.4.3 A generic interest in controlling immigration as a stand-alone justification for denying residence

A third distorting feature of the Strasbourg approach in Article 8 ECHR immigration cases is the use of the generic interest in controlling and restricting immigration as an autonomous justification for denying residence.[372]

Procedural restrictions in immigration law serve to ensure effective immigration control; to ensure that it is the State that determines who is allowed entry and residence and who is not.[373] Infringement of procedural restrictions does not in itself signify that there are substantive objections against a particular person's presence in the host State. We only know that this person is not authorised to enter or reside.

Individual interest-related criteria serve to delineate the personal scope of who is eligible for (a family member) being granted entry or residence. These criteria generally reflect an interest in being granted residence because they refer to certain ties with the host State or between family members. Yet, the purpose of their inclusion in national immigration laws in the first place is to restrict immigration in a quantitative sense.[374] As with procedural restrictions, a failure to comply with individual interest-related criteria does not signify that there are substantive objections against that particular person's presence in the host State.[375] What is clear is that they fall outside the personal scope of those having the right to entry or residence. Since procedural immigration criteria and individual interest-related criteria do not distinguish between foreign nationals posing a threat to a substantive public interest and foreign nationals who do not pose such threat, the public interests

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[372] The significance of the inclusion of immigration control as an unspecified public interest in judicial reasoning has been recognised by a.o. Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff Publishers 2010) Chapter 3; Costello (n 353) 316.

[373] Thus, the obligation for foreign nationals to obtain a provisional residence permit before entry serves to ensure that persons only enter a State with the proper authorisation. And the obligation to leave the territory of the host State after having been ordered to do so serves to effectuate decisions in which it is established that a person is no longer authorised to reside in the host State.

[374] E.g. *Abdulaziz* (n 233).

[375] As contended by Dauvergne, the content of immigration criteria inevitably reflect normative values. They determine, for example, which types of relationships between individuals count as family (See, C. Dauvergne, Sovereignty in global times, MLR(2004), 588-615, at 590.) The very purpose of implementing individual interest-related restrictions, however, is not to encourage people to get married, but to restrict immigration. Such normative values therefore should not be mistaken for the principal purpose that is served with the inclusion of the criteria that merely reflect these normative values.

in upholding these rules reflect unspecified, or *generic* interests in controlling and restricting immigration.

The problem with accepting generic interests in controlling and restricting immigration in a balancing context is that in concrete cases it is impossible to make distinctive, evaluative considerations in respect of the public interest if all we have is the interests in controlling and restricting immigration. We cannot tell for example, whether as such, the value of restricting immigration, as pursued by individual interest-related criteria, calls for denying a right to family reunification to people not born in the host state, those who are not in a relationship for at least two years; or to parents who, after having settled in the host State themselves, did not apply for family reunification with their children as soon as possible. In a concrete case, the morality of enforcing such criteria can only relate to the individual interests at stake − not to the public interest in upholding these criteria.

The same goes for the abstract value of enforcing procedural immigration rules, i.e. of States being able to maintain control over who is allowed entry and residence − stripped from possible substantive objections against a person residing in the host State. Since the essence of procedural immigration criteria is allowing States to determine who is allowed entry and residence, enforcing such criteria is necessarily a matter of controlling immigration. If solely regarded in the light of the interest of States in maintaining control over who is allowed entry and residence and who is not, denying residence for infringement of procedural rules always serves a legitimate purpose. In addition, it is not possible to distinguish between violations of procedural rules of immigration law in the sense that some violations are more detrimental to the public interest in controlling immigration than others. The reason for this is that in a concrete case, denying residence for infringement of procedural immigration rules can only serve the interest in controlling immigration through general deterrence or general prevention. Once a foreign national is caught for circumventing procedural rules, the State has control over whether to allow or deny his residence. At that point, denying residence to that person does not add to the level of control the State has over this person's entry or residence. Stripped from the issue of whether there are substantive objections against this individual's presence in the host State, denying residence to this particular person may only add to maintaining control over who is allowed entry or residence through general deterrence: it may discourage *other* persons from circumventing procedural rules.[376] This effect of general deterrence does not depend on the circumvented restriction in the case at hand. With general deterrence as the conclusive legitimate purpose for denying

[376] See explicitly in this regard, the cases *Nunez* (n 127) and *Antwi* (n 127), discussed in section 2.6.

residence, every decision to deny residence for infringement of procedural criteria is equally legitimate.

The Strasbourg Court has shown consistent in treating the generic interest in controlling immigration as an autonomous legitimate public interest. Illustrative in this regard is the following comment made in *Berrehab*:

> [T]he disputed decisions were consistent with Dutch immigration-control policy and could *therefore* be regarded as having been taken for legitimate purposes.[377]

Another noteworthy remark in this context was made in the case of *Jeunesse*:

> The corollary of a State's right to control immigration is the duty of aliens such as the applicant to submit to immigration controls and procedures and leave the territory of the Contracting State when so ordered if they are lawfully denied entry or residence.[378]

In *Nunez*, the Court even explicitly rejected that an established interest in controlling immigration requires an additional substantive interest to justify denying residence. In this case, in which the applicant had acquired a residence permit on the basis of a false identity, the Court reasoned as follows:

> 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 it serious or not, must be rejected.[379]

That the irrelevance of substantive objections against a person's presence is a conscious choice in relation to violations of procedural immigration rules furthermore follows from the Court's explicit acknowledgment that expulsion is an important means of general deterrence against violations of immigration law.[380] As argued above, the interest in controlling immigration is hence not necessarily involved with the person who has been denied residence in the case at hand, but instead takes issue with future conduct of *other* foreign nationals. Expelling this individual for violations of immigration law discourages others from doing the same.

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[377] *Berrehab* (n 266) para 25. Emphasis added.
[378] *Jeunesse v the Netherlands* App No 12738/10 (ECtHR, 3 October 2014), para 100.
[379] *Nunez* (n 127) 71.
[380] See the discussion of the cases of *Nunez*, *Antwi* and *Darren Omoregie* in section 2.6.

In view of the foregoing, it is safe to say that the Court has consciously accepted that the legitimacy of denying residence is evaluated exclusively in view of a generic interest in controlling immigration. The balancing or necessity assessment in Article 8 ECHR immigration cases therefore, thus may take place conclusively in view of a public interest that has no inherent substantive limitations.

The significance of this assertion may be exemplified by recalling the Court's approach in the series of national security cases discussed in section 2.3. There, the Court firmly rejected that a mere declaration that a person poses a threat to national security may serve as a sufficient legitimation of that person's expulsion:

> 123. Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information (see the judgments cited in paragraph 119 above).
> 124. *The individual must be able to challenge the executive's assertion that national security is at stake*. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.[381]

The Court thus considers it essential that the individual must be able to challenge the assertion that national security is at stake. In *C.G. and others v Bulgaria*, the Court even more explicitly stressed the importance of the possibility of 'meaningful scrutiny' as regards the assertion that the person at issue presents a risk to national security:

> It is true that the notion of "national security" is not capable of being comprehensively defined (see Esbester v. the United Kingdom, no. 18601/91, Commission decision of 2 April 1993, unreported; Hewitt and Harman v. the United Kingdom, no. 20317/92, Commission decision of 1 September 1993, unreported; and Christie v. the United Kingdom, no. 21482/93, Commission decision of 27 June 1994, DR 78-A, p. 119, at p. 134). It may, indeed, be a very wide one, with a large margin of appreciation left to the executive to determine what is in the interests of that security. However, that does not mean that its limits may be stretched beyond its natural meaning (see, mutatis mutandis, Association for European Integration and Human Rights and Ekimdzhiev, cited above, § 84). It can hardly be said, on any reasonable definition of the term, that the acts alleged against the first applicant – as grave as they may be, regard being had to the devastating

[381] *Al-Nashif v Bulgaria* (n 67), paras 123,124 (emphasis added).

> effects drugs have on people's lives – were capable of impinging on the national security of Bulgaria or could serve as a sound factual basis for the conclusion that, if not expelled, he would present a national security risk in the future.
> 44. It thus seems that the national courts, while ex post facto accepting for examination the first applicant's application for judicial review, *did not subject the executive's assertion that he presented a national security risk to meaningful scrutiny* (see, mutatis mutandis, Lupsa, cited above, § 41).[382]

In national security cases therefore, the Court takes the stand that if it is not possible to substantively challenge the assertion that the expelled individual poses a risk to the public interest, this renders absent any protection against arbitrary decision making.

The foregoing citations immediately show the significance of accepting the generic interest in controlling and restricting immigration as an autonomous justification for denying residence: in cases of non-compliance with procedural immigration rules or individual interest-related criteria, it is technically impossible to challenge the assertion that the public interest in controlling or restricting immigration is at stake. Consequently, in these cases there is no protection against arbitrary decision-making. Consistently allowing the generic interest in controlling and restricting immigration as an autonomous justification for denying residence means that a failure to obtain a provisional residence permit cannot be countered by the circumstance that the applicant satisfies the substantive requirements for residing in the host State. The same goes for the failure to timely registration after entering the host State, or to renew one's residence status on time. Also, the person having obtained a residence permit on the basis of a false identity cannot invoke the circumstance that he has always worked and paid his bills and that he never has caused any trouble.[383] Accordingly, it proved *necessary* in light of Article 8(2) ECHR to refuse residence to individuals who had not travelled abroad and back again before applying for a residence permit, and to expel a person whose name was Henry and not Jose.[384]

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[382] *C.G. and others v Bulgaria* App No 1365/07 (ECtHR, 24 April 2008), paras 43-44 (emphasis added).

[383] In some cases the Court has addressed the absence of substantive objections against a person's presence in the host State to underpin that denying residence was disproportional, but this always coincided with the occurrence of one of the indicative factors. E.g. *Da Silva Hoogkamer* (n 205), *Berrehab* (n 266).

[384] Endicott has recognised, albeit on different grounds than the ones asserted here, that the interest in controlling immigration cannot be 'weighed'. He notes in this regard that 'if courts are "balancing" things that cannot be balanced, then their decision seems to represent a departure from the rule of law, in favor of arbitrary rule by judges.' Endicott (n 26) 323.

4.5 Technical obstacles for reconciling a generic State right to control immigration with protecting family and private life

In the previous sections I have argued that it is technically impossible to assign value or weight to upholding a restrictive criterion that by exclusion reflects the generic interest in controlling and restricting immigration. In this section I examine the consequences of this assertion for the potential scope of protection of Article 8 ECHR in immigration cases.

4.5.1 Judicial balancing requires a 'valuable' public interest

If substantive public interest aspects are fully excluded from being of relevance in a judicial assessment of a concrete decision to deny residence, this assessment has no bearing on the value or the weight of taking that decision. The judicial body may have *assumed* the weight of that decision, but the weight has not been *assessed*.[385] Thus, in cases featuring procedural immigration rules and individual interest-related criteria, it is technically impossible for a judicial body to assign value to the decision at issue without taking into account substantive aspects relating to the public interest.

Since the essence of judicial balancing is the assignment of value or weight to the competing interests at stake,[386] the foregoing implies that it is technically impossible for the Court to conduct a balancing assessment in cases featuring procedural immigration rules or individual interest-related criteria without including substantive, public interest-related aspects in the assessment. In other words, if the Court accepts non-compliance with these criteria as an *autonomous* justification for denying residence, this precludes the outcome of the case is the result of balancing. Thus, accepting a generic interest in controlling or restricting immigration as an autonomous justification for taking immigration decisions, conflicts with the assertion that an assessment of such decisions under Article 8 ECHR requires balancing the competing interests at stake.

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[385] Aleinikoff (n 346) 982. It may be that the legitimacy of a national decision is established by examining whether procedural guarantees have been upheld in the decision-making process. If, however, these procedural guarantees do not guarantee the inclusion of substantive public interest-related aspects in the decision-making process, the assesment of whether procedural guarantees have been upheld does not comprise a substitute for attaching *value* or *weight* to the particular decision at issue.

[386] ibid 946.

4.5.2 A balanceable right with no minimum protection in relation to either of the competing interests

Importantly, the very fact that the right to respect for family and private life as guaranteed by Article 8 ECHR allows for exceptions to be made in view of pursuing the public interest, implies that this right cannot function if both a minimum-level of protection of the individual interest at stake and a minimum level of scrutiny of the public interest are lacking.

If, indeed, denying residence to foreign nationals is to fall within the scope of Article 8 ECHR, this requires either substantive scrutiny of the public interest in denying residence, or the acknowledgment of a concrete minimum threshold of substantive protection for the individual interest in being granted entry or residence.[387] In the absence of a substantive minimum threshold relating to the individual interest in being granted residence, Article 8 ECHR may still offer some protection if the Court would be prepared to conduct a substantive scrutiny of the public interest in denying residence. Conversely, in the absence of substantive scrutiny of the public interest in denying residence, Article 8 ECHR may still offer protection if a substantive individual interest in being granted residence in itself could dictate the conclusion that denying residence violated Article 8 ECHR. These structures would not, technically, qualify as balancing the competing interests;[388] but at least they would allow the Court to maintain its assertion that immigration cases, even where procedural rules or individual interest-related rules are at stake, are not categorically excluded from the protection of Article 8 ECHR.

It may be argued that immigration cases in which the generic interest in controlling or restricting immigration is at stake are not completely excluded from the protection of Article 8 ECHR. Indeed, as indicated in the previous chapters, the decision-model in these cases involves an evaluation of whether the national criteria have been applied correctly and consistently, and it provides leeway in cases where the person concerned cannot be held accountable for failing to comply with these criteria. However, this scrutiny does not qualify as a minimum-level of judicial protection deriving from the right to respect for family and private life as protected by 8 ECHR.

First of all, the situations in which a good excuse may lead to being exempted from having to satisfy the criterion is limited. As earlier observed, the Court has

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[387] Joseph H.H. Weiler, 'Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space' in Riva Kastoryano et al, *An Identity for Europe: The Relevance of Multiculturalism in EU Construction* (Palgrave MacMillan 2009) 76.

[388] Since this requires an evaluation of both the competing interests, not of just one of the opposing interests at stake.

engaged in aspects of accountability with regard to the fulfilment of procedural aspects such as registration requirements and the obligation to obtain a provisional residence permit abroad. The Court has furthermore accepted from an appellant a good excuse for not having obtained the nationality of the host State when this was possible, and for the separation between parents and their children. Accordingly, it may seem as if the generic interest in controlling or restricting immigration cannot affect individual interests as long as individuals are willing to try their best to comply with the rules. However, not every restrictive criterion can be 'remedied' by a good excuse for non-compliance. It is not possible, for example, to be excused for having been denied a refugee status; not having had a relationship for at least two years earlier; or for having ended a marriage. Perhaps the most striking case in point of a restrictive criterion for which no excuse can provide leeway concerns the nationality a person is born with. This aspect lies at the basis of every immigration-decision while obviously, no individual can be held accountable for nationality of birth.[389] To the extent that the leeway of a good excuse by definition cannot be of any relevance in the judicial assessment of national restrictive criteria, all that rests for the Court to do is to secure that the rules at stake, whatever their scope of restriction, are enforced in a correct and consistent manner. Indeed, under vigour of the decision-model, the scope of the interest in family and private life protected 'under Article 8 ECHR' would in fact be determined by the restrictive criteria set out by the State, and therefore not follow from Article 8 ECHR.

Admittedly, the Court may dismiss a State's assertion on whether a foreign national's individual ties qualify as family or private life, as it did in for example *Berrehab*.[390] However, in the immigration-context the Court has no means with which to dismiss a State's assertion on what, in substance, qualifies as 'respect' for family or private life. Indeed, to the extent that procedural rules and individual interest-related criteria in national immigration laws are only examined as to their correct and consistent application, it is impossible for the Court to restrict the State in imposing immigration criteria that have the effect of substantively restricting the enjoyment of family or private life. The limits of Strasbourg scrutiny in this regard have been exemplified by the deference paid with regard to the restriction featuring

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[389] For an interesting critical account of "birthright citizenship as a complex type of inherited property", see Ayelet Shachar *The Birthright Lottery* (Harvard University Press 2009). Shachar uses an analogy between inherited property and birthright citizenship, which allows us to look at birthright citizenship 'as a carefully regulated system for limiting access to scarce resources to those that "naturally" belong within its bounds as the heirs, not of "one's body," but of the *body politick* itself.' (ibid 43).

[390] *Berrehab* (n 266). What constitutes family or private life is therefore to be distinguished from the question when family or private life may give rise to a right of entry or residence. The former is not an immigration-specific aspect, the latter is.

in *Gül*, that only a permanent right of abode gives right to pursue family reunification; and with regard to the restriction at issue in *Biao*, that only foreign nationals who had lived in Denmark for at least 28 years are considered to be sufficiently 'attached' to Denmark so as to be eligible for family reunification.

In sum, to the extent that the Court accepts a generic interest in controlling immigration (*i.e.* infringement of procedural immigration rules and non-compliance with individual interest-related criteria) as an autonomous justification for denying residence, the inherent lack of substantive scrutiny of the restrictive measures at issue renders these measures outside the scope of protection of Article 8 ECHR.

The analysis of Strasbourg Article 8 ECHR immigration cases in the first part of this book on the one hand has confirmed the correctness of the widespread perception of the Strasbourg case law as lacking transparency and being inconsistent. At the same time, however, the analysis has identified a clear pattern of scrutiny in the body of Article 8 ECHR immigration cases. A pattern that is largely determined by the interest of States in controlling immigration and which has been concealed, due to the use of the margin of appreciation in a balancing structure. The identification of the boundaries of Strasbourg scrutiny in these chapters, and the core premises on which these boundaries rest, have provided the focal point for examining in the second part of this book the extent to which the scrutiny of national restrictions differs according to whether the measure is evaluated in the light of Article 8 ECHR or against standards of EU law.

PART II LUXEMBOURG

Introduction

The second part of this book examines how scrutiny of national restrictions to entry or residence under EU law compares to the findings of the Strasbourg analysis. Given the outcomes of the Strasbourg analysis, the investigation of the role of the public interest in the case law of the ECJ focuses on the role of the generic interest in controlling immigration in deciding on national restrictive measures.

The case law covered in this analysis is confined to national restrictive conditions to the right to free movement of Union citizens and their family members and family reunification pursued by third country nationals on the basis of Directive 2003/86.

As indicated in the introduction to this book, as a starting point for delineating the scope of Luxembourg scrutiny serves an in-depth analysis of income-requirement cases in relation to the various categories of persons whose right of entry and residence under EU law may be subjected to such requirements. Income requirements relate to substantive objections against a person's presence in the host Member State and at the same time constitute an immigration-specific reason for denying residence.[391] Analysing this particular requirement arguably provides a clear insight in how the scope of scrutiny of national restrictions under EU Law differs from Strasbourg scrutiny of such restrictions in view of Article 8 ECHR. The features of Luxembourg scrutiny as identified in the case law on income-related restrictions are subsequently set out against the approach to other grounds for restricting entry and residence rights, in order to establish whether the ECJ's approach to income requirements is reason-specific.

In discussing the results of the analysis, I distinguish between the following categories of persons: economically active Union citizens (chapter 5), economically non-active Union citizens (chapter 6), various subcategories of family members of Union citizens (chapter 7), and third country nationals that fall within the scope of

[391] *I.e.* a reason that only in the context of immigration may determine whether a person may be physically excluded from society as a whole. See further, section 4.3.1.

the Family reunification Directive (chapter 8). For each (sub)category I will start with an outline of the legal provisions that, at present, cover the extent to which the right of residence of the persons concerned may be subjected to income conditions. Subsequently I examine the Court's adjudication of national income restrictions as to their compliance with EU law. If it appears that the Court does not evaluate the weight of the public interest in upholding income-related criteria, I examine which case-specific aspects do determine whether the national criterion is in accordance with EU law.

In chapter 9, I compare the ECJ's approach to income requirements with its approach to other categories of restrictions: criminal convictions, procedural rules, criteria relating to certain family ties and integration criteria. I shall test the hypothesis that the Court's approach to income conditions is not specific for this type of restrictions, but instead equally applies to any other type of restriction to the right of Union citizens and their family members to free movement and that to family reunification of third country nationals on the basis of Directive 2003/86. Furthermore, I explain how identification of the 'technical' context of a restrictive criterion makes it possible to determine rather precisely which interests may be of relevance in deciding whether Member States may impose/uphold that particular criterion, and which may not. I conclude by discussing whether scrutiny of national legal restrictions under EU law permits that significance is attached to the generic interests in controlling or restricting immigration.

Chapter 5 Income requirements for economically active Union citizens

5.1 Introduction

The first category in relation to which the occurrence and adjudication of income restrictions is examined concerns that of economically active Union citizens. This category consists of 'workers', 'self-employed persons', 'jobseekers' and 'ex-workers'. In the following I first sketch the legal framework that indicates the possibility of imposing income conditions to economically active Union citizens (section 5.2). Section 5.3 describes how the Court has adjudicated income restrictions imposed by Member States. Section 5.4 discusses the consequences of the Court's approach for the extent to which the various interests that may be at stake have the capacity of determining the outcome of a concrete case.

5.2 Legal framework

The legislative framework relating to income conditions for Union Citizens is laid down in Directive 2004/38.[392] This Directive entails an elaboration of Article 21 TFEU, which not only confers on Union citizens the right to move and reside freely within the territory of the Member States, but also gives room for EU legislation that subjects this right to limitations and conditions:

> *Article 21 TFEU*
> Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

[392] Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L158/77 (Directive 2004/38).

5.2.1 Workers[393]

The right to free movement of workers is established in Article 45 TFEU, which reads as follows:

> *Article 45 TFEU*
> 1. Freedom of movement for workers shall be secured within the Union.
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
> 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
> a) to accept offers of employment actually made;
> b) to move freely within the territory of Member States for this purpose;
> c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
> d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
> 4. The provisions of this Article shall not apply to employment in the public service.

The third paragraph of Article 45 TFEU allows for limitations of the right to free movement of workers on grounds of public policy, public security or public health. Given the broadness inherent to the concept of public policy, Article 45 TFEU arguably does not rule out that a failure to comply with income requirements may pose a ground on the basis of which the right to free movement of workers may be restricted. However, Directive 2004/38 precludes that economic grounds are invoked to restrict the right to free movement of workers.

Directive 2004/38 distinguishes between entry, residence for up to three months, and residence for more than three months. As regards the right of Union citizens to enter the territory of another Member State, Article 5(1) of Directive 2004/38 states the following:

> *Article 5 - Right of entry*
> 1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.
> No entry visa or equivalent formality may be imposed on Union citizens.

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[393] In Directive 2004/38 the subcategories of workers and self-employed persons are consistently bracketed together. For this reason the latter subcategory is not dealt with separately.

The emphasis placed in this provision on the obligation ("shall grant") for Member States to allow into their territory Union citizens and their family members with only a valid identity card or passport, rules out the possibility of imposing income requirements on entry.[394] With regard to the right of residence for up to three months, Directive 2004/38 precludes income requirements to be applied as a precondition:

> *Article 6 - Right of residence for up to three months*
> 1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.
> 2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

If, however, during these three months it appears that Union citizens or their family members have become an unreasonable burden on the social assistance scheme of the host Member State, this circumstance may have implications for their right to reside. Nevertheless, this is not the case if it concerns workers:

> *Article 14 - Retention of the right of residence*
> 1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.
> 2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.
> […]
> 4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:
> (a) *the Union citizens are workers* or self-employed persons, or
> (b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

Article 14(4)(a) in conjunction with Article 14(1) of Directive 2004/38 entail an explicit derogation of the possibility to expel workers who have the right of residence as provided for in Article 6 of Directive 2004/38, for lack of sufficient income. As regards the referral in Article 14(4) to Chapter VI of the Directive, which provides

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[394] In *Oulane* the Court emphasised that the requirement of presenting a valid identity card or passport is aimed at establishing the maximum that Member States may require of the persons concerned with a view of recognising their right of residence. Case C-211/03 *Oulane v Minister voor Vreemdelingenzaken en Integratie* [2005], ECR I-1245, para 22.

for grounds for expulsion of Union citizens who otherwise fulfil the conditions of residence; the first provision of that Chapter immediately clarifies that economic reasons are not to be taken into account in this respect:

> *Article 27 - General principles*
> 1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. *These grounds shall not be invoked to serve economic ends*.

Thus, once a Union citizen satisfies the residence conditions as a worker, Article 27 of the Directive cannot be invoked to restrict his right of residence for lack of income.

When it comes to the right of residence for more than three months, workers are equally exempted from being subjected to income requirements:

> *Article 7 - Right of residence for more than three months*
> 1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
> a) are workers or self-employed persons in the host Member State; *or*
> b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State;
> […]

The construction this provision, acknowledging the right of residence for more than three months to Union citizens who are workers *or* who have sufficient resources, implies that the worker criterion does not include the requirement to obtain *sufficient* income from his activities as a worker. Moreover, the prohibition in Article 14(4)(a) of Directive 2004/38 to expel Union citizen workers for lack of income extends to their right of residence for more than three months. Finally, Article 27 of Directive 2004/38 applies here too, so that there is no room for Member States to expel Union citizen workers for economic reasons.

The above overview may seem conclusive as to how EU legislation rules out income requirements being imposed to workers. At the same time, however, there is a certain contradiction in identifying workers as a category that as such is exempted from income conditions. Undeniably, the term ‘worker’ suggests that the Union citizen concerned should be employed. Employment, in turn, presupposes that income is obtained. I elaborate on this seeming contradiction in section 5.3. First, I address the other two subcategories of economically active Union citizens: jobseekers and ex-workers.

5.2.2 Jobseekers and ex-workers

The TFEU does not speak of jobseekers. Yet, in the case of *Antonissen*[395] the Court ruled that Article 45 TFEU (then Article 48 TEC) should be interpreted in such a way that not only persons that actually have a job or a job offer, but also persons that are seeking employment are covered by this provision.[396] As regards the right of entry, as seen earlier, Union citizens in general, and therefore also jobseekers, cannot be subjected to income requirements on entry into another Member State.[397] Neither is the right of residence of jobseekers subjected to the fulfilment of income requirements. The conditions in Article 14(4)(b) of the Directive that are to be satisfied to enjoy a right of residence as a jobseeker do not include income conditions:

> *Article 14 Retention of the right of residence*
> 1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.
> 2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.
> […]
> 4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:
> (a) the Union citizens are workers or self-employed persons, or
> (b) *the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.*

As discussed earlier, the reference in Article 14(4) to Chapter VI of Directive 2004/38 does not mean that income requirements may be imposed in the form of a general derogation from the right to free movement: Article 27 of Directive 2004/38 states that the enlisted grounds for expulsion may not be invoked to serve economic ends.

Although jobseekers can claim a right of residence without having to satisfy income conditions, Member States may rely on the derogation provided for in Article 24(2) of Directive 2004/38 and refuse the grant of social assistance benefits to this

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[395] Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-745.

[396] ibid para 10-12. This case is discussed more elaborately in section 5.4.1.2, text to note 438.

[397] Article 5(1) of Directive 2004/38, cited above.

category of Union citizens.[398] Further, the Union citizen who entered the host Member State in order to seek employment but who no longer satisfies the conditions of par 14(4)(b) of Directive 2004/38 (the 'ex-jobseeker') classifies as an economically non-active Union citizen.[399] As is discussed in Chapter 6, the latter category of Union citizens is subjected to income requirements.

Directive 2004/38 lays down a separate right of residence for *ex-workers*: Union citizens who are in search for work *after* having been employed in a host Member State. This takes place in Article 7(3):

> *Article 7 - Right of residence for more than three months*
> 3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:
> (a) he/she is temporarily unable to work as the result of an illness or accident;
> (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;
> (c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;
> (d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

Union citizens who satisfy the criteria as set out in paragraph 7(3) of Directive 2004/38 may not be subjected to income requirements. These persons retain the status of *worker* and therefore enjoy the protection of Article 14(4)(a) of Directive 2004/38. With regard to ex-workers Member States may not rely on Article 24(2) of Directive 2004/38 to withhold social assistance benefits from ex-workers. As opposed to jobseekers, ex-workers do enjoy equal treatment with the nationals of the host Member State as provided in Article 24(1) of Directive 2004/38.[400]

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[398] Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* (ECLI:EU:C:2015:597), paras 57-58.

[399] Of course, this leaves open the possibility that a former jobseeker may enjoy a right of residence as a family member of another Union citizen.

[400] To identify the income-related conditions and limitations to rights of Union citizens it is important to properly distinguish between economically non-active Union citizens, jobseekers who have a right of residence on the basis of Article 14(4)(b), and ex-workers who still retain the status as a worker on the basis of Article 14(4)(b). As opposed to the former, the latter two categories may not be subjected to income conditions. Further, when it comes to the right to claim social assistance benefits, Member States may derogate from

In the case of *Saint Prix*[401] the Court has added a third category of persons that qualify as a worker without actually working. A woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of 'worker', within the meaning of Article 45 TFEU, provided she returns to work or finds another job within a reasonable period after the birth of her child.[402] This category of persons has not yet been included separately in EU legislation.

Considering the foregoing, Directive 2004/38 seems clear: income requirements may not be imposed on workers, jobseekers or ex-workers. As pointed out above, however, there is a certain inherent contradiction in the categorical exemption of economically active persons - more in particular, the category of workers - from being subjected to income requirements. It seems inevitable that in order to classify as a worker, it is essential that income is being, will be, or has been obtained. This assumption is reinforced by the general definition of the term 'worker' as developed by the ECJ:

> [A]ny person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must

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the principle of equal treatment with regard to economically non-active Union citizens and jobseekers (the duration of this derogation differs for jobseekers), but such derogation is not possible with regard to ex-workers. Finally, it is important in this regard to distinguish between the various types of benefits: while on the basis of Article 24(2) of Directive 2004/38 Member States may (temporarily) withhold social assistance benefits from legally residing economically non-active Union citizens and jobseekers, this is different when it comes to 'special non-contributory cash benefits' as covered in Regulation 883/2004 on the social security coordination, such as old-age benefits. The latter type of benefits are to be granted to legally residing non-active Union citizens and jobseekers, provided that they 'habitually reside' in the host Member State. Furthermore, jobseekers may not be withheld benefits that are intended to facilitate access to employment in the labour market of a Member State. Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-02703, para 58-71, especially para 63; Case C-258/04 *Office national de l'emploi v Ioannis Ioannidis* [2005] ECR I-08275, paras 22-25; Joined cases C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] I-04585, paras 37-45. See for an elaborate discussion on the relationship between the right of residence, the right of equal treatment and the right to social benefits, Herwig Verschueren, 'Preventing "Benefit Tourism" in the EU: a Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in *DANO*?' (2015) 52 CML Rev 363.

[401] Case C-507/12 *Saint Prix v Secretary of State for Work and Pensions* (ECLI:EU:C:2014:2007).

[402] ibid para 47.

> be regarded as a 'worker'. The essential feature of an employment relationship is […] that for a certain period of time a person performs services for and under the direction of another person *in return for which he receives remuneration*.[403]

Thus, while EU legislation categorically exempts Union citizens from being subjected to income requirements, the Court considers it an essential feature of an employment relationship that the person concerned receives *remuneration*. Additionally, the Court's definition speaks of *a certain period of time during which the person concerned performs activities in an employment relationship*. It may therefore not come as a surprise that - despite the aforementioned categorical exemption - there is a substantial body of Luxembourg case law in which the Court had to adjudicate income requirements imposed by Member States in the context of the recognition of Union citizens as a worker in the sense of Article 45 TFEU. The following sections illustrate how the Court has reconciled the constitutive elements in the definition of 'worker' that regard the obtainment of income for a certain period of time with the starting point that workers as such are exempted from income requirements.[404]

5.3 Luxembourg scrutiny of income-related restrictions to workers

In this section I first discuss the manner in which the Court has dealt with Member States that failed to recognise a person as a worker for not having satisfied the element of remuneration (5.3.1). Subsequently, I address the requirement entailing that the employment relationship should cover a certain period of time (5.3.2). Finally, attention is paid to cases featuring employed persons having recourse to social assistance (5.3.3).

5.3.1 The element of remuneration in the worker definition

As regards the element of remuneration as part of the worker definition, the first case to be discussed is the *Levin* case.[405] It concerns Mrs Levin, a British national whose request for a residence permit in the Netherlands was rejected. Mrs Levin had claimed that she and her husband had property and income arising therefrom, which

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[403] F.e. Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121, para 17; *Vatsouras and Koupatantze* (n 400) para 26.

[404] The discussion of this issue and of these cases as such is not new. See a.o. Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th edn, Oxford University Press 2015) 748-758. Yet, in view of the particular focus of this chapter on the ECJ's approach to income requirements, I feel that it cannot be left out here.

[405] Case 53/81 *Levin v Staatssecretaris van Justitie*, [1982] ECR 1035.

enabled her to support herself. The Netherlands authorities, however, submitted that Mrs Levin could not be considered a worker because her employment did not provide sufficient means for her support equal at least to the minimum legal wage prevailing in the Netherlands.[406]

The Court observed that the Directive did not provide for restrictions relating to the kind of employment or the amount of income derived from it and for this reason, it rejected this restrictive interpretation of the concept of 'worker':

> [A]lthough Article 4 of Directive 68/36/EEC grants the right of residence to workers upon the mere production of the document on the basis of which they entered the territory and of a confirmation of engagement from the employer or a certificate of employment, it does not subject this right to any condition relating to the kind of employment or to the amount of income derived from it.
> […]
> 16. It follows that the concepts of "worker" and "activity as an employed person" must be interpreted as meaning that the rules relating to freedom of movement for workers also concern persons who pursue or wish to pursue an activity as an employed person on a part-time basis only and who, by virtue of that fact obtain or would obtain only remuneration lower than the minimum guaranteed remuneration in the sector under consideration. In this regard no distinction may be made between those who wish to make do with their income from such an activity and those who supplement that income with other income, whether the latter is derived from property or from the employment of a member of their family who accompanies them.[407]

On the basis of *Levin*, part-time workers are not to be excluded from the scope of free movement of persons because of a lack of income.[408] Nevertheless, the Court did leave room for Member States to apply a certain threshold for activities to be recognised as actual employment:

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[406] ibid para 1 (under the heading of Facts and Issues). Furthermore, it was contended that Mrs Levin did not meet the condition, which was to be inferred from Netherlands law, that the citizen must have the subjective will to pursue an occupation. The applicant had taken up employment in the Netherlands in order to enable her husband, who was not a national of a Member State, to be deemed a "favoured EEC citizen".

[407] ibid paras 14, 16.

[408] In a number of subsequent cases the Court has rejected the practice of Member States to apply a fixed minimum of working-hours to establish the effective en genuine character of a person's activities: Case C-317/93 *Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-4625, paras 19, 22 (15 hours a week); Case C-102/88 *Ruzius-Wilbrink v Bestuur van de Bedrijfsvereniging voor Overheidsdiensten* [1989] ECR 4311, paras 7, 17 (18 hours a week); Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECR 1741, paras 2, 16 (12 hours a week); Case 171/88 *Rinner-Kühn v FWW Spezial-Gebäudereinigung* [1989] ECR 2743, para 16 (10 hours a week).

> 17. It should however be stated that whilst part-time employment is not excluded from the field of application of the rules on freedom of movement for workers, those rules cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.[409]

The dividing line between activities that may be considered 'effective and genuine' economical activities and those that should be regarded as 'purely marginal and ancillary' was subject of subsequent case law. In this regard considerable attention has been paid to whether the level of remuneration paid in return for activities could pose an indication for their effective and genuine economical character.

In the case of *Lawrie-Blum*,[410] the Court was to judge upon the situation in which a trainee teacher had a reduced income, not because of working part-time but because of a reduced wage. The Court started out by evaluating whether the traineeship fulfilled the criteria of the 'worker' definition:

> 17. Th[e] concept [of worker] must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.
> 18. In the present case, it is clear that during the entire period of preparatory service the trainee teacher is under the direction and supervision of the school to which he is assigned. It is the school that determines the services to be performed by him and his working hours and it is the school's instructions that he must carry out and its rules that he must observe. During a substantial part of the preparatory service he is required to give lessons to the school's pupils and thus provides a service of some economic value to the school. The amounts which he receives may be regarded as remuneration for the services provided and for the duties involved in completing the period of preparatory service. Consequently, the three criteria for the existence of an employment relationship are fulfilled in this case.[411]

For a Union citizen to be classified as a worker, the Court considered it crucial that the person concerned receives remuneration in return for the services provided. The relatively low level of remuneration, however, was not accepted as a circumstance that may exclude a person from falling within the scope of this definition:

> 21. The fact that trainee teachers give lessons for only a few hours a week and are paid remuneration below the starting salary of a qualified teacher does not prevent them from being regarded as workers. In its judgment in Levin, cited above, the Court held that the expressions 'worker' and 'activity as an employed person' must be understood as including persons who, because they are not employed full time, receive pay lower than that for

[409] *Levin* (n 405), para 17.
[410] *Lawrie-Blum* (n 403).
[411] ibid paras 17-18.

> full-time employment, provided that the activities performed are effective and genuine. The latter requirement is not called into question in this case. [412]

As regards the level of remuneration, another significant case is that of *Bettray*.[413] Mr Bettray worked within the framework of the Dutch Social Employment Law, which intended to provide work for the purpose of reintegration into the labour market of persons who could not work under normal conditions. His request for a residence permit for qualifying as a worker was denied and the Court was asked to answer the question whether or not a person in the circumstances of Mr Bettray should be qualified as a worker. The Court answered this question in the negative. In doing so, however, the Court emphasised that this was not because of the level of remuneration:

> 14. It appears from the order for reference that persons employed under the scheme set up by the Social Employment Law perform services under the direction of another person in return for which they receive remuneration. The essential feature of an employment relationship is therefore present.
> 15. That conclusion is not altered by the fact that the productivity of persons employed in the scheme is low and that, consequently, their remuneration is largely provided by subsidies from public funds. Neither the level of productivity nor the origin of the funds from which the remuneration is paid can have any consequence in regard to whether or not the person is to be regarded as a worker.[414]

The reason why Mr Bettray was not considered a worker was that the work in view of the Court did not constitute "effective and genuine economic activity". In this regard, the Court emphasised the absence of an autonomous demand for the activities to be conducted, combined with the irrelevance of the person that was to conduct these activities:

> 17. However, work under the Social Employment Law cannot be regarded as an effective and genuine economic activity if it constitutes merely a means of rehabilitation or reintegration for the persons concerned and the purpose of the paid employment, which is adapted to the physical and mental possibilities of each person, is to enable those persons sooner or later to recover their capacity to take up ordinary employment or to lead as normal as possible a life.
> 18. It appears from the order for reference that the jobs in question are reserved for persons who, by reason of circumstances relating to their situation, are unable to take up employment under normal conditions and that the social employment ends once the local authority is informed by the employment office that the person concerned will be able within a short period to take up employment under normal conditions.

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[412] ibid para 21.

[413] Case 344/87 *Bettray v Staatssecretaris van Justitie* [1989] ECR 1612.

[414] ibid paras 14-15.

> 19. It also appears from the order for reference that persons employed under the Social Employment Law are not selected on the basis of their capacity to perform a certain activity; on the contrary, it is the activities which are chosen in the light of the capabilities of the persons who are going to perform them in order to maintain, re-establish or develop their capacity for work. Finally, the activities involved are pursued in the framework of undertakings or work associations
> created solely for that purpose by local authorities.
> 20. The reply to the national court's question must therefore be that Article 48(1) of the EEC Treaty is to be interpreted as meaning that a national of a Member State employed in another Member State under a scheme such as that established under the Social Employment Law, in which the activities carried out are merely a means of rehabilitation or reintegration, cannot on that basis alone be regarded as a worker for the purposes of Community law.[415]

Thus, although remuneration is a *conditio sine qua non* for being considered a worker, the mere fact that a person obtains income does not guarantee the economical character of the activities conducted. Given the particularities of the work in *Bettray* the Court saw no room to frame the activities of the person concerned within the economic dynamics of supply and demand of labour.[416] In the case of *Steymann*[417] the rather particular setting of the work did not detract from the genuine and effective economical character of the activities conducted. This case concerned the question whether the member of a Bhagwan community should be qualified as a worker. Mr Steymann carried out plumbing work and general household duties in this community, while the community provided for the material needs of its members in any event, and therefore irrespective of the nature and the extent of their activities. The Court reiterated that even in the absence of a regular payment for work conducted, the occurrence of an indirect element of *quid pro quo* still may cause the work to be genuine and effective:

> 11. As regards the activities in question in this case, it appears from the documents before the Court that they consist of work carried out within and on behalf of the Bhagwan Community in connection with the Bhagwan Community's commercial activities. It appears that such work plays a relatively important role in the way of life of the Bhagwan

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[415] ibid, paras 17-20.

[416] In *Birden*, the Court noted the particular nature of the circumstances that had lead to the conclusion in *Bettray* and emphasised that the latter case should not too easily be taken as an example to reject the status of worker (Case C-1/97 *Birden v Stadtgemeinde Bremen* [1998] ECR I-7747, paras 30-31). In *Trojani* the Court left it to the national court to establish whether the person concerned should be considered a worker or whether his activities constituted 'merely a means of rehabilitation or reintegration for the persons concerned' Case C-456/02 *Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-07573, paras 17-25.

[417] Case 196/87 *Steymann v Staatssecretaris van Justitie* [1988], ECR 6159.

> Community and that only in special circumstances can the members of the community avoid taking part therein. In turn, the Bhagwan
> Community provides for the material needs of its members, including pocketmoney, irrespective of the nature and the extent of the work which they do.
> 12. In a case such as the one before the national court it is impossible to rule out *a priori* the possibility that work carried out by members of the community in question constitutes an economic activity within the meaning of Article 2 of the Treaty. In so far as the work, which aims to ensure a measure of self-sufficiency for the Bhagwan Community, constitutes an essential part of participation in that community, the services which the latter provides to its members may be regarded as being an indirect quid pro quo for their work.
> […]
> 14. Accordingly, the answer given to the first question must be that Article 2 of the EEC Treaty must be interpreted as meaning that activities performed by members of a community based on religion or another form of philosophy as part of the commercial activities of that community constitute economic activities in so far as the services which the community provides to its members may be regarded as the indirect quid pro quo for genuine and effective work.[418]

The case of *Steymann* thus confirmed the *Bettray* case in that there must be a certain demand for the activities being carried out in order to accept the income obtained from those activities as 'remuneration' in the sense of the worker definition. Importantly, the circumstance that the Court speaks of 'services provided by the community' in return for the work conducted, implicates that remuneration is not necessarily to be paid in cash.

5.3.2 The required duration of economic activities

Besides conditions related to the level and the nature of income, as a constitutive criterion in the worker definition Member States have put forward that the activities conducted should be of a certain duration. This aspect becomes of relevance in cases where retention of the right to reside for ex-workers is at stake: does a person who has worked in another Member State for a short period of time still have a right to reside in that Member State on the basis of paragraph 7(3) of Directive 2004/38? The Court has ruled on various occasions that the fact that the period of employment - and therewith the period in which income has been obtained - is of short duration, does not in itself exclude that employment from the scope of Article 45 TFEU. One of which is the case of *Ninni-Orasche*:[419]

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[418] ibid paras 11,12,14.

[419] Case C-413/01 *Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-13187.

> 24. [The] concept [of worker] must be defined in accordance with objective criteria characterising the employment relationship in view of the rights and duties of the persons concerned. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person in return for which he receives remuneration (see *Lawrie-Blum*, cited above, paragraph 17, Case 344/87 *Bettray* [1989] ECR 1621, paragraph 12, and *Meeusen*, cited above, paragraph 13).
> 25. In the light of that case-law, it must be held that the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 48 of the Treaty.[420]

In *Ninni-Orasche* the person concerned had worked for almost three months. In joined cases *Vatsouras* and *Koupatantze*, the Court did not dismiss the possibility that a Union citizen who had worked in another Member State for a period of less than two months could retain the status of worker after his contract had ended.[421] In the latter case, the Court did not confirm that the persons concerned indeed would retain this status; this was to be decided by the national authorities on the basis of an 'overall assessment of the employment relationship'. Yet, the Court did set out the boundaries for underpinning the conclusion to be drawn in this respect: the short duration of the period in which the activities had been conducted could not as such be decisive.[422] If, however it is clear that a person has never worked or looked for work in the host Member State, the Court requires no elaborate case-by-case assessment in order to evaluate whether the persons concerned are to be treated as workers. An example can be found in the case of *Dano*:[423]

> 66. It is apparent from the documents before the Court that Ms Dano has been residing in Germany for more than three months, that she is not seeking employment and that she did not enter Germany in order to work. She therefore does not fall within the scope *ratione personae* of Article 24(2) of Directive 2004/38.[424]

In the foregoing it has been explained that in order to classify as a worker it is crucial that a Union citizen for a certain period of time carries out economical activities in employment, in return for which he receives remuneration, to the exclusion of economic activities that are on such a small scale that they are to be considered purely marginal and ancillary. In its case law the Court has not set concrete standards as to when activities that fultime fil the first part of the definition, are nevertheless

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[420] ibid paras 24-25.
[421] *Vatsouras and Koupatantze* (n 400).
[422] ibid paras 29, 30.
[423] Case C-333/13 *Dano v Jobcenter Leipzig* (ECLI:EU:C:2014:2358).
[424] ibid para 66. For an older example, see Joint Cases 48/88, 106/88 and 107/88 *Achterberg-te Riele and others v Sociale Verzekeringsbank* [1989] ECR 1963.

of such a small scale that they should be considered marginal or ancillary. On the contrary, time and again the Court has reiterated that the use of fixed standards of scale – i.e. a particular level of income, a certain number of working hours per week, or a certain duration of the period of employment in another Member State – as a conclusive standard for whether a Union citizen is regarded a worker, goes against the broad interpretation that is to be given to the concept of worker. Instead, the genuine and effective character of the economic activities is to be established on the basis of an overall assessment of the employment relationship. The right to reside for workers in another Member State thus cannot be made dependent on the fulfilment of fixed, positive criteria regarding the level and nature of income or the duration of the income being acquired.

5.3.3 Economically active Union citizens in receipt of social benefits

A final income-related aspect concerns the possible consequences of an appeal on the social welfare scheme of the host Member State. The Court's case law has made clear that a 'negative' variety of the sufficient means condition – one that attaches consequences to having recourse to social benefits - is not in order when it comes to economically active persons. This holds true for workers, jobseekers and ex-workers. An appeal to social benefits and hence, a 'negative' income in the host Member State, thus cannot affect the right to free movement of these categories of Union citizens in the host Member State. This was first put to the fore in the case of *Kempf*.[425]

Mr Kempf, a German national, had moved to the Netherlands where he gave 12 piano lessons per week. To supplement his income, he received allowances from the Dutch unemployment benefits system. His request for a residence permit was denied because according to the authorities, Mr Kempf could not be qualified as a favoured EEC citizen within the meaning of the Netherlands legislation. He had had recourse to public funds in the Netherlands and was therefore manifestly unable to meet his needs out of the income received from his employment.[426] The Court did not accept the Member State's argument. Elaborating on the *Levin* case discussed earlier, the Court reasoned that the source of income that supplements the income from work could not detract from the fact that the person concerned carries out activities as a worker:

> [A] person in effective and genuine part-time employment cannot be excluded from their sphere of application merely because the remuneration he derives from it is below the level of the minimum means of subsistence and he seeks to supplement it by other lawful means of subsistence. In that regard it is irrelevant whether those supplementary means of subsistence are derived from property or from the employment of a member of his

[425] *Kempf* (n 408).
[426] ibid para 4.

> family, as was the case in *Levin,* or whether, as in this instance, they are obtained from financial assistance drawn from the public funds of the Member State in which he resides, provided that the effective and genuine nature of his work is established.[427]

This starting point from *Kempf* has been incorporated in Directive 2004/38. Having recourse to social security or social assistance benefits does not constitute a reason for expulsion when it comes to workers, jobseekers or ex-workers.[428]

Above I have illustrated how the Court has reconciled the preclusion of income requirements for economically active Union citizens with the worker definition. The argument can be made that since the classification of a Union citizen as a worker is inevitably coupled to acquiring income, it cannot be maintained that workers are not subjected to income conditions. Nevertheless, it has been shown that Member States are not allowed to make the classification of a Union citizen as a worker or ex-worker dependent on the very fulfilment of fixed income criteria that regard the scale of the activities or the level of remuneration received. Only if there is a complete absence of remuneration or a complete absence of activities as a worker or as a jobseeker this may in itself allow for the conclusion that a person is not a worker.

When it comes to applying the worker definition on the national level, the Court's case law implies that decision-making in this regard may not take place on the basis of fixed or singular criteria. This argumentative restriction the ECJ has imposed on Member States inevitably creates considerable practical difficulties in enforcing (income-related aspects of) the worker definition laid down in national (policy) rules.[429] Indeed, on this particular issue the Court appears to have disqualified national decision-making on the basis of generally applicable rules altogether.

5.4 Overview and analysis of the ECJ's approach to income requirements in relation to economically active Union citizens

The manner of reasoning on income requirements in relation to economically active Union citizens described above follows a characteristic pattern. Section 5.4.1 contains a general outline of this pattern. Subsequently I discuss the extent to which the various public and private interests that may be at stake have the capacity to determine the scope of the right of residence in concrete cases (section 5.4.2).

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[427] ibid para 14.

[428] Discussed in section 5.2.

[429] Eva Hilbrink, 'Het middelenvereiste in EU-rechtelijk Perspectief' (2010) 2 Journaal Vreemdelingenrecht 13.

5.4.1 General outline

The Court's reasoning in cases relating to income requirements of economically active Union citizens is characterised by a broad interpretation of the right to free movement of Union citizens and a strict assessment of the possibilities of states to restrict this right.

5.4.1.1 No unilateral restriction of the scope of EU-rights by Member States

In its scrutiny of income conditions attached by Member States to the classification of a Union citizen as a worker, the Court commonly begins by pointing out that the definition of the terms 'worker' and 'activity as an employed person' is a matter of EU law. The consequence thereof, is that these terms may not be defined by reference to the national laws of the Member States. The reason why the Court does not give room for national interpretation in this regard is not so much the pursuit of uniformity as an autonomous value, but to prevent Member States from using their national legislation to unilaterally *restrict* the scope of free movement of workers:

> […] Articles 48 to 51 of the Treaty [now 45 to 48 TFEU], by the very fact of establishing freedom of movement for 'workers', have given Community scope to this term. If the definition of this term were a matter within the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of 'migrant worker' and to eliminate at will the protection afforded by the Treaty to certain categories of person. Moreover nothing in Articles 48 to 51 of the Treaty leads to the conclusion that these provisions have left the definition of the term 'worker' to national legislation. On the contrary, the fact that Article 48(2) mentions certain elements of the concept of 'workers', such as employment and remuneration, shows that the Treaty attributes a Community meaning to that concept. Articles 48 to 51 would therefore be deprived of all effect and the abovementioned objectives of the Treaty would be frustrated if the meaning of such a term could be unilaterally fixed and modified by national law.[430]

It is with this starting point in mind, that the Court in *Levin* rejected the argument that the right to free movement of workers could only be relied upon by persons who fulfilled national standards relating to the minimum wage and the minimum number of hours:

> 10. The Netherlands and Danish Governments have maintained that the provisions of Article 48 may only be relied upon by persons who receive a wage at least commensurate with the means of subsistence considered as necessary by the legislation of the Member State in which they work, or who work at least for the number of hours considered as usual in respect of fulltime employment in the sector in question. In the absence of any provisions to that effect in Community legislation, it is suggested that it is necessary to

[430] Case 75/63 *Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 347, para 1 (at 184).

> have recourse to national criteria for the purpose of defining both the minimum wage and the minimum number of hours.
> 11. That argument cannot, however, be accepted. As the Court has already stated in its judgment of 19 March 1964 in Case 75/63 Hoekstra (née Unger) [1964] ECR 1977 the terms "worker" and "activity as an employed person" may not be defined by reference to the national laws of the Member States but have a Community meaning. *If that were not the case, the Community rules on freedom of movement for workers would be frustrated, as the meaning of those terms could be fixed and modified unilaterally, without any control by the Community institutions, by national laws which would thus be able to exclude at will certain categories of persons from the benefit of the Treaty*.
> 12. Such would, in particular, be the case if the enjoyment of the rights conferred by the principle of freedom of movement for workers could be made subject to the criterion of what the legislation of the host State declares to be a minimum wage, so that the field of application ratione personae of the Community rules on this subject might vary from one Member State to another. The meaning and the scope of the terms "worker" and "activity as an employed person" should thus be clarified in the light of the principles of the legal order of the Community.[431]

In a similar way the Court underpinned its conclusion in *Kempf* that having recourse to publicly funded financial assistance could not detract from the classification of a person as a worker. It pointed out that otherwise the right to free movement of workers could be restricted through the use of national laws:

> 14. […] In that regard it is irrelevant whether those supplementary means of subsistence are derived from property or from the employment of a member of his family, as was the case in Levin, or whether, as in this instance, they are obtained from financial assistance drawn from the public funds of the Member State in which he resides, provided that the effective and genuine nature of his work is established.
> 15. That conclusion is, indeed, corroborated by the fact that, as the Court held most recently in Levin, the terms 'worker' and 'activity as an employed person' for the purposes of Community law may not be defined by reference to the national laws of the Member States but have a meaning specific to Community law. Their effect would be jeopardized if the enjoyment of rights conferred under the principle of freedom of movement for workers could be precluded by the fact that the person concerned has had recourse to benefits chargeable to public funds and created by the domestic legislation of the host State.[432]

5.4.1.2 Securing a broad interpretation of the fundamental freedom of movement

The Court consistently rejects restrictions to the concepts of ‘worker’ and ‘activity as an employed person’ that are based on national standards - and hence, it rejects Member States as authoritative interpreters of these concepts. This observation is accompanied by a reiteration of the fact that these concepts define the field of

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[431] *Levin* (n 405) paras 10-12 (emphasis added).
[432] *Kempf* (n 408) paras 14-15.

application of one of the fundamental freedoms guaranteed by the Treaty and as such may not be interpreted restrictively:

> The Court has consistently held that freedom of movement for workers forms one of the foundations of the Community. The provisions laying down that fundamental freedom and, more particularly, the terms 'worker' and 'activity as an employed person' defining the sphere of application of those freedoms must be given a broad interpretation in that regard, whereas exceptions to and derogations from the principle of freedom of movement for workers must be interpreted strictly.[433]

The appropriateness of such broad interpretation is substantiated by referring to the objectives of the Treaty, which include, *inter alia*, the abolition of obstacles to freedom of movement of persons:

> 15. An interpretation which reflects the full scope of these concepts [of 'worker' and 'activity as an employed person' EH] is also in conformity with the objectives of the Treaty which include, according to Articles 2 and 3, the abolition, as between Member States, of obstacles to freedom of movement for persons, with the purpose inter alia of promoting throughout the Community a harmonious development of economic activities and a raising of the standard of living.[434]

Thus, an interpretation of the concept of worker that would allow for imposing income restrictions to workers would create an obstacle to free movement for persons; therefore such an interpretation would be at odds with one of the central objectives of the Treaty. In some cases, the Court illustrates this point by emphasizing the consequences for the achievement of the Treaty objectives if a particular restriction invoked by the Member State indeed would be accepted. With regard to the restriction that the right to free movement of workers would only cover full-time employment, the Court reasoned as follows:

> Since part-time employment, although it may provide an income lower than what is considered to be the minimum required for subsistence, constitutes for a large number of persons an effective means of improving their living conditions, the effectiveness of Community law would be impaired and the achievement of the objectives of the Treaty would be jeopardized if the enjoyment of rights conferred by the principle of freedom of movement for workers were reserved solely to persons engaged in full-time employment and earning, as a result, a wage at least equivalent to the guaranteed minimum wage in the sector under consideration.[435]

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[433] *Kempf* (n 408) para 13. Similar remarks are made in *Levin* (n 405) para 13; *Lawrie-Blum* (n 403) para 16; *Bettray* (n 413) para 11; *Antonissen* (n 395) para 11.

[434] *Levin* (n 405) para 15.

[435] *Levin* (n 405) para 15.

In a similar vein, the Court established in the case of *Antonissen* that jobseekers should fall within the scope of the right to free movement of workers. In that case the Member State had argued that according to the strict wording of Article 45 TFEU, Community nationals are given the right of free movement within the territory of the Member States for the purpose only of accepting offers of employment actually made,[436] whilst the right to stay in the territory of a Member State is stated to be for the purpose of actual employment.[437] The Court pointed out the consequences of accepting this point of view:

> 10. Such an interpretation would exclude the right of a national of a Member State to move freely and to stay in the territory of the other Member States in order to seek employment there, and cannot be upheld.
> […]
> 12. […] a strict interpretation of Article 48(3) [now 45(3) TFEU] would jeopardize the actual chances that a national of a Member State who is seeking employment will find it in another Member State, and would, as a result, make that provision ineffective.[438]

In view of the foregoing, the general approach to cases featuring income restrictions to economically active persons seems to be based on the premise that the objective to abolish obstacles for free movement of workers precludes a strict interpretation of the scope of the right to free movement of workers - and therewith the scope of the concepts of 'worker' and 'activity as employed person'. The application of this starting point has resulted in a judicial approach in which conditions that are not expressly provided for in EU legislation – especially those that would allow Member States to restrict the scope of free movement for workers on the basis of particularities in national legislation – are consistently dismissed as an unjust restriction of the scope of the right to free movement of workers. This approach inevitably has consequences for the possible relevance of the various interests that may be at stake in deciding on the scope of the worker definition in a concrete case. In the next section I discuss which interests can be of relevance in the Court's scrutiny of national income requirements to economically active Union citizens, and which interests cannot.

5.4.2 The interests of relevance in adjudicating the scope of the worker definition

The argumentation scheme applied by the Court in relation to economically active Union citizens does not comprise a balancing assessment. As explained in the first part of this book, a balancing test presupposes the possible relevance of *competing*

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[436] With reference to Article 45(3)(a) and (b) TFEU (then, Article 45 EC).
[437] With reference to Article 45(3)(c) TFEU (then Article 45 EC).
[438] *Antonissen* (n 395) paras 10,12.

interests for the outcome of the case.[439] Thus, in a balancing test the issue is whether there is a sufficient public interest in pursuing a certain legitimate aim that might outweigh the competing individual interest in being granted a certain right or *vice versa*. Thus, if the acceptability of income criteria to the concept of worker would have been assessed on the basis of a balancing assessment, both the weight of the public interest in denying residence to a person and the weight of the opposing right to free movement of Union citizens would have made up possible variable factors in the Court's argumentation.

The 'public' interest that by exclusion is considered of relevance in Luxembourg income cases regarding economically active persons, regards the Treaty objective to abolish obstacles to free movement of persons in order to accomplish an internal market without internal frontiers. It is this objective that consistently proves to be leading for concluding on the acceptability of national interpretations of the worker definition. Importantly, this EU public interest coincides with the individual interest in exercising the right to free movement. The interests of Member States - insofar they are contrary to the public interest in abolishing obstacles to free movement of persons, and therewith contrary to the individual interest in being granted entry and residence as an economically active person – are categorically dismissed as being of relevance. This means that, even though it might be considered profitable to the national economic well-being of a Member State to deny residence to persons who may have recourse to social welfare schemes, or who work for only a limited number of hours or who receive a reduced wage, or to those who reside in the host Member State for the purpose of looking for work; such considerations may not be invoked to withhold the worker status to a Union citizen. The essential feature of a balancing assessment - entailing the potential relevance of both the public and the individual interest as competing interests - is therefore absent in judicial reasoning in the cases at issue here.

The specifics of the case at hand relating to the individual interest in being accorded the status of worker proved equally irrelevant in establishing whether there is a right to free movement. Admittedly, in general terms, the individual interest in being granted the worker status plays an important role in the Court's reasoning. In *Levin*, for example, the conclusion that part-time employment falls within the scope of the right to free movement of workers was substantiated, among others, by pointing out that part-time employment 'constitutes for a large number of persons an effective means of improving their living conditions'.[440] Yet, the issue of whether this also held true for the person concerned in the case at hand was not a relevant aspect. The mere fact that a person has opted to (look for) work in another Member

[439] Section 4.2.2.
[440] *Levin* (n 405) para 15.

State is sufficient to establish his right to free movement as a worker, regardless whether this indeed serves best his individual interests. Consequently, the circumstance that the person concerned may have better job prospects in his country of origin, or that he has no social ties with the host Member State are irrelevant in deciding on whether a Union citizen should be classified as a worker.

Likewise, the Court considers it irrelevant that in taking up or seeking a job in another Member State, the person concerned in fact sought to fulfil a different interest than to improve his living conditions by means of work. In the case of *Ninni-Orasche*, it was submitted that the person concerned, rather than genuinely seeking to exercise her right to freedom of movement with a view to working, in fact intended to study in a Member State other than her Member State of origin.[441] It was argued that she had thus attempted to create a situation in which it appeared that she was a worker merely to obtain other advantages, such as study finance. The Court, however, did not accept this circumstance as being of relevance for whether the person concerned should be considered a worker for the purposes of the Treaty:

> 31. Finally, as regards the argument that the national court is under an obligation to examine, on the basis of the circumstances of the case, whether the appellant in the main proceedings has sought abusively to create a situation enabling her to claim the status of a worker within the meaning of Article 48 of the Treaty with the aim of acquiring advantages linked to that status, it is sufficient to state that any abusive use of the rights granted by the Community legal order under the provisions relating to freedom of movement for workers presupposes that the person concerned falls within the scope *ratione personae* of that Treaty because he satisfies the conditions for classification as a 'worker' within the meaning of that article. It follows that the issue of abuse of rights can have no bearing on the answer to the first question.[442]

Considering the foregoing, it may be concluded that the dynamics of counter-positioned interests as they are inherent to a balancing assessment are absent in cases featuring income restrictions to the right to free movement of economically active persons. The individual interest in being granted the worker status is not set out against the public interest, but instead coincides with the latter, that is, the community interest in establishing an internal market. Although Member States may perceive the EU public interest in promoting the free movement of workers to conflict with their interest in protecting the national social welfare scheme, this interest does not have the capacity to outweigh the EU 'public' interest in promoting free movement of workers. On the contrary, a Member State's interests in protecting the national economic well-being is excluded from being of any relevance, regardless the nature or weight of these interests. There is thus no room for balancing

[441] *Ninni-Orasche* (n 419).
[442] ibid para 31.

in this regard. Further, the legitimacy of income-related restrictions does not depend on case-specific aspects relating to the individual interest in being granted a right of residence as a worker. Instead, the very fact that a person works or is looking for work in another Member State activates the full protection of the right to free movement. Thus, the right of entry and residence of persons working full time is not better protected than the right of entry and residence of those who work part time. And the right of residence of Union citizens earning a wage below the minimum level is not less protected compared to those whose earnings rise above this level. Other aspects that relate to the individual interest in being granted the right to free movement of persons, such as a person's social ties to a particular Member State, do not determine the scope of this right. The individual interest in being granted the status of an economically active person is therefore not balanced against other interests. Indeed, the existence of a right to free movement of economically active Union citizens is to be established autonomously, 'in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned'.[443]

[443] ibid para 24, with references to other cases.

Chapter 6 Income requirements for economically non-active Union citizens

6.1 Introduction

EU law does provide for income requirements for economically inactive Union citizens. However, the principle that in view of the nature of the right to free movement, restrictions to this right should be interpreted narrowly, applies here too.

Section 6.2 contains the legal framework in relation to income requirements for economically non-active Union citizens. In section 6.3, I discuss the Court's approach to national interpretations of the sufficient resources condition. Special attention is paid to the manner in which the Court evaluates the public interest in upholding (national) restrictive income criteria. Section 6.4 concludes this chapter by picturing the general features of the Court's approach, as well as the consequences thereof for the relevance that the various interests at stake may have in determining the outcome of a concrete case.

6.2 Legal framework

As discussed in chapter 5, Directive 2004/38 prohibits income requirements on entry in the territory of another Member State with regard to all Union citizens, i.e. including those citizens who are economically non-active. Article 5(1) of Directive 2004/38 states that Member States shall grant Union citizens leave to enter their territory on the mere submission of a valid identity card or passport.[444] The right of residence of economically non-active Union citizens is subjected to the fulfilment of income requirements. Article 14(1) of Directive 2004/38 provides that the right to reside for up to three months as provided for in Article 6 exists as long as the Union citizen does not become an unreasonable burden on the social assistance system of the host Member State:

[444] Cited above in the text to note 394.

> *Article 14 – Retention of the right of residence*
> 1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

With regard to the right of residence for more than three months, income requirements are laid down in Article 7 of Directive 2004/38:

> *Article 7 - Right of residence for more than three months*
> 1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
> (a) are workers or self-employed persons in the host Member State; or
> (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State;
> […]

On the basis of Article 14(2) of Directive 2004/38 the right of residence of economically non-active Union citizens for more than three months exists as long as the conditions of Article 7, and thereby the condition to have sufficient resources, remain satisfied:

> *Article 14 – Retention of the right of residence*
> 2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

Directive 2004/38 does not provide clear-cut standards as regards the level at which a person's resources may be considered (in)sufficient. First of all, Article 8(4) prohibits an interpretation of Article 7 (in conjunction with Article 14) in a manner whereby on the basis of fixed reference amounts it is determined whether a person has sufficient resources:

> *Article 8 - Administrative formalities for Union citizens*
> 4. Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

Importantly, the obligation in Article 8(4) of Directive 2004/38 to take in account the personal situation of the person concerned does not regard circumstances relating to the individual interest in being granted that right. Instead, the personal situation of the person concerned is linked to the amount that may be regarded as sufficient not to become a burden on the social assistance scheme. In other words, this

provision requires that the question whether a person poses a risk of becoming a burden on the public finances is examined on the basis of the personal situation of the person concerned. This implies that for example low rental costs may be invoked as a factor of significance in deciding upon the sufficiency of a person's resources.

A second reason why Directive 2004/38 is not clear-cut when it comes to the conditioning capacity of the sufficient resources requirement is that Article 14(3) states that not every appeal to the social assistance scheme may justify an expulsion decision:

> *Article 14 – Retention of the right of residence*
> 3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

The consequence of the above provision is that every case in which a person actually has recourse to social assistance still requires an individual assessment of whether this circumstance poses a sufficient reason to deny a right of residence to the person concerned.

Finally, even if it is established that a person may be expelled for a (structural) lack of income, it is only under exceptional circumstances that a Member State may impose an entry ban on that person. At this point it should be recalled that there is a distinction between on the one hand expelling a Union citizen for no longer fulfilling the conditions for the right to free movement, such as the condition of sufficient resources, and on the other hand expelling a Union citizen for posing a threat to public policy, public security or public health, irrespective of whether he fulfils the conditions of exercising the right to free movement. On the basis of Article 15 of Directive 2004/38 only in the latter case an entry ban may be imposed:

> *Article 15 - Procedural safeguards*
> 1. The procedures provided for by Articles 30 and 31 [on the procedures to be followed in case of expulsion, EH] shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.
> 2. […]
> 3. The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies.

Thus, to justify an entry ban for failure to satisfy the sufficient resources condition, it is necessary that the Union citizen in addition represents an actual and sufficiently serious threat to the Member State's public order in the sense of Article 27 of Directive 2004/38. Since the latter provision precludes economic reasons to be invoked in this regard, non-compliance with the sufficient resources condition only

exceptionally results in the Union citizen being prevented from re-entering the host Member State.[445] An example of such a situation might be that in which a person has committed large-scale social assistance fraud.[446]

In view of the foregoing, it appears that although Directive 2004/38 does provide for income requirements to be imposed on economically non-active Union citizens, the capacity of such requirements to actually restrict these Union citizens' right to enter into or reside in another Member State is rather modest.

The above-discussed provisions determining the scope of the sufficient resources condition are mostly codifications of Luxembourg case law. In the next section I discuss that case law, complemented with cases succeeding the coming into force of Directive 2004/38. It will emerge that it has become particularly difficult for Member States to apply the sufficient resources condition without making use of standardised assessment-criteria.

6.3 Luxembourg scrutiny of income restrictions to non-active Union citizens

In chapter 5 it is observed that in establishing whether a Union citizen satisfies the worker condition, income-related aspects may be indicative but they may not be applied as autonomous criteria to determine whether or not a person qualifies as a worker. In addition, the Court categorically precludes that Member States invoke the interest in protecting their social assistance scheme, or any other economical reason in order to counterbalance, and therewith restrict the right to free movement of workers.

This section contains an in-depth discussion of Luxembourg cases on the interpretation of the sufficient resources condition that applies to economically non-active Union citizens. For each case I provide an overview of the facts and the main conclusions, after which I evaluate whether the legitimacy of the national income requirements depends on the weight of the public interest in upholding these requirements in the case at hand. The discussion of the legal framework in relation to economically non-active persons shows that with regard to this category of Union

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[445] This does not mean that an expulsion decision for lack of income should be considered as a measure without consequence: after re-entry, the person concerned classifies as a Union citizen who exercises the right to reside up to three months as provided for in Article 6 of Directive 2004/38. This means that on the basis of Article 24(2) of the Directive the Member State is not under the obligation to grant him social assistance benefits.

[446] Eva-Maria Poptcheva, 'Freedom of Movement and Residence of EU Citizens, Access to Social Benefits' (2014) Research Paper European Parliamentary Research Service <https://epthinktank.eu/2014/06/16/freedom-of-movement-and-residence-of-eu-citizens-access-to-social-benefits/> accessed 28 October 2016.

citizens, the public interest in protecting the social assistance scheme in fact is accepted as an interest that may detract from the right to free movement.

6.3.1 Grzelczyk (Case C-184/99) [447]

The *Grzelczyk* case concerned a student of French nationality, who during the first three years of his studies in Belgium paid for his own costs of maintenance, accommodation and studies by taking on various minor jobs and by obtaining credit facilities. At the beginning of his fourth and final year of his studies he applied to the public social assistance centre (CPAS) for payment of the Belgian minimum subsistence allowance (minimex). The CPAS had observed that Mr Grzelczyk had worked hard to finance his studies, but that his final academic year, involving the writing of a dissertation and the completion of a qualifying period of practical training, would be more demanding than the previous years. For those reasons, by decision of 16 October 1998, the CPAS granted Mr Grzelczyk the minimex. Afterwards, the CPAS applied to the Belgian State authorities for reimbursement of the minimex paid to Mr Grzelczyk. The competent federal minister, however, had refused to reimburse the CPAS on the ground that the legal requirements for the grant of the minimex, and in particular the nationality requirement, had not been satisfied. Hereupon, the CPAS withdrew the minimex from Mr Grzelczyk with effect from 1 January 1999, for the stated reason that 'the person concerned is an EEC national enrolled as a student'. Although the Belgian minimex legislation did not exclude nationals from other Member States *per se*, only EEC workers were eligible for minimex benefits. With regard to students, therefore, the scope of eligibility was restricted to those who had the Belgian nationality. Since the Belgian authorities had not regarded Mr Grzelczyk as a worker but instead had classified him as a student, his nationality posed an obstacle for the grant of minimex payments.[448]

The ECJ disagreed with the Belgian practice. It observed that the denial to grant minimex payments comprised a difference in treatment between students of Belgian nationality and Union citizen students with the nationality of another Member State: only the latter were subjected to the restriction of falling within the scope of

[447] Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193.

[448] The Court, with reference to the A-G's Opinion, took the stance that Mr Grzelczyk in fact was to be considered a worker. The Court nevertheless discussed the case as if it did not concern a worker, since this was the manner in which the Belgian court had framed its questions to the ECJ. ibid paras 16-18.

Regulation 1612/68.[449] The case thus became a matter concerning discrimination on the basis of nationality:

> 29. It is clear from the documents before the Court that a student of Belgian nationality, though not a worker within the meaning of Regulation No 1612/68, who found himself in exactly the same circumstances as Mr Grzelczyk would satisfy the conditions for obtaining the minimex. The fact that Mr Grzelczyk is not of Belgian nationality is the only bar to its being granted to him. It is not therefore in dispute that the case is one of discrimination solely on the ground of nationality.[450]

Although in *Grzelczyk* the person concerned had not been denied residence – rather the matter concerned entitlement to social benefits – the case is nevertheless of importance for this research on national legal restrictions on entry and residence of foreign nationals. The reason for this is that only Union citizens *lawfully* residing in the territory of another Member State could rely on the protection against discrimination on the basis of nationality as provided for in the Treaty:

> 30. Within the sphere of application of the Treaty, such discrimination is, in principle, prohibited by Article 6 [now Article 18 TFEU]. In the present case, Article 6 must be read in conjunction with the provisions of the Treaty concerning citizenship of the Union in order to determine its sphere of application.
> 31. Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.
> 32. As the Court held in paragraph 63 of its judgment in *Martínez Sala*, cited above, a citizen of the European Union, lawfully resident in the territory of a host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law.[451]

Thus, to establish whether Mr Grzelczyk could rely on the prohibition of discrimination on the basis of nationality, it was crucial to establish firstly whether he had a right to reside in Belgium. Consequently, the outcome of the case in essence depended on whether his appeal to the minimum subsistence allowance had meant

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[449] Council Regulation (EEC) 1612/68 on freedom of movement for workers within the Community [1986] OJ Spec Ed 475 (Regulation 1612/68).

[450] *Grzelczyk* (n 447) para 29.

[451] ibid para 30-31. With the coming into force of Directive 2004/38, equal treatment of Union citizens as regards a.o. social benefits is governed by that Directive in Article 24. To rely on Article 24 of Directive 2004/38 it is required that the person concerned has a right of residence *on the basis of Directive 2004/38*. A Union citizen in the possession of a national residence permit without satisfying the criteria of Directive 2004/38 cannot, like in *Martínez Sala*, claim equal treatment on the basis of Directive 2004/38.

that he did no longer fulfil the residence conditions as entailed in Directive 93/96 on the right of residence for students.[452] In its evaluation of the consequences of an appeal to the host Member State's social assistance system for the right of residence of Union citizen students, the Court started out by delineating the scope of the resources condition applicable to Union citizen students.[453] The Court's interpretation of what may be required on the basis of the Directive is a rather strict one:

> 38. As regards those limitations and conditions, it is clear from Article 1 of Directive 93/96 that Member States may require of students who are nationals of a different Member State and who wish to exercise the right of residence on their territory, first, that they satisfy the relevant national authority that they have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence, next, that they be enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there and, lastly, that they be covered by sickness insurance in respect of all risks in the host Member State.
> 39. Article 3 of Directive 93/96 makes clear that the directive does not establish any right to payment of maintenance grants by the host Member State for students who benefit from the right of residence. On the other hand, there are no provisions in the directive that preclude those to whom it applies from receiving social security benefits.
> 40. As regards more specifically the question of resources, Article 1 of Directive 93/96 does not require resources of any specific amount, nor that they be evidenced by specific documents. The article refers merely to a declaration, or such alternative means as are at least equivalent, which enables the student to satisfy the national authority concerned that he has, for himself and, in relevant cases, for his spouse and dependent children, sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their stay (see paragraph 44 of the judgment in Case C-424/98 *Commission* v *Italy* [2000] ECR I-4001).
> 41. In merely requiring such a declaration, Directive 93/96 differs from Directives 90/364 and 90/365, which do indicate the minimum level of income that persons wishing to avail themselves of those directives must have. That difference is explained by the special characteristics of student residence in comparison with that of persons to whom

[452] Council Directive (EEC) 93/96 on the right of residence for students [1993] OJ L 317/59 (Directive 93/96).

[453] Article 1 of Directive 93/96 provided the following in this regard: '[T]he Member States shall recognize the right of residence for any student who is a national of a Member State and who does not enjoy that right under other provisions of Community law, and for the student's spouse and their dependent children, where the student assures the relevant national authority, by means of a declaration or by such alternative means as the student may choose that are at least equivalent, that he has sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence, provided that the student is enrolled in a recognized educational establishment for the principal purpose of following a vocational training course there and that he is covered by sickness insurance in respect of all risks in the host Member State.'

> Directives 90/364 and 90/365 apply (see paragraph 45 of the judgment in *Commission* v *Italy*, cited above).[454]

Even though the sufficient resources condition that applied to students was less demanding than that which was applicable to other economically non-active Union citizens, the Court acknowledged that under certain circumstances Member States may attach consequences to students' right to reside in cases where this condition is no longer fulfilled:

> 42. That interpretation [entailing that a 'light version' of the sufficient resources condition applies to students, EH] does not, however, prevent a Member State from taking the view that a student who has recourse to social assistance no longer fulfils the conditions of his right of residence or from taking measures, within the limits imposed by Community law, either to withdraw his residence permit or not to renew it.[455]

As to the circumstances under which a measure to deny a residence could be justified, the Court stressed that this requires a case-by-case assessment:

> 43. Nevertheless, in no case may such measures become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State's social assistance system.
> 44. Whilst Article 4 of Directive 93/96 does indeed provide that the right of residence is to exist for as long as beneficiaries of that right fulfil the conditions laid down in Article 1, the sixth recital in the directive's preamble envisages that beneficiaries of the right of residence must not become an 'unreasonable' burden on the public finances of the host Member State. Directive 93/96, like Directives 90/364 and 90/365, thus accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.[456]

An appeal to social assistance is not in itself sufficient to draw the conclusion that a Union citizen student no longer has a right of residence in the host Member State. If a Union citizen student has recourse to the social assistance scheme of the host Member State, the issue of whether this affects his right to reside in the host Member State depends on whether the burden he poses on the social assistance scheme is considered 'unreasonable'.[457] The circumstance that the Court pointed out the

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[454] *Grzelczyk* (n 447) paras 38-41.

[455] ibid para 42.

[456] ibid paras 43-44.

[457] Notably, this restraint is based not on the text of the Directive then in force itself, but instead, on the text of the sixth recital of the preamble to Directive 93/96: 'Whereas beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State.' The question of whether the preamble of a

temporariness of a person's financial difficulties as a relevant aspect in this regard implies that this case-by-case assessment aims at establishing the weight of the public interest:[458] a minor appeal to social assistance poses a minor burden on the social assistance scheme of the host Member State and does not immediately constitute an 'unreasonable' burden.[459]

6.3.2 Baumbast (Case C-413/99)[460]

The *Baumbast* case concerned a failure to fulfil the requirement to be covered by sickness insurance in respect of all risks in the host Member State, and not the failure to fulfil the income requirement. The case is nevertheless discussed at this place, since the fulfilment of the sufficient resources condition did constitute an aspect of relevance. Moreover, as it is shown below, the insurance requirement and the income requirement were treated as conditions of a similar kind, i.e. as conditions that are both 'based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States'[461].

The *Baumbast* case concerned a German/Colombian family. The father, who had the German nationality, worked as an employer with German companies in China and Lesotho, after having pursued economic activities in the United Kingdom for several years. The question as to the Baumbast family's right to reside arose when the family's applications for indefinite leave to remain in the United Kingdom were refused. As to Mr Baumbast, it was held that since he had stopped working in the United Kingdom, he could no longer be regarded a Community worker and therefore he could no longer derive a right to reside from Regulation 1612/68. Furthermore, it was contended that Mr Baumbast could not found a right to reside on Directive

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Directive may be used to interpret the meaning of Directive provisions, as has been conducted in the underlying case, is an interesting one, which nevertheless falls outside the scope of this book.

[458] See also the discussion of Article 8(4) of Directive 2004/38 in the text to note 556.

[459] The Court concluded this case by stating that 'Articles 6 and 8 of the Treaty preclude entitlement to a non-contributory social benefit, such as the minimex, from being made conditional, in the case of nationals of Member States other than the host State where they are legally resident, on their falling within the scope of Regulation No 1612/68 when no such condition applies to nationals of the host Member State. The Court – understandably, given the scope of the question referred to it - did not draw an explicit conclusion as to whether a person in the circumstances like that of mr Grzelczyk poses an unreasonable burden on the social assistance scheme of the host Member State.

[460] Case C-413/99 *Baumbast and R. v Secretary of State for the Home Department* [2002] ECR I-7091.

[461] ibid para 90.

90/364,[462] since arguably, he did not satisfy the condition laid down in that Directive to have comprehensive sickness insurance in the Member State.

In interpreting the scope of the requirement to have comprehensive sickness insurance in the host Member State, the Court started out by evaluating the facts of the case at hand that had lead the authorities to conclude that Mr Baumbast failed to comply with that requirement:

> 87. As regards the limitations and conditions resulting from the provisions of secondary legislation, Article 1(1) of Directive 90/364 provides that Member States can require of the nationals of a Member State who wish to enjoy the right to reside within their territory that they themselves and the members of their families be covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.
> 88. As to the application of those conditions for the purposes of the Baumbast case, it is clear from the file that Mr Baumbast pursues an activity as an employed person in non-member countries for German companies and that neither he nor his family has used the social assistance system in the host Member State. In those circumstances, it has not been denied that Mr Baumbast satisfies the condition relating to sufficient resources imposed by Directive 90/364.
> 89. As to the condition relating to sickness insurance, the file shows that both Mr Baumbast and the members of his family are covered by comprehensive sickness insurance in Germany. The Adjudicator seems to have found that that sickness insurance could not cover emergency treatment given in the United Kingdom.[463]

Before addressing the question whether Mr Baumbast indeed had lost his right of residence, the Court discussed the argumentative framework on the basis of which such conclusion was to be drawn. Like in *Grzelczyk*, the Court pointed out the legitimate interest in protecting the public finances as encompassed in the preamble to the Directive: the prevention of Union citizens becoming an 'unreasonable' burden on the public finances.[464] In addition, the Court emphasised that limitations

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[462] Council Directive (EEC) 90/364 on the right of residence of economically non-active Union citizens [1990] OJ L 180/26 (Directive 90/364).

[463] ibid paras 87-89.

[464] The text of the preamble thus again served to delineate the scope of the applicable Directive provision, since the latter does not contain the term 'unreasonable'. Directive 90/364 states in Article 1 the following: '1. Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.

to Union citizens' right of residence should be applied in accordance with the principle of proportionality:

> 90. In any event, the limitations and conditions which are referred to in Article 18 EC and laid down by Directive 90/364 are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. In that regard, according to the fourth recital in the preamble to Directive 90/364 beneficiaries of the right of residence must not become an "unreasonable" burden on the public finances of the host Member State.
> 91. However, those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. That means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued (see, to that effect, Joined Cases C-259/91, C-331/91 and C-332/91 *Alluè and Others* [1993] ECR I-4309, paragraph 15).[465]

Applying the proportionality principle to the circumstances of the *Baumbast* case, the Court observed that Mr Baumbast had sufficient income; that he and his family members had resided lawfully for several years in the host Member State; and that they had not become a burden on the public finances of the Member State. Furthermore it considered that save for emergency treatment given in the host Member State, the Baumbast family did have comprehensive sickness insurance, albeit in another Member State. In view of these circumstances the Court came to conclude that denying residence to Mr Baumbast for failing to fulfil the requirement to have sickness insurance *in respect of all risks in the host Member State* would constitute a disproportionate interference with the exercise of his right of residence:

> 92. In respect of the application of the principle of proportionality to the facts of the Baumbast case, it must be recalled, first, that it has not been denied that Mr Baumbast has sufficient resources within the meaning of Directive 90/364; second, that he worked and therefore lawfully resided in the host Member State for several years, initially as an employed person and subsequently as a self-employed person; third, that during that period his family also resided in the host Member State and remained there even after his activities as an employed and self-employed person in that State came to an end; fourth,

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> The resources referred to in the first subparagraph shall be deemed sufficient where they are higher than the level of resources below which the host Member State may grant social assistance to its nationals, taking into account the personal circumstances of the applicant and, where appropriate, the personal circumstances of persons admitted pursuant to paragraph 2.
> Where the second subparagraph cannot be applied in a Member State, the resources of the applicant shall be deemed sufficient if they are higher than the level of the minimum social security pension paid by the host Member State.'

[465] *Baumbast* (n 460) paras 90-91.

> that neither Mr Baumbast nor the members of his family have become burdens on the public finances of the host Member State and, fifth, that both Mr Baumbast and his family have comprehensive sickness insurance in another Member State of the Union.
> 93. Under those circumstances, to refuse to allow Mr Baumbast to exercise the right of residence which is conferred on him by Article 18(1) EC by virtue of the application of the provisions of Directive 90/364 on the ground that his sickness insurance does not cover the emergency treatment given in the host Member State would amount to a disproportionate interference with the exercise of that right.
> 94. The answer to the first part of the third question must therefore be that a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality.[466]

Evidently, in *Baumbast* the Court has conducted a case-by-case assessment of whether the failure to fulfil the requirement to have sickness insurance in respect of all risks in the host Member State posed a sufficient public interest in denying residence, *i.e.* the interest in the prevention of Union citizens from becoming an unreasonable burden on the public finances of the host Member State. Importantly, even though the sickness insurance requirement was not fully satisfied, the conclusion that Mr Baumbast would indeed no longer had a right of residence on the basis of the Directive, would require an additional assessment. That assessment entailed whether, on the whole, the person concerned could be said to pose an unreasonable burden on the public finances.

6.3.3 Trojani (Case C-456/02)[467]

Mr Trojani is a French national, who after his entry into Belgium had resided for some time at a campsite in Blankenberge after which he moved to Brussels. There, initially he had stayed in a youth hostel and finally was given accommodation in a Salvation Army hostel. In this hostel, he performed various jobs for about 30 hours a week as part of a personal socio-occupational reintegration programme, in return for board and lodging and some pocket money. He approached the social assistance authority in Brussels, CPAS, with a view to obtaining the minimex, on the grounds that he had to pay EUR 400 a month to the hostel and should also be able to leave the hostel and live independently. The CPAS, however, did not regard Mr Trojani a Community worker, since it considered the activities he performed not to be real and

[466] ibid paras 92-94.
[467] *Trojani* (n 416).

genuine.[468] It was argued that consequently, he could not rely on the non-discrimination provision of Regulation 1612/68, and that thus his claim for being granted the minimex should be rejected.

The Court was to answer the question whether Mr Trojani, assumed that he could not be considered a worker and given his appeal to the Belgian social assistance scheme, had a right of residence as a Union citizen. The Court started out by depicting the argumentative framework to be applied in answering such question:

> 31. It must be recalled that the right to reside in the territory of the Member States is conferred directly on every citizen of the Union by Article 18(1) EC (see Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 84). Mr Trojani therefore has the right to rely on that provision of the Treaty simply as a citizen of the Union.
> 32. That right is not unconditional, however. It is conferred subject to the limitations and conditions laid down by the Treaty and by the measures adopted to give it effect.
> 33. Among those limitations and conditions, it follows from Article 1 of Directive 90/364 that Member States can require of the nationals of a Member State who wish to enjoy the right to reside within their territory that they themselves and the members of their families be covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of that State during their period of residence.
> 34. As the Court has previously held, those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality (*Baumbast and R*, paragraph 91).[469]

This time, however, applying the proportionality test did not turn out in favour of the person concerned:

> 35. It follows from the judgment making the reference that a lack of resources was precisely the reason why Mr Trojani sought to receive a benefit such as the minimex.
> 36. In those circumstances, a citizen of the Union in a situation such as that of the claimant in the main proceedings does not derive from Article 18 EC the right to reside in the territory of a Member State of which he is not a national, for want of sufficient resources within the meaning of Directive 90/364. Contrary to the circumstances of the case of *Baumbast and R* (paragraph 92), there is no indication that, in a situation such as that at issue in the main proceedings, the failure to recognise that right would go beyond what is necessary to achieve the objective pursued by that directive.[470]

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[468] The Court did not reject this point of view, (text to n 416).

[469] *Trojani* (n 416) paras 31-34.

[470] ibid paras 35-36. While as such Mr Trojani could not derive a right to reside on the basis of the Treaty – for he did not fulfil the sufficient resources requirement – he had been granted a residence permit based on national law. Thus, qualifying as a lawfully residing Union citizen in another Member State, he could nevertheless rely on the principle of non-

After having confirmed that the person concerned lacked sufficient resources, the Court confined its argumentation to pointing out the contrast between the circumstances in the *Trojani* case and those in the *Baumbast* case. If we recall the circumstances in the *Baumbast* case, we can see that while the members of the Baumbast family had been self-sufficient throughout their residence in the host Member State, Mr Trojani made use of a reintegration programme aimed at helping persons 'who, for an indefinite period, are unable, by reason of circumstances related to their situation, to work under normal conditions'. The latter's appeal to minimum subsistence benefits was therefore not likely to be of just a short duration.

Given the nature of the aforementioned contrasting aspects, it may be argued that the Court's conclusion in *Trojani* involved a case-by-case assessment of the weight of the public interest in preventing Union citizens from becoming an unreasonable burden on the public finances. It was thus not the mere appeal to the social assistance scheme that had led the Court to draw its conclusion.

6.3.4 Zhu and Chen (Case C-200/02)[471]

The *Zhu and Chen* case concerned a Chinese woman, Mrs Chen, who had entered the UK and who from there temporarily had moved to Northern Ireland for the occasion of giving birth to her daughter Catherine. The purpose thereof was to provide her daughter with the Irish nationality and its consequential residence benefits connected to Union citizenship. These benefits could be enjoyed after moving to another country within the United Kingdom.[472] The question relating to the sufficient means condition was whether Catherine could be denied a right of residence in the host Member State in view of the fact that her resources were provided exclusively by her third country national parent and not by herself. The national authorities had put forward in this regard that the sufficient resources condition required *the Union citizen* to have sufficient resources. The Court,

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discrimination on the basis of nationality: 'a citizen of the Union who does not enjoy a right of residence in the host Member State under Articles 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities must ensure that those limitations and conditions are applied in compliance with the general principles of Community law, in particular the principle of proportionality. However, once it is ascertained that a person in a situation such as that of the claimant in the main proceedings is in possession of a residence permit, he may rely on Article 12 EC in order to be granted a social assistance benefit such as the minimex.' ibid para 46.

[471] Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

[472] ibid para 11.

however, rejected an interpretation of the sufficient resources condition that precluded taking into account income not possessed by the Union citizen personally:

> 28. It is clear from the order for reference that Catherine has both sickness insurance and sufficient resources, provided by her mother, for her not to become a burden on the social assistance system of the host Member State.
> 29. The objection raised by the Irish and United Kingdom Governments that the condition concerning the availability of sufficient resources means that the person concerned must, in contrast to Catherine's case, possess those resources personally and may not use for that purpose those of an accompanying family member, such as Mrs Chen, is unfounded.
> 30. According to the very terms of Article 1(1) of Directive 90/364, it is sufficient for the nationals of Member States to 'have' the necessary resources, and that provision lays down no requirement whatsoever as to their origin.[473]

This strict reading of what Member States may require from Union citizens on the basis of the sufficient resources condition provide for in the Directive is substantiated by recalling the fundamental nature of the principle of free movement of persons, which demands a broad interpretation of provisions laying down that principle – and therewith a strict interpretation of restrictions thereof.

> 31. The correctness of that interpretation is reinforced by the fact that provisions laying down a fundamental principle such as that of the free movement of persons must be interpreted broadly.[474]

Additionally, the Court emphasised the proportionality principle as a vital means of interpretation in applying limitations and conditions to the right of residence of Union citizens as provided for in EU legislation:

> 32. Moreover, the limitations and conditions referred to in Article 18 EC and laid down by Directive 90/364 are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. Thus, although, according to the fourth recital in the preamble to Directive 90/364, beneficiaries of the right of residence must not become an 'unreasonable' burden on the public finances of the host Member State, the Court nevertheless observed that those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the principle of proportionality (see, in particular, *Baumbast and R*, paragraphs 90 and 91).[475]

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[473] ibid paras 28-30.
[474] ibid para 31.
[475] ibid para 32.

Application of the starting points of a strict interpretation of restrictive conditions and that of the principle of proportionality to the circumstances of the case at hand, resulted in a rejection of the requirement to personally have sufficient resources:

> 33. An interpretation of the condition concerning the sufficiency of resources within the meaning of Directive 90/364, in the terms suggested by the Irish and United Kingdom Governments would add to that condition, as formulated in that directive, a requirement as to the origin of the resources which, not being necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States, would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by Article 18 EC.[476]

Like in earlier cases, the rejection of the national measure in *Zhu and Chen* is based on a strict interpretation of what may be required on the basis of the sufficient resources requirement provided for in the Directive. Importantly, however, in this case, the Court's evaluation of the reason to deny residence did not regard the manner in which the national authorities in the case at hand had applied an otherwise acceptable criterion. Instead its scrutiny was directed at the restrictive criterion *as such*.

In earlier cases, a mere appeal to social assistance had been rejected as a sufficient justification for denying residence, but the Court had not ruled out altogether the possibility that having recourse to the social assistance system – provided that it is sufficiently substantial – could justify such measure. Likewise, in *Baumbast* the Court had not rejected the requirement to have comprehensive sickness insurance as such, but only considered its application in the case at hand to be disproportionate. By contrast, in *Zhu and Chen*, the criterion that the Union citizen should personally have sufficient resources was *as such* considered disproportionate. The Court did not see how the circumstance that a Union citizen is maintained through income provide by his family members would (ever) enhance the prospects of the persons concerned becoming a burden on the public finances of the host Member State.

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[476] ibid paras 26-31. See for recent confirmations of this conclusion, Case C-86/12 *Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration* (ECLI:EU:C:2013:645); Case C-218/14 *Singh and Others v Minister for Justice and Equality* (ECLI:EU:C:2015:476). In *Singh*, the Court held that the third country national spouse of a Union citizen residing in another Member State than that of which he has the nationality may contribute to the fulfilment of the sufficient resources condition as provided for in Article 7(1)(b) of Directive 2004/38 (ibid paras 74-77).

6.3.5 Commission v Belgium (Case C-408/03)[477]

This case concerns an action brought before the Court by the Commission, with two complaints against Belgium. According to the first complaint, Belgian legislation required that in order to acquire a right to reside, economically non-active Union citizens must have sufficient personal resources. In assessing whether an applicant had fulfilled the sufficient means requirement, only the personal resources of the Union citizen or those of the spouse or a child of that citizen were taken into account. Resources of a third person, such as a partner with whom he has no legal link, were excluded from the assessment.[478] The second complaint entailed that Belgian immigration legislation provided for an automatic order to leave Belgian territory, to be served on Union citizens that had not produced the documents to prove the fulfilment of the applicable residence conditions within a specified time.[479]

The Court considered both complaints to be well founded. As to the admissibility of the requirement that only the Union citizen, his spouse or his child could contribute to the fulfilment of the sufficient resources condition, the Court starts out by recalling its framework for interpretation established in *Baumbast* and *Zhu and Chen*, and discusses the consequences of this case law for the underlying case:

> 39. It must be borne in mind that it is settled case-law that the limitations and conditions laid down in the first subparagraph of Article 1(1) of Directive 90/364 must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. That means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued (see *Baumbast and R*, paragraph 91).
> 40. In paragraphs 30 and 31 of its judgment in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, the Court held that according to the very terms of the first subparagraph of Article 1(1) of Directive 90/364, it is sufficient for the nationals of Member States to 'have' the necessary resources, and that provision lays down no requirement whatsoever as to their origin. The correctness of that interpretation is reinforced by the fact that provisions laying down a fundamental principle such as that of the free movement of persons must be interpreted broadly.
> 41. The Court therefore held that an interpretation of the condition concerning the sufficiency of resources within the meaning of Directive 90/364 to mean that the person concerned must himself have such resources and may not rely on the resources of a member of the family accompanying him would add to that condition, as formulated in that directive, a requirement as to the origin of the resources which, not being necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States, would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by Article 18 EC (*Zhu and Chen*, paragraph 33).

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[477] Case C-408/03 *Commission v Belgium* [2006] ECR I-2647.
[478] ibid para 38.
[479] ibid para 1.

> 42. According to that case-law, the condition concerning the sufficiency of resources laid down in the first subparagraph of Article 1(1) of Directive 90/364 is met where the financial resources are provided by a member of the family of the citizen of the Union.
> 43. It must be examined whether the same conclusion is called for where a citizen of the Union intends to rely on the income of his partner who resides in the host Member State.
> 44. Consideration of that question essentially focuses on the source of such income, as the authorities of the host Member State are, in any event, entitled to undertake the necessary checks as to its existence, amount and availability.[480]

The scope of investigation is thus confined to the issue of whether the partner of a Union citizen is to be accepted as a source that provides for the income to fulfil the sufficient resources requirement. In the paragraphs that follow the Court examines whether indeed, as the Belgian authorities had contended, the protection of the public finances of the host Member State necessitated the existence of a particular legal link between the Union citizen and his sponsor. The Court concludes that this contention was unfounded.

First, the Court rejects the assumption that the issue of who provides for the sufficient resources necessarily determines the chances of loss of sufficient resources. Further, the Court generally does not accept that for the purpose of protecting the Member State's public finances it is necessary to deny residence to persons who are considered *likely to become* a burden on the social assistance scheme. In this regard the Court points out that if it appears that a Union citizen and his family members have *actually become* a burden on the social assistance scheme, Member States can rely on the Directive for possibilities to act upon this situation. Therefore, the Court sees no need to take preventive measures in this regard:

> 45. The Kingdom of Belgium accepts that such income may be taken into account where it comes from a person connected with the beneficiary by a legal link which obliges him to provide for the beneficiary. It contends that such a requirement is justified by the fact that, if account were taken of the income of a person whose link with the citizen of the Union was not legally defined and could, therefore, be severed easily, the risk of that citizen becoming a burden for the social security system of the host Member State after a certain time would be all the greater.
> 46. Such a justification cannot be accepted, as the requirement of a legal link, as advocated by the Kingdom of Belgium, between the provider and the recipient of the resources is disproportionate in that it goes beyond what is necessary to achieve the purpose of Directive 90/364, which is the protection of the public finances in the host Member State.
> 47. The loss of sufficient resources is always an underlying risk, whether those resources are personal or come from a third party, even where that third party has undertaken to support the holder of the residence permit financially. The source of those resources thus

[480] ibid paras 39-44.

> has no automatic effect on the risk of such a loss arising, as the materialisation of such a risk is the result of a change of circumstances.
> 48. It is for that reason that, in order to protect the legitimate interests of the host Member State, Directive 90/364 contains provisions allowing that State to act in the event of an actual loss of financial resources, to prevent the holder of the residence permit from becoming a burden on the public finances of that State.
> 49. Thus, Article 3 of Directive 90/364 provides that the right of residence is to remain for as long as beneficiaries of that right fulfil the conditions laid down in Article 1 of that directive.
> 50. That provision enables the host Member State to monitor whether citizens of the Union who enjoy a right of residence continue to meet the conditions laid down for that purpose by Directive 90/364 throughout the period of their residence. In addition, the first subparagraph of Article 2(1) of that directive allows the Member States, when they deem it to be necessary, to require revalidation of the permit at the end of the first two years of residence.
> 51. It follows from all those considerations that, by excluding the income of a partner residing in the host Member State in the absence of an agreement concluded before a notary and containing an assistance clause, the Kingdom of Belgium has failed to fulfil its obligations under Article 18 EC and Directive 90/364 when applying that directive to nationals of a Member State who wish to rely on their rights under that directive and on Article 18 EC.[481]

The second complaint of the Commission concerned the automatic order to leave the Belgian territory in case of non-compliance with the time limit to provide the necessary documentation. Without further regard, the Court considered the automatic character of the deportation orders rendered those orders disproportionate:

> 66. Only if a national of a Member State is not able to prove that [the residence] conditions are fulfilled may the host Member State undertake deportation subject to the limits imposed by Community law (see Case C-215/03 *Oulane* [2005] ECR I-1215, paragraph 55).
> 67. By its second plea, the Commission takes issue with the Belgian legislation because, under it, failure by the national of a Member State to produce, within a specified period, the supporting documents necessary for the grant of a residence permit automatically entails the service of an order for deportation.
> 68. Such automatic deportation impairs the very substance of the right of residence directly conferred by Community law. Even if a Member State may, where necessary, decide to deport a national of another Member State where that person is unable to produce, within the required period, the documents proving that he fulfils the necessary financial conditions, where that deportation is automatic, as it is under the Belgian legislation, it is disproportionate.[482]

[481] ibid paras 39-40, 42-47, 51.
[482] ibid paras 66-68.

The main argument was that in case of automatic deportations, the failure to satisfy income requirements is *presumed* rather than that the actual circumstances of the case are evaluated. Moreover, automatic deportation orders – even if such orders in practice are not immediately enforced - could deter Union citizens from exercising their right to free movement:

> 69. Since the order for deportation is automatic, that legislation does not allow account to be taken of the reasons why the person concerned did not take the necessary administrative measures or of whether he was able to establish that he fulfilled the conditions which Community law attached to his right of residence.
> 70. In that regard, it is of no relevance that there is in practice no immediate enforcement of orders for deportation. The Belgian legislation, notably Articles 45, 51 and 53 of the Royal Decree, provides for time-limits on expiry of which the orders for deportation issued are enforceable. In any event, the fact that the deportation orders are allegedly qualified does not alter the fact that those measures are disproportionate to the seriousness of the infringement and are liable to deter citizens of the Union from exercising their right to freedom of movement.
> 71. In view of the foregoing, the Court finds that the second plea relied on by the Commission is well founded.[483]

In its rejection of the restrictive conditions imposed by the Belgian authorities, the Court again attached decisive importance to the circumstance that these restrictions do not (sufficiently) add up to the aim of protecting the public finances of the host Member State. The restriction of the scope of persons who could contribute to fulfil the sufficient resources condition was dismissed because, in short, there was no reason to assume that the loss of sufficient resources correlates with that particular restriction.

Moreover, the Court made it clear that non-compliance with the sufficient resources requirement is not at issue if a person has a certain *chance* of becoming a burden on the social assistance scheme. This would constitute a preventive measure, unnecessary for the protection of the Member State's public finances, since there are sufficient options in the Directive to act upon an *actual* appeal to social assistance. Likewise, the Court rejected the practice of automatic deportation orders for lack of a certain public interest: an automatically imposed deportation order would not necessarily be based on the actual impossibility for the person concerned to provide the required documents. In sum, the Belgian restrictive conditions were rejected for lacking the ability to take into account the actual public interest in protecting the public finances of the host Member State.

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[483] ibid paras 66-71.

6.3.6 Commission v the Netherlands (Case C-398/06) [484]

In *Commission v The Netherlands*, the Court remains consistent in taking issue with Member States imposing requirements that appeal to a mere risk of a person becoming a burden on the public finances of the host Member State. In this case the Commission had raised a complaint against the Netherlands for imposing on economically non-active and retired Union citizens the requirement to prove sustainable means of subsistence in order to acquire a residence permit. The person concerned had to prove the availability of sufficient resources for at least another year, counted from the day of application for the residence permit. The Court dismissed the Dutch practice by pointing out that consistently requiring an applicant's income to be available for a period of a year, irrespective of the actual duration of the period of residence, was disproportionate:

> 29. Dienaangaande volstaat het eraan te herinneren dat het Koninkrijk der Nederlanden het bestaan van de verweten inbreuk aan het einde van de in het met redenen omkleed advies gestelde termijn niet betwist. Door van aanvragers van een verblijfsvergunning te verlangen dat zij stelselmatig het bezit van toereikende middelen van bestaan voor een verblijf van ten minste een jaar bewijzen, zulks overigens ongeacht de werkelijke duur van het verblijf, wordt immers een voorwaarde gesteld die kennelijk onevenredig is aan het rechtmatige belang dat de lidstaten erbij hebben dat de begunstigden van het verblijfsrecht geen onredelijke belasting voor de openbare middelen worden. Dit vereiste gaat verder dan hetgeen de richtlijnen 90/364 en 90/365 bepalen en bemoeilijkt de afgifte van verblijfsvergunningen. Bijgevolg is dit vereiste in strijd met artikel 9, leden 1 en 3, van richtlijn 68/360.[485]

In the operational part of the Judgment, the Court appears to have dismissed not just the requirement to prove income of at least one year, but the requirement to prove of sustainable resources altogether:

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[484] Case C-398/06 *Commission v The Netherlands* (ECLI:EU:C:2008:214).

[485] ibid para 29. [In this regard, it suffices to bring in mind the fact that the Kingdom of the Netherlands has not disputed the occurrence of the infringement accused of at the expiry of the period laid down in the reasoned opinion. By requiring of persons applying for a residence permit that they systematically prove that they have adequate personal resources for at least a year, irrespective of the actual duration of the period of residence, a condition is imposed which is apparently disproportionate in view of the legitimate interest that Member States have in avoiding that the beneficiaries of the right to reside become an unreasonable burden for the public finances. This requirement goes beyond what is stipulated in the Directives 90/364 and 90/365 and hinders the issuance of residence permits. Accordingly, this requirement infringes Article 9, paragraphs 1 and 3 of Directive 68/360. Translation, EH]

> *By maintaining in force national provisions under which*, in order to obtain a residence permit, nationals of the European Union and of the European Economic Area who are non-active and retired *must prove that they have sustainable resources*, the Kingdom of the Netherlands has failed to fulfil its obligations under Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Council Directive 90/364/EEC of 28 June 1990 on the right of residence and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity.[486]

A categorical rejection of a requirement to prove sustainable resources implies that there is no room whatsoever for Member States under Directive 2004/38 to apply standards that aim at establishing the sustainability of a person's income beforehand. Since the Court requires that income requirements correspond to the actual duration of a person's residence in the host state, every requirement to prove on beforehand the availability of resources in the future is problematic.

Although the Court's line of reasoning in this case is relatively brief, in essence the Court followed the same approach as discerned in the cases discussed above. The requirement at issue is rejected because it does not allow for taking into account the actual public interest in preventing Union citizens from becoming an unreasonable burden on the social assistance scheme of the host Member State. The Court confirmed that the mere risk of a person to become such a burden cannot justify denying his right to reside as a Union citizen.

6.3.7 Brey (Case C-140/12)[487]

Like in the case of *Grzelczyk*, in *Brey* it was not a residence permit that had been denied, but a request for a social assistance benefit. It concerned a compensatory retirement pension supplement, made by an in Austria residing German national. The refusal was based on the circumstance that the very application for this benefit indicated that Mr Brey did not satisfy the sufficient resources condition of Article 7(1)(b) of Directive 2004/38. This, in turn, meant that Mr Brey had no right of residence and accordingly he was not entitled to the benefit at issue. Thus, the Court had to assess whether indeed having recourse to the supplement at issue meant that he no longer fulfilled the conditions for retention of his right of residence.

The Court started out by acknowledging that, since Mr Brey had made an appeal to the social assistance scheme, he possibly did not satisfy the condition of Article 7(1)(b) of having sufficient resources:

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[486] ibid (emphasis added).

[487] Case C-140/12, *Pensionsversicherungsanstalt v Peter Brey* (ECLI:EU:C:2013:565).

> 62. As regards the compensatory supplement at issue in the main proceedings, it is clear from paragraphs 33 to 36 above that that benefit may be regarded as coming under the 'social assistance system' of the Member State concerned. As the Court found in paragraphs 29 and 30 of *Skalka*, that benefit, which is intended to ensure a minimum means of subsistence for its recipient where his pension is insufficient, is funded in full by the public authorities, without any contribution being made by insured persons.
> 63. Consequently, the fact that a national of another Member State who is not economically active may be eligible, in light of his low pension, to receive that benefit could be an indication that that national does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State for the purposes of Article 7(1)(b) of Directive 2004/38 (see, to that effect, Trojani, paragraphs 35 and 36).[488]

Subsequently, the Court pointed out that any definitive conclusion to be drawn in this regard requires an overall assessment:

> 64. However, the competent national authorities cannot draw such conclusions without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned.[489]

With reference to its earlier case law, the Court continued by sketching the boundaries that should be taken into account in this regard. It is recalled that as such, the Directive does not preclude that economically non-active Union citizens may receive social assistance benefits in the host Member State:

> 65. First, it should be pointed out that there is nothing in Directive 2004/38 to preclude nationals of other Member States from receiving social security benefits in the host Member State (see, by analogy, Grzelczyk, paragraph 39).
> 66. On the contrary, several provisions of that directive specifically state that those nationals may receive such benefits. Thus, as the Commission has rightly pointed out, the very wording of Article 24(2) of that directive shows that it is only during the first three months of residence that, by way of derogation from the principle of equal treatment set out in Article 24(1), the host Member State is not to be under an obligation to confer entitlement to social assistance on Union citizens who do not or no longer have worker status. In addition, Article 14(3) of that directive provides that an expulsion measure is not to be the automatic consequence of recourse to the social assistance system of the host Member State by a Union citizen or a member of his family.[490]

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[488] ibid paras 62-63.
[489] ibid para 64.
[490] ibid paras 65-66.

Subsequently, the Court took issue with the automatic application of the sufficient resources condition and it rejects the application of fixed reference norms to establish whether the sufficient resources condition is fulfilled:

> 67. Second, it should be noted that the first sentence of Article 8(4) of Directive 2004/38 expressly states that Member States may not lay down a fixed amount which they will regard as 'sufficient resources', but must take into account the personal situation of the person concerned. Moreover, under the second sentence of Article 8(4), the amount ultimately regarded as indicating sufficient resources may not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where that criterion is not applicable, higher than the minimum social security pension paid by the host Member State.
> 68. It follows that, although Member States may indicate a certain sum as a reference amount, they may not impose a minimum income level below which it will be presumed that the person concerned does not have sufficient resources, irrespective of a specific examination of the situation of each person concerned (see, by analogy, Chakroun, paragraph 48).
> 69. Furthermore, it is clear from recital 16 in the preamble to Directive 2004/38 that, in order to determine whether a person receiving social assistance has become an unreasonable burden on its social assistance system, the host Member State should, before adopting an expulsion measure, examine whether the person concerned is experiencing temporary difficulties and take into account the duration of residence of the person concerned, his personal circumstances, and the amount of aid which has been granted to him.[491]

The Court then continued by stressing the importance of a strict interpretation of the limitations to the right to free movement and of attaining the objective to facilitate and strengthen the right to free movement:

> 70. Lastly, it should be borne in mind that, since the right to freedom of movement is – as a fundamental principle of EU law – the general rule, the conditions laid down in Article 7(1)(b) of Directive 2004/38 must be construed narrowly (see, by analogy, Kamberaj, paragraph 86, and Chakroun, paragraph 43) and in compliance with the limits imposed by EU law and the principle of proportionality (see Baumbast and R, paragraph 91; Zhu and Chen, paragraph 32; and Commission v Belgium, paragraph 39).
> 71. In addition, the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would compromise attainment of the objective of Directive 2004/38, which is, inter alia, to facilitate and strengthen the exercise of Union citizens' primary right to move and reside freely within the territory of the Member States, and the practical effectiveness of that directive (see, by analogy, Chakroun, paragraphs 43 and 47).[492]

[491] ibid paras 67-69.
[492] ibid paras 70-71.

Finally, the Court again emphasised that in order to establish whether a Union citizen's appeal on the social assistance scheme constitutes an unreasonable burden to the host Member State's social assistance scheme, a range of factors should be taken into account:

> 72. By making the right of residence for a period of longer than three months conditional upon the person concerned not becoming an 'unreasonable' burden on the social assistance 'system' of the host Member State, Article 7(1)(b) of Directive 2004/38, interpreted in the light of recital 10 to that directive, means that the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole. Directive 2004/38 thus recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary (see, by analogy, Grzelczyk, paragraph 44; Bidar, paragraph 56; and Förster, paragraph 48).[493]

Applying the above starting points for evaluation to the case at hand, the Court contended that the Austrian practice was to be rejected because of its automatic application of the resources condition. In conclusion, a number of aspects are stated that should be taken into consideration in the case at hand in order to assess the specific burden which granting the social assistance benefit would place on the social assistance system as a whole:

> 76. As regards the legislation at issue in the main proceedings, it is clear from the explanation provided by the Austrian Government at the hearing that, although the amount of the compensatory supplement depends on the financial situation of the person concerned as measured against the reference amount fixed for granting that supplement, the mere fact that a national of another Member State who is not economically active has applied for that benefit is sufficient to preclude that national from receiving it, regardless of the duration of residence, the amount of the benefit and the period for which it is available, that is to say, regardless of the burden which that benefit places on the host Member State's social assistance system as a whole.
> 77. Such a mechanism, whereby nationals of other Member States who are not economically active are automatically barred by the host Member State from receiving a particular social security benefit, even for the period following the first three months of residence referred to in Article 24(2) of Directive 2004/38, does not enable the competent authorities of the host Member State, where the resources of the person concerned fall short of the reference amount for the grant of that benefit, to carry out – in accordance with the requirements under, inter alia, Articles 7(1)(b) and 8(4) of that directive and the principle of proportionality – an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned.

[493] ibid para 72.

> 78. In particular, in a case such as that before the referring court, it is important that the competent authorities of the host Member State are able, when examining the application of a Union citizen who is not economically active and is in Mr Brey's position, to take into account, inter alia, the following: the amount and the regularity of the income which he receives; the fact that those factors have led those authorities to issue him with a certificate of residence; and the period during which the benefit applied for is likely to be granted to him. In addition, in order to ascertain more precisely the extent of the burden which that grant would place on the national social assistance system, it may be relevant, as the Commission argued at the hearing, to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State.[494]

With its conclusion in the *Brey* case, the Court is consistent with its approach adopted in its earlier case law. Again it calls for an evaluation of the weight of public interest on a case-by-case basis. Yet, in this case it seems as if the Court expanded the scope of this principle, since the Court not merely demanded from national authorities to establish whether the person concerned has made an actual and moreover substantial appeal to social assistance benefits. It seems that the Court additionally required taking into consideration the general impact on the social assistance scheme in view of the total number of Union citizens eligible for such benefits. Apparently, therefore, the weight of the public interest is to be established both on a micro and a macro level.

6.4 Overview and analysis of the ECJ's approach to income requirements in relation to economically non-active Union citizens

6.4.1 Outline of the ECJ's approach

In the previous section I have described the ECJ's approach to income requirements in relation to the right of residence of economically non-active Union citizens. The Court's approach firstly shows that it conducts a strict interpretation of what may be required from individuals in the context of the sufficient resources condition. That strict interpretation, moreover, takes place in view of the aim that is pursued by the provisions establishing income requirements. Considering the objective of preventing that Union citizens become an 'unreasonable' burden on the social assistance scheme, the Court has repeatedly dismissed national practices, such as that in which a mere appeal to social assistance resulted in denying residence, or where conditions were imposed as regards the origin of the resources.

The Court consistently takes issue with national practices that fail to examine whether in the case at hand there is an actual unreasonable burden on the host

[494] ibid paras 76-78.

Member State's social assistance scheme. A mere appeal to social benefits, or the failure to produce evidence of sufficient resources within a certain time limit may not without further regard result in the conclusion that the person concerned lacks sufficient resources. Neither are Member States allowed to restrict the scope of persons who may contribute to fulfil the sufficient resources requirement to only the Union citizen himself or only those family members with whom the Union citizen has a certain legal bond. Indeed, as long as the Union citizen concerned may actually rely on the means of subsistence at issue, the source thereof is of no relevance. The origin of the resources has thus no bearing on the principal issue to be examined, which is: whether or not a person poses an unreasonable burden on the social assistance scheme of the host Member State. In a similar vein, the Court has rejected the requirement to provide evidence of the availability of resources in the future. Since such a requirement is of a strictly preventive nature, its application would not be based on whether the persons concerned *in fact* pose an unreasonable burden on the social assistance scheme. The Court thus may be said to be consistent in conducting a rigorous, case-specific scrutiny of the public interest in enforcing the sufficient means requirement.

6.4.2 The interests of relevance

Given the fact that the sufficient resources condition inherently represents a public interest, combined with the rigorous scrutiny of Member States' implementation of this condition by the Court, the weight of the public interest self-evidently is of great significance in deciding on the legitimacy of national income criteria. By contrast, aspects indicating a case-by-case evaluation of the weight of the *individual* interest in remaining in the host Member State are hardly discernible in the Court's reasoning. The technical explanation for this is firstly, that the scope of persons who may enjoy a right of residence on the basis of the Citizenship Directive is not defined by their interest in being granted a right of residence. Indeed, for a person to qualify as an economically non-active Union citizen the only prerequisite is that he has the nationality of a Member State other than that in which he resides. There is thus no need to establish a person's interest in being granted a right of residence in order to establish whether he indeed has this right.[495]

Secondly, in its argumentation on the legitimacy of national income restrictions, the first aspect that is addressed is whether the national restrictive measure *as such* should be considered appropriate. The Court's strict interpretation of what Member States may require on the basis of the sufficient resources condition, and connected to that, its categorical rejection of national criteria that do not allow for a case-by-case application of the applicant's resources, proved to be quite a hurdle.

[495] See more elaborately on this aspect, section 9.4.2.1.

Accordingly, in most cases the Court simply does not get round to addressing the individual interests at stake. Only *after* it is established that the restrictive condition at issue does not go against Directive 2004/38 and that furthermore the applicant's income cannot prevent him from becoming an 'unreasonable' burden on the social assistance scheme of the host Member State, a case-by-case evaluation of the competing individual interest comes into question. Only then it is appropriate to discuss the circumstances under which the individual interest in being allowed to remain in the host Member State may pose a barrier to denying the person concerned a right of residence.

Of the cases discussed above, the only instance in which the Court explicitly addressed case-specific aspects relating to the individual interest in being granted residence is the *Baumbast* case. In that case the Court held that the condition to have comprehensive sickness insurance as such was in accordance with Directive 2004/38. Further, it had been established that Mr Baumbast had not complied with that requirement. Accordingly, in this case the Court did address case-specific aspects relating to the individual interest - *i.e.* the circumstance that the person concerned had resided for several years in the United Kingdom, and that his family members had accompanied him. Also in *Trojani* it was acknowledged that the person concerned did not satisfy the income condition. Arguably, it is for this reason that the Court in its conclusion in that case explicitly refers to the *Baumbast* case, *i.e.* to substantiate *a contrario* that (given the weight of the competing interests) there was no reason to consider that 'the failure to recognise that right would go beyond what is necessary to achieve the objective pursued by that directive'.[496]

In sum, the Court's adjudication of national income conditions in relation to economically non-active Union citizens is characterised by a rigorous case-by-case assessment of the public interest in upholding income requirements, leaving a marginal role to be played by both the individual interest in being granted a right to reside and the generic interest in controlling immigration.

[496] *Trojani* (n 416) paras 35-36.

Chapter 7 Income requirements for family members of Union citizens

7.1 Introduction

After having discussed the ECJ's approach in relation to economically active and non-active Union citizens, this chapter deals with the family members of these Union citizens. It is examined whether and how the Court evaluates income-related requirements imposed by Member States in relation to the right of residence of these family members. Just as with the right of residence of Union citizens, the right of residence of their family members comes in various legal flavours. For each of these categories I address the basis of the right of residence, followed by a discussion of the extent to which – in view of EU legislation and case law - this right may be subjected to income requirements. The focus is placed on whether the admissibility of national requirements depends on an evaluation of the weight of the public interest in upholding such requirements. Additionally, attention is paid to the extent to which the various other interests at stake may determine the outcome of the case.

7.2 Family members within the scope of Directive 2004/38

When it comes to the right of residence of family members of Union citizens, Directive 2004/38 distinguishes between on the one hand family members as defined in Article 2(2), and on the other hand 'other' family members as addressed in Article 3(2). With regard to the former category, Directive 2004/38 establishes concrete rights of entry and residence. With regard to the 'other family members' the Directive confines to stating that their entry and residence shall be 'facilitated' by the Member States.

7.2.1 Family members falling within the scope of Article 2(2) of Directive 2004/38

Article 2(2) in conjunction with Article 3(1) of Directive 2004/38 determine which family members are directly covered by the Directive:

Article 2 - Definitions
For the purposes of this Directive:
[…]
2. "Family member" means:
(a) the spouse;
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

Article 3 - Beneficiaries
1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, *and to their family members as defined in point 2 of Article 2 who accompany or join them*.[497]

7.2.1.1 Legal framework in relation to income requirements

Member States' ability to impose income requirements on family members is determined by the extent to which such requirements may be imposed on the Union citizen they join or accompany. There are thus no separate income requirements for family members. This follows first of all from Article 7 of Directive 2004/38. Both family members who themselves are Union citizens and third country national family members have a right of residence if the Union citizen they join or accompany satisfies the residence conditions:

Article 7 – Right of residence for more than three months
1. All Union citizens shall have the right of residence on the territory of another Member State for
a period of longer than three months if they:
a) are workers or self-employed persons in the host Member State; or
b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members

[497] Emphasis added.

> not to become a burden on the social assistance system of the host Member State during their period of residence; or
> *d)* are family members accompanying or joining *a Union citizen who satisfies the conditions referred to in points (a), (b) or (c)*.
> 2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, *provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c)*.[498]

Likewise, Article 14 of Directive 2004/38 addresses Union citizens and their family members as a unity when it comes to the conditions under which they may retain their right of residence in the host Member State:

> *Article 14 - Retention of the right of residence*
> 1. *Union citizens and their family members* shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.
> 2. *Union citizens and their family members* shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.
> […]
> 4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against *Union citizens or their family members* if:
> (a) the *Union citizens* are workers or self-employed persons, or
> (b) the *Union citizens* entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

Family members of economically *active* Union citizens, like the Union citizens they accompany or join, are exempted from the obligation to fulfil the sufficient resources condition. The right of residence of family members of economically *non-active* Union citizens is subjected to fulfilment of the sufficient resources condition provided for in Article 7(1)(b) of Directive 2004/38.

Articles 12 and 13 of Directive 2004/38 cover the circumstances under which family members of Union citizens may retain their right of residence in the event of death or departure of the Union citizen, or in case of termination of the marriage or registered partnership with the Union citizen. These circumstances may differ according to whether the family members concerned are Union citizens themselves or whether they are third country nationals. If a family member of a Union citizen may retain his right of residence on the basis of Article 12 or 13 of the Directive, this right in principle remains subject to the residence conditions as laid down in Article

[498] Emphasis added.

7 of Directive 2004/38, until a permanent residence permit is acquired.[499] This means that unless the family member of the Union citizen is a worker, he must satisfy the sufficient resources condition that applies to economically non-active Union citizens. In one situation the retention of the right of residence of family members is *not* made conditional upon satisfying the residence conditions of Article 7 of Directive 2004/38. This is the case when Union citizens have died or left the host Member State while their children and the other parent still remained in the host Member State:

> *Article 12 - Retention of the right of residence by family members in the event of death or departure of the Union citizen*
> 3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

As long as the child of a Union citizen is enrolled at school/higher education, he and the parent who has actual custody of him retain their right of residence in the event of death or departure of the Union citizen, without being subjected any further conditions of residence.[500]

7.2.1.2 The ECJ's approach to income requirements imposed to family members falling under the definition of Article 2(2)

As discussed in the previous section, the extent to which family members of Union citizens are subjected to income conditions is connected to the extent to which the Union citizens they join or accompany may be subjected to such conditions. Consequently, the Court's approach to national income requirements as regards Union citizens' family members is not different from that in relation to Union citizens themselves. This means that the right of residence of an economically active Union citizen, and that of his family members may not be restricted through a narrow interpretation of the worker definition. Only if a Union citizen does not qualify as a worker, he and his family members cannot rely on the right to reside as family members of a worker.[501] Under no circumstances may the interest in protecting the

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[499] Article 12(1),(2) and 13(1),(2) of Directive 2004/38.

[500] Section 7.3 discusses situations that are similar to, but that are not covered by Articles 12 and 13 of Directive 2004/38.

[501] That is, of course, notwithstanding the situation in which a Union citizen qualifies as a jobseeker in the sense of Article 14(4)(b) of Directive 2004/38, or retains the status as a worker because he satisfies the conditions as provided for in Article 7(3) of Directive

public finances of the host Member State serve as a basis for failing to acknowledge the right of residence to workers, jobseekers or ex-workers; or to their family members. Thus, an appeal to the social assistance scheme cannot affect the right of residence of these Union citizens, or that of their family members.[502]

As regards the role of the individual interest of family members being granted residence in the host Member State, the interest of economically active Union citizens in being able to reside in the host Member State strictly plays a role in the abstract.[503] Whether economically active Union citizens have a right of residence in another Member State does not depend on an actual, separately established interest in exercising this right. Accordingly, such a separate interest plays no role in relation to their family members either. Aspects concerning the individual interest may, however, play a role in cases where an economically *non-active* Union citizen does seem to satisfy the sufficient resources condition. If it is established that the Union citizen and his family members indeed pose an unreasonable burden on the host state's social assistance scheme, the final decision on whether residence may be denied involves an evaluation of the consequences of that decision for the persons concerned. Only then, the individual interest in (the family member) being granted residence may serve as a counterweight for the public interest in protecting the Member State's public finances.[504]

7.2.2 Family members falling under the scope of Article 3(2) of Directive 2004/38

7.2.2.1 Legal framework

In the introduction to section 7.2, I briefly mentioned the category of so-called 'other' family members as addressed in Article 3(2) of Directive 2004/38. These are family members who are not covered by the definition of 'family member' in Article 2(2) of Directive 2004/38, but with whom the Union citizen nevertheless has a close relationship. Either because in their country of origin they were dependents or members of the household of the Union citizen, or because serious health grounds strictly require the personal care of the family member of the Union citizen. Close ties are also presumed between the Union citizen and the partner with whom the Union citizen concerned has a duly attested, durable relationship:

Article 3 - Beneficiaries

2004/38. Furthermore, losing the worker status does not preclude that the persons concerned may enjoy a right of residence on another legal basis.

[502] Section 5.3.3.

[503] Section 5.4.2.

[504] Section 6.4.2.

> 2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
> (b) the partner with whom the Union citizen has a durable relationship, duly attested.
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

Article 3(2) of Directive 2004/38 states that the conditions for entry and residence of these 'other' family members are principally to be set out in national legislation. Member States' room for manoeuvre in this respect is restricted by the stipulation that entry and residence of these family members shall be facilitated. Furthermore, the final paragraph of this provision requires that the host Member State undertakes an extensive examination of the personal circumstances and justifies any denial of entry or residence to these persons.

7.2.2.2 The (expected) approach to income requirements imposed on 'other family members'

At the time of writing, the extent to which 'other' family members as meant in Article 3(2) of Directive 2004/38 may be subjected to income conditions has not been addressed in Luxembourg case law. The general starting points set out by the ECJ in relation to this Directive provision may allow for drawing up a picture of what is to be expected in this regard.

Despite the referral in Article 3(2) of Directive 2004/38 to national legislation, this provision at the same time restricts Member States in what they may require from these family members.[505] The starting points to be applied in this regard have been set out in the case of *Rahman*:[506]

> 26. [O]n a proper construction of Article 3(2) of Directive 2004/38:the Member States are not required to grant every application for entry or residence submitted by family members of a Union citizen who do not fall under the definition in Article 2(2) of that directive, even if they show, in accordance with Article 10(2) thereof, that they are dependants of that citizen;it is, however, incumbent upon the Member States to ensure

[505] Article 3(2) of Directive 2004/36. Of course, insofar the family members themselves are Union citizens, Member States may not impose any other or more strict conditions with regard to their right of entry or residence.

[506] Case C-83/11 *Rahman v Secretary of State for the Home Department* (ECLI:EU:C:2012:519).

> that their legislation contains criteria which enable those persons to obtain a decision on their application for entry and residence that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons; the Member States have a wide discretion when selecting those criteria, but the criteria must be consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2) and must not deprive that provision of its effectiveness; and every applicant is entitled to a judicial review of whether the national legislation and its application satisfy those conditions.[507]

The quotation above shows, first of all, that the mere circumstance that a family member is dependent on a Union citizen who resides in another Member State does not oblige that Member State to grant entry and residence to this family member. This is hardly surprising, since even 'regular' family members, *i.e.* those falling within the scope of Article 2(2) of the Directive, are not exempted from entry or residence conditions.

As to what may be required concretely, of particular significance is the emphasis placed on the fact that imposing entry or residence requirements may not be contrary to the stipulation that entry and residence shall be *facilitated*, and that the requirements imposed should not render Article 3(2) of Directive 2004/38 ineffective. Given the Court's habit to interpret the application of Directive provisions in the light of their aim as described in the preamble – it is worthwhile to observe the sixth recital therein:

> (6) *In order to maintain the unity of the family in a broader sense* and without prejudice to the prohibition of discrimination based on nationality, the situation of people who do not fall within the definition of family members under this Directive and therefore do not enjoy an automatic right of entry and residence in the host Member State should be examined by the latter on the basis of its national law, to decide whether the right entry or residence could be granted to such persons, given their relationship to the citizen of the Union and other circumstances such as their financial or physical dependence on the citizen.

It may be expected that the Court will connect the obligation to facilitate entry and residence to this category of family members, to the purpose 'to maintain the unity of the family in a broader sense of Union citizens who have exercised their right to free movement'. It is likely that in evaluating national criteria in view of the aforementioned purpose, the Court will emphasise that Member States are required to justify any decision to deny entry or residence of family members who fall within the scope of Article 3(2) of Directive 2004/38. National income requirements imposed on this category of family members thus will be approached rather strictly: the starting point will not be the right of Member States to restrict the right of entry

[507] ibid para 26.

or residence, but the aim to maintain the family unit by facilitating their entry and residence. Furthermore, Article 8(4) of the Citizenship Directive lays down a general concept of 'sufficient resources':

> *Article 8 - Administrative formalities for Union citizens*
> 4. Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

Article 8 of Directive 2004/38 contains norms that apply to Union citizens, but it also contains norms that are directed specifically at family members who fall within the scope of Article 2(2) and 3(2) of Directive 2004/38.[508] That Article 8(4) is meant to serve as a general standard when it comes to interpreting the sufficient resources condition furthermore follows from the fact that it is equally considered applicable with regard to family members falling within the scope of Article 12 and 13 of Directive 2004/38.[509]

In view of the foregoing, and given the elaborate considerations made by the Court on the reasonableness of income requirements, it is unlikely that it will establish or accept a separate set of principles in view of which it is examined whether denying entry or residence for failure to meet income conditions is justified. A final remark concerns the significance of the individual interest in the family member being granted a right of residence in the host Member State. If it is established that a family member falls within the scope of Article 3(2) of Directive 2004/38, and if additionally it is established that the sufficient resources condition is not fulfilled, it follows from both the text of Article 3(2) and from the starting points set out in the case of *Rahman*, that the individual interest in the family member being granted residence is to be taken into account in deciding on that person's right of residence.

7.3 Regulation 1612/68: Children of (former) EU migrant workers and their primary carers

As discussed in section 7.2.1.1, Article 12(3) of Directive 2004/38 provides that in the event of death or departure of the Union citizen, the child of this Union citizen, as well as the person who has custody of the child, retain their right of residence

[508] E.g. Article 8(5) of Directive 2004/38.
[509] Article 12(2) and 13(2) of Directive 2004/38.

without this right being subjected to income requirements. The conditions attached to this right of residence are that the child is enrolled in an educational institution, and – as regards the right of residence of the primary carer – that the child is in need of the primary carer's care.[510]

Previous to the coming into being of Directive 2004/38, the Court had inferred a right of former workers' children and their primary carers from Article 12 of Regulation 1612/68:

> *Article 12 of Regulation 1612/68*
> The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.
> Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.

Primarily dealing with children's access to education, it was not self-evident that Article 12 of Regulation 1612/68 conferred a right of residence upon the children concerned or their primary carers, apart from the residence status of the Union citizen worker they had settled with. A series of cases on this issue eventually resulted in the case of *Baumbast*.[511] The Court settled the right of residence of the child of a Union citizen worker as a right connected to the pursuance of education, independent from the current status of the Union citizen parent:

> [C]hildren of a citizen of the European Union who have installed themselves in a Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there, pursuant to Article 12 of Regulation No 1612/68. The fact that the parents of the children concerned have meanwhile divorced, the fact that only one parent is a citizen of the Union and that parent has ceased to be a migrant worker in the host Member State and the fact that the children are not themselves citizens of the Union are irrelevant in this regard.[512]

Connected to the child's right of residence, also his primary carer could derive a right of residence from Article 12 of Regulation 1612/68:

> 75. [W]here children have the right to reside in a host Member State in order to attend general educational courses pursuant to Article 12 of Regulation No 1612/68, that provision must be interpreted as entitling the parent who is the primary carer of those

[510] This requirement of dependency will be discussed in detail in section 9.3.3.

[511] Case C-413/99 *Baumbast and R. v Secretary of State for the Home Department* [2002] ECR I-7091.

[512] ibid para 63.

> children, irrespective of his nationality, to reside with them in order to facilitate the exercise of that right notwithstanding the fact that the parents have meanwhile divorced or that the parent who has the status of citizen of the European Union has ceased to be a migrant worker in the host Member State.[513]

After the entry into force of Directive 2004/38 it turned out that Article 13(2) of this Directive did not cover all issues relating to former workers' children enrolled in an educational institution and their primary carers. There was thus still a role to play for Article 12 of Regulation 1612/68.

The cases of *Ibrahim*[514] and *Teixeira*,[515] rendered on the same day, did involve children of former Union citizen workers, but the latter had not deceased or departed the host Member State.[516] The Court observed that with the coming into force of Directive 2004/38, Article 12 of Regulation 1612/68 had not been repealed and therewith, had not lost its self-standing significance. Therefore the child of the former Union citizen worker – in the situation where the latter had stopped being a worker but had remained in or returned to host Member State – as well as the primary carer of this child, still could derive a right of residence from this provision:

> 55. The London Borough of Lambeth and the United Kingdom and Danish Governments submit that Directive 2004/38, since its entry into force, constitutes the sole basis for the conditions governing the exercise of the right of residence in the Member States of citizens of the Union and the members of their families, and consequently that no right of residence may now be derived from Article 12 of Regulation No 1612/68.
> 56. [T]here is nothing to suggest that, when adopting Directive 2004/38, the legislature intended to alter the scope of Article 12 of that regulation, as interpreted by the Court, so as to limit its normative content from then on to a mere right of access to education.
> 57. It should be noted here that, unlike Articles 10 and 11 of Regulation No 1612/68, Article 12 of that regulation was not repealed or even amended by Directive 2004/38. The European Union legislature thus did not intend thereby to introduce restrictions of the scope of Article 12, as interpreted in the case-law of the Court.
> 58. That interpretation is confirmed by the fact that the *travaux préparatoires* to Directive 2004/38 show that it was designed to be consistent with the judgment in *Baumbast and R* (COM(2003) 199 final, p. 7).[517]

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[513] ibid para 75.

[514] Case C-310/08 *London Borough of Harrow v Nomco Hassan Ibrahim and Secretary of State for the Home Department* [2010] ECR I-1065.

[515] Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary for the Home Department* [2010] ECR I-1107.

[516] In *Teixeira* the Union citizen parent had stopped being a worker but had not left the host Member State, and in *Ibrahim* the Union citizen parent had initially left the host Member State after he had stopped being a worker but had subsequently returned.

[517] *Teixeira* (n 515) paras 55-58.

Since this right of residence of the child and its primary carer was based solely and independently on Article 12 of Regulation 1612/86, it could not be made subject to restrictions that were provided for in relation to residence rights that were founded otherwise, such as residence rights based on Directive 2004/38:

> 41. To accept that children of former migrant workers can continue their education in the host Member State although their parents no longer reside there is equivalent to allowing them a right of residence which is independent of that conferred on their parents, such a right being based on Article 12.
> 42. Article 12 of Regulation No 1612/68 must therefore be applied independently of the provisions of European Union law which govern the conditions of exercise of the right to reside in another Member State. That independence of Article 12 from Article 10 of that regulation formed the basis of the judgments of the Court referred to in paragraphs 29 to 31 above [*Baumbast,* EH], and cannot but subsist in relation to the provisions of Directive 2004/38.[518]

Geared toward income requirements specifically, the Court reasoned that neither Article 12 of Regulation 1612/68 nor the Court's case law provided a basis for the starting point that this right of residence could be subjected to such requirements:

> 52. It must be stated at the outset that there is no such condition in Article 12 of Regulation No 1612/68 and that, as the Court has already held, that article cannot be interpreted restrictively and must not, under any circumstances, be rendered ineffective (*Baumbast and R*, paragraph 74).
> 53. Nor does a requirement as to the self-sufficiency of the members of the family of a worker who is a national of a Member State and their protection in the host Member State in the case of illness follow from the case-law of the Court.
> [...]
> 59. In the light of the above considerations, the answer to the first two questions is that, in circumstances such as those of the main proceedings, the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer can claim a right of residence in the latter State on the sole basis of Article 12 of Regulation No 1612/68, without such a right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State.[519]

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[518] *Ibrahim* (n 514) paras 41-42. The same reasoning is made in *Teixeira* (n 515) in paras 53-54.

[519] *Ibrahim* (n 514) paras 52, 53 and 59. The same reasoning is made in *Teixeira* (n 515) para 70. A few years later, in the case of *Alarape*, it became clear that not having to comply with the residence conditions of Directive 2004/38 has the consequence that the persons concerned cannot rely on this Directive for acquisition of a permanent right of residence. Accordingly, the child who is no longer enrolled in education, or the parent whose child is no longer in need of his care in order to be able to pursue his studies, can – if their right to reside was solely based on Article 12 of Regulation 1612/68 - no longer claim a right

That the Court dismissed the possibility of denying residence to this particular category of family members for lack of sufficient resources was not based on considerations related to the public interest in denying residence to the persons concerned. Instead, the Court *categorically* rejected income requirements to be imposed on this particular category of persons. If the persons concerned had posed a substantial burden on the social assistance scheme, this would not have changed the Court's conclusion. Since the weight of the public interest in protecting the social assistance scheme of the host Member State was not a relevant aspect in this regard, there was neither a role to play for the weight of the individual interest in being able to exercise a right of residence in the host Member State as a possible counterbalance.[520]

7.4 Family members of Union citizens who reside in their home Member State

The right to free movement of Union citizens is in first instance about creating rights for workers that move to or reside in another Member State than that of which they possess the nationality. The Luxembourg Court has also acknowledged rights of residence to family members in situations where Union citizens reside in their 'own' Member State.

For a proper understanding of the Court's argumentation in this type of cases, it is crucial to recognise the distinction between on the one hand, the issue whether a decision to deny residence falls within the scope of EU law; and on the other hand, the issue of whether, given the applicability of EU law, a person has an actual right to reside in the host Member State on the basis of EU law. The former conclusion serves to establish the Court's competence to adjudicate the matter and to establish that the national measure is to be assessed as to its compliance with (principles of) EU law. If the constellation of facts constitutes a so-called 'purely internal situation', the provisions and principles of EU law do not apply to the case concerned. Consequently, in that case the Court is not competent to rule on the matter.[521]

If a national decision to accept or deny residence falls within the scope of EU law, this decision must be taken in accordance with the applicable norms of EU law, but it does not necessarily mean that the person concerned indeed has a right of

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to reside. Case C-529/11 *Alarape and Tijani v Secretary of State for the Home Department* (ECLI:EU:C:2013:290), para 40.

[520] As will be discussed in section 9.4.2 the various types of restrictions to the right of residence of Union citizens and their family members are consistently approached separately from one another.

[521] Eleanor Spaventa 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects.' (2008) 45 CMLR 13, 14.

residence on the basis of these norms.[522] The conclusion that a decision falls within the scope of EU law and the conclusion that a person has an actual right of residence on the basis of EU law are not interchangeable; neither are the aspects that are of relevance for drawing these conclusions. This is exemplified in the following discussion of cases.

7.4.1 The right to return - Eind

In the case of *Eind*,[523] a Dutch Union citizen who, after having resided as a worker in the United Kingdom, had returned to the Netherlands. During the time he resided in the United Kingdom, his eleven-year-old daughter Rachel had joined him from Surinam and on his return to the Netherlands Mr Eind was accompanied by her. Since his return in the Netherlands, Mr Eind had been in receipt of social assistance, and, because of ill health, he had not been employed. The request for a residence permit on behalf of Rachel was rejected, since she was not in possession of a provisional residence permit, a requirement based on the Netherlands national law regarding first entry of third country nationals. It was argued that Mr Eind could no longer be regarded as a Community national, as he had not, since his return to the Netherlands, been engaged in effective and genuine activities so that he was not considered an economically non-active Union citizen for the purposes of the EC Treaty. It was argued that for this reason the national, stricter provisions of Dutch immigration law applied to the request for the residence permit on behalf of his daughter.

The Court first of all had to answer the question whether the case at hand fell within the reach of Community law. Only if this were the case, the question could be addressed whether the right of residence of the Union citizen or that of his family member could be made dependent on a requirement to have sufficient resources. The Court starts out with the latter aspect, reiterating that the right to free movement of Union citizens is subjected to the limitations and conditions imposed by the Treaty and by the measures adopted for its implementation. The Court recalls that economically non-active persons residing in another Member State can be required to have sufficient resources, and that the right of residence of their family members is linked to that of the Union citizens they join or accompany. As regards Union citizens who reside in the Member State of which they have the nationality, the Court reiterates that this right cannot be refused or made subject to conditions:

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[522] Conversely, if a national decision to deny residence does not fall within the scope of EU law, this person cannot rely on EU norms and principles, but it may nevertheless be that he can rely on other, national or international norms. See section 9.4.

[523] Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie v R.N.G. Eind* [2007] ECR I-10719.

> 28. As a preliminary point, it must be borne in mind that the right of nationals of one Member State to reside in the territory of another Member State without being engaged in any activity, whether on an employed or a self-employed basis, is not unconditional. Under Article 18(1) EC, the right of every citizen of the Union to reside in the territory of the Member States is recognised subject to the limitations and conditions imposed by the Treaty and by the measures adopted for its implementation (see, to that effect, Case C-456/02 *Trojani* [2004] ECR I-7573, paragraphs 31 and 32, and Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 26).
> 29. Among those limitations and conditions is the provision made in the first subparagraph of Article 1(1) of Directive 90/364, under which the Member States may require citizens of the Union who are not economically active and wish to enjoy the right to reside in their territory, to ensure that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.
> 30. The right of residence enjoyed by the members of the family of an economically non-active citizen of the Union under Article 1(2) of Directive 90/364 is linked to the right enjoyed by that citizen under Community law.
> 31. In the main proceedings, since Mr Eind is a Netherlands national, his right to reside in the territory of the Netherlands cannot be refused or made conditional.[524]

Accordingly, if it would appear that Mr Eind after having returned to the Netherlands was in fact exercising his right to free movement, the conclusion would be that, since this right cannot be subjected to income related conditions, the same would hold true for the right to reside of his family members.

In establishing whether denying residence to the daughter of Mr Eind indeed could be considered to touch upon the latter's right to free movement, the Court first set out the general starting point to be applied in this regard:

> [T]he right of the migrant worker to return and reside in the Member State of which he is a national, after being gainfully employed in another Member State, *is conferred by Community law, to the extent necessary to ensure the useful effect of the right to free movement for workers* under Article 39 EC and the provisions adopted to give effect to that right, such as those laid down in Regulation No 1612/68. That interpretation is substantiated by the introduction of the status of citizen of the Union, which is intended to be the fundamental status of nationals of the Member States.[525]

Subsequently the Court discussed whether it was indeed necessary to label the right of the migrant worker to return and reside in the Member State of origin as being conferred by Community law in order to ensure the useful effect of the right to free movement of workers. The Court discussed whether in general, a failure to provide

[524] ibid paras 28-31.
[525] ibid para 32 (emphasis added).

a right to return could deter a Union citizen from making use of his right to free movement:

> 35. A national of a Member State could be deterred from leaving that Member State in order to pursue gainful employment in the territory of another Member State if he does not have the certainty of being able to return to his Member State of origin, irrespective of whether he is going to engage in economic activity in the latter State.
> 36. That deterrent effect would also derive simply from the prospect, for that same national, of not being able, on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification.
> 37. Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the Member States have under Community law, as the right of a Community worker to return to the Member State of which he is a national cannot be considered to be a purely internal matter.
> 38. It follows that, in circumstances such as those in the case before the referring court, Miss Eind has the right to install herself with her father, Mr Eind, in the Netherlands, even if the latter is not economically active.[526]

The Court held that barriers to family reunification upon return of a Union citizen worker to his Member State of origin have the capacity to deter Union citizens from exercising their right to free movement in the first place. Therefore, such barriers should be considered to affect Union citizens' right of free movement. Accordingly, Miss Eind had the right to install herself with her father in the Netherlands.

Importantly, the phrase that 'Miss Eind has the right to install herself with her father' should not be interpreted as entailing that this right could not be subjected to any restrictions or conditions. The circumstance that a person enjoys a right of residence on the basis of EU law leaves open the possibility that this person may not fulfil the conditions that are attached to this right. This explains why, after having established the existence of the daughter's right to reside, the Court subsequently evaluates whether the applicable conditions were fulfilled. In this regard, only those conditions actually provided for in EU legislation were accepted to be of relevance. As we have seen, the Court had already observed that EU law did not provide for income requirements to be imposed on Union citizens who resided in their Member State of origin, so that neither the right of residence of their family members could be made dependent on such a condition. The only conditions considered of relevance were those involving the relationship of dependency between Mr Eind and his daughter:

> 39. That right remains subject to the conditions laid down in Article 10(1)(a) of Regulation No 1612/68, which apply by analogy.

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[526] ibid paras 35-38.

> 40. Thus, a person in the situation of Miss Eind may enjoy that right so long as she has not reached the age of 21 years or remains a dependant of her father.
> 41. This finding is not affected by the fact that, before residing in the host Member State where her father was gainfully employed, Miss Eind did not have a right of residence, under national law, in the Member State of which Mr Eind is a national.
> 42. Contrary to the contentions of the Netherlands, Danish and German Governments, the inability to rely on such a right has no bearing on the recognition of a right of entry and residence for such a child, in her capacity as a member of a Community worker's family, in the Member State of which he is a national.
> 43. First of all, the basis for requiring such a right is not laid down, expressly or by implication, in any provision of Community law relating to the right of residence in the Community of third-country nationals who are members of the families of Community workers. According to settled case-law of the Court of Justice, secondary Community legislation on movement and residence cannot be interpreted restrictively (see, inter alia, in respect of Regulation No 1612/68, Case 267/83 *Diatta* [1985] ECR 567, paragraphs 16 and 17, and Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 74).
> 44. Secondly, such a requirement would run counter to the objectives of the Community legislature, which has recognised the importance of ensuring protection for the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty (Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 38, and Case C-459/99 *MRAX* [2002] ECR I-6591, paragraph 53).[527]

When we consider the Court's argumentation in *Eind*, we must distinguish between the conclusion that the position of Mr Eind and his daughter are covered by the right to free movement of workers, and the conclusion that the daughter's right of residence cannot be made subject to the fulfilment of income requirements.

The former conclusion is similar to the Court's reasoning in relation to workers, more in particular, the subcategory of jobseekers. The interest of the state in denying residence is of no relevance, and the individual interest is discussed only *in abstracto*. The Court accepts a right of residence to family members of returning workers because otherwise, Union citizens could be deterred from exercising their right of free movement. Whether is likely that Mr Eind would have chosen not to leave for the United Kingdom, had he been aware of the possibility that he would not be able to return together with his daughter, is irrelevant. That Mr Eind in fact had exercised his right to free movement thus may not serve as proof that he was not deterred from making use of his right to free movement. Furthermore, other aspects that might detract from the weight of the individual interests at stake, such as the consideration that the child might have more substantial family ties in her country of origin, are of no significance.[528]

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[527] ibid paras 39-44.

[528] The relevance of the individual interest in establishing a right of residence for the child and his primary carer in the first place, i.e. apart from whether this right is subjected to income requirements, is discussed in section 9.2.2.

7.4.2 The right to enjoy EU citizenship – the Zambrano doctrine

7.4.2.1 The Zambrano case

In *Zambrano*[529] the family consisted of Mr and Mrs Zambrano, both of Colombian nationality, and their three children, two of which were born in Belgium and had acquired the Belgian nationality. The parents had entered Belgium with their first child, and had unsuccessfully applied for asylum there. They were, however, granted a temporary stay in view of the ongoing civil war in Colombia. Nevertheless, subsequent applications, made with the purpose to secure the family's residence status in Belgium, had been rejected. In the meantime, Mr Zambrano had made an appeal for unemployment benefits. Initially this was due to a temporary suspension of his employment contract for economic reasons. However, after Mr Zambrano had gone back to work, following an inspection at the registered office of Mr Zambrano's employer, he had received a formal order to stop working immediately. The next day, Mr Zambrano's employer terminated his contract of employment with immediate effect and without compensation.[530] This formal order thus posed the cause for the second request for unemployment benefits. Both applications for unemployment benefits were rejected on the ground that on the working days on which the entitlement to unemployment benefit was based, Mr Zambrano had resided without a residence permit and worked without a work permit.

Mr Zambrano's children had never made use of their right to free movement, nor did they – as in *Zhu and Chen* – reside in another Member State than that of which they had the nationality. Therefore, the applicability of EU law in this case was not self-evident. The Court phrased the question to be answered in this regard as follows:

> By its questions, which it is appropriate to consider together, the referring court asks, essentially, whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State.[531]

In answering this question, the Court started by establishing that Directive 2004/38 was not applicable:

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[529] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-1177.

[530] ibid para 27.

[531] ibid para 36.

> 39. It should be observed at the outset that, under Article 3(1) of Directive 2004/38, entitled '[b]eneficiaries', that directive applies to 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members …'. Therefore, that directive does not apply to a situation such as that at issue in the main proceedings.[532]

Subsequently, it was examined whether perhaps Article 20 TFEU was of relevance, as it conferred the status of Union citizen on every person with the nationality of a Member State:

> 40. Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State (see, inter alia, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 27, and Case C-148/02 *Garcia Avello*[2003] ECR I-11613, paragraph 21). Since Mr Ruiz Zambrano's second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the Member State in question to lay down (see, to that effect, inter alia, Case C-135/08 *Rottmann* [2010] ECR I-0000, paragraph 39), they undeniably enjoy that status (see, to that effect, *Garcia Avello*, paragraph 21, and *Zhu and Chen*, paragraph 20).
> 41. As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82; *Garcia Avello*, paragraph 22; *Zhu and Chen*, paragraph 25; and *Rottmann*, paragraph 43).[533]

The Court considered that because of this fundamental status, Member States may not take measures that have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred on them by virtue of their status as Union citizens:

> 42. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, *Rottmann*, paragraph 42).[534]

A national measure thus comes within the scope of Article 20 TFEU if it would have the effect of depriving the Union citizen concerned of the genuine enjoyment of the substance of rights conferred by virtue of his status as a Union citizen.[535]

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[532] ibid para 39.
[533] ibid paras 40-41.
[534] ibid para 42.
[535] The Zambrano-criterion, to be discussed below, thus serves to establish whether EU law is applicable.

Subsequently, the Court examined whether the refusal to grant a right of residence in the circumstances of the Zambrano family indeed would have that effect:

> 43. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.
> 44. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.
> 45. Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.[536]

In subsequent cases the Court reaffirmed that there are two elements crucial to fulfil the so-called Zambrano criterion. Firstly, there must be a situation in which a Union citizen is obliged to leave the territory of the Union as a whole, as a consequence of a decision to deny residence to third country national family member. Secondly, this obligation to leave must have its origins in the circumstance that the Union citizen is dependent on the third country national family member concerned.

7.4.2.2 The two components of the Zambrano criterion

In *O, S, and L*,[537] the Court pointed out that – for a decision to deny residence to a third country family member to touch upon Union citizenship − it must in fact oblige the dependent Union citizen to leave the territory of the Union as a whole. In this regard, the Court reiterated its starting point taken in *Dereci*,[538] that the mere desirability to maintain the family unit on the territory of the host Member State is not sufficient to conclude that denying residence to the third country national family member would *compel* the Union citizen to leave that Member State:

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[536] *Zambrano* (n 529), paras 43-54.

[537] Joint cases C-356/11 and C-357/11 *O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L* (ECLI:EU:C:2012:776).

[538] Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] ECR I-11315.

> 52. However, the mere fact that it might appear desirable, for economic reasons or in order to preserve the family unit in the territory of the Union, for members of a family consisting of third country nationals and a Union citizen who is a minor to be able to reside with that citizen in the territory of the Union in the Member State of which he is a national is not sufficient in itself to support the view that the Union citizen would be forced to leave the territory of the Union if such a right of residence were not granted (see, to that effect, *Dereci and Others*, paragraph 68).[539]

In *Alokpa*, the Court assumed that the Zambrano-criterion was not fulfilled because the dependent Union citizens allegedly had a right of residence in France and, as their primary carer, so would their mother. The consequence of the Luxembourg Court denying the mother a right of residence was therefore not that the Union citizen children were compelled to leave the EU *as a whole*.[540]

As regards the origins of the obligation to leave the Union as a result from denying residence to a third country national family member, the Court has observed in *O, S and L* that such an obligation may have its origin in legal issues, but it may also result from the fact that the children are part of reconstituted families:

> 49. In the present case, it is for the referring court to establish whether the refusal of the applications for residence permits submitted on the basis of family reunification in circumstances such as those at issue in the main proceedings entails, for the Union citizens concerned, a denial of the genuine enjoyment of the substance of the rights conferred by their status.
> 50. When making that assessment, it must be taken into account that the mothers of the Union citizens hold permanent residence permits in the Member State in question, so that, in law, there is no obligation either for them or for the Union citizens dependent on them to leave the territory of that Member State or of the European Union as a whole.
> 51. For the purpose of examining whether the Union citizens concerned would be unable, in fact, to exercise the substance of the rights conferred by their status, the question of the custody of the sponsors' children and the fact that the children are part of reconstituted families are also relevant. First, since Ms S and Ms L have sole custody of the Union citizens concerned who are minors, a decision by them to leave the territory of the Member State of which those children are nationals, in order to preserve the family unit, would have the effect of depriving those Union citizens of all contact with their biological fathers, should such contact have been maintained up to the present. Secondly, any decision to stay in the territory of that Member State in order to preserve the relationship, if any, of the Union citizens who are minors with their biological fathers would have the

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[539] *O, S, and L* (n 537), para 52.

[540] Case C-86/12, *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration* (ECLI:EU:C:2013:645), para 34. See also *Rottmann*, where the issue whether a decision withdrawing naturalisation was in accordance is connected to the factual consequences of that decision. Case C-136/08, *Janko Rottman v Freistaat Bayern* [2010] ECR I-1449, para 61-63.

> effect of harming the relationship of the other children, who are third country nationals, with their biological fathers.
> […]
> 53. In connection with the assessment, mentioned in paragraph 49 above, which it is for the referring court to carry out, that court must examine all the circumstances of the case in order to determine whether, in fact, the decisions refusing residence permits at issue in the main proceedings are liable to undermine the effectiveness of the Union citizenship enjoyed by the Union citizens concerned.
> 54. Whether the person for whom a right of residence is sought on the basis of family reunification lives together with the sponsor and the other family members is not decisive in that assessment, since it cannot be ruled out that some family members who are the subject of an application for family reunification may arrive in the Member State concerned separately from the rest of the family.
> 55. It should also be noted that, contrary to the submissions of the German and Italian Governments, while the principles stated in the *Ruiz Zambrano* judgment apply only in exceptional circumstances, it does not follow from the Court's case-law that their application is confined to situations in which there is a blood relationship between the third country national for whom a right of residence is sought and the Union citizen who is a minor from whom that right of residence might be derived.
> 56. On the other hand, both the permanent right of residence of the mothers of the Union citizens concerned who are minors and the fact that the third country nationals for whom a right of residence is sought are not persons on whom those citizens are legally, financially or emotionally dependent must be taken into consideration when examining the question whether, as a result of the refusal of a right of residence, those citizens would be unable to exercise the substance of the rights conferred by their status.[541]

While the reason why a Union citizen may be obliged to leave the territory of the Union may differ from case to case, the Court makes clear that the effectiveness of Union citizenship it is only undermined if the cause of that obligation is the very dependency of the Union citizen on the third country family member whose expulsion is intended:

> As the Advocate General observes in point 44 of his Opinion, it is the relationship of dependency between the Union citizen who is a minor and the third country national who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in fact, to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole, as a consequence of such a refusal (see *Ruiz Zambrano*, paragraphs 43 and 45, and *Dereci and Others*, paragraphs 65 to 67).[542]

[541] *O, S, and L* (n 537), paras 49-56.
[542] ibid para 56.

Although the Zambrano doctrine is interesting in many ways, I focus on the extent to which and on the basis of which arguments the fulfilment of the Zambrano criterion depends on the fulfilment of income criteria.[543]

7.4.2.3 The significance of income in a Zambrano-assessment

As discussed above, the circumstance that a Union citizen is financially dependent on the third country national concerned may imply that expulsion of this third country national to a non-Member State would jeopardise the effectiveness of the dependent person's Union citizenship. Nevertheless, the Court has also accepted legal and emotional dependency as relevant for in establishing whether there is a relationship of dependency. It is therefore not essential that the third country national contribute to maintain the Union citizen concerned. Moreover, the mere fact that the third country national concerned has sufficient resources does not establish that the Union citizen is dependent on the third country national: it may very well be that the Union citizen relies on other resources, such as his own or those of another parent.

At any rate, the question whether the family member has sufficient resources to maintain the Union citizen cannot play a role in view of a possible interest of the host Member State to protect its public finances. Indeed, the fulfilment of the Zambrano-criterion strictly relates to the consequences for the Union citizen of denying residence to a third country national family member; it has no bearing on the interests that are at stake for the Member State.

However, the Zambrano-criterion 'only' serves to establish whether the decision to deny residence falls within the scope of EU law: if a decision to deny residence to a third country national satisfies the Zambrano-criterion, the consequence thereof is that this decision is to be assessed on the basis of the norms and principles of EU law. In theory, therefore, applying these EU norms and principles not necessarily results in granting a right of residence to the third country family member. Since EU law does not provide under which circumstances Member States may expel the third country national in a Zambrano-situation, we cannot directly rely on concrete provisions of EU legislation. Nevertheless, such an expulsion decision should comply with the general principles of EU law, such as the principle of proportionality.[544] Furthermore, the provisions of the EU Charter on human rights are applicable here. It is unlikely that – especially given the high thresholds that apply to 'regular' free movement cases[545] – the Court will easily accept a public

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[543] Section 9.3.1 discusses whether criminal convictions may affect the right of residence of a person whose expulsion would satisfy the Zambrano-criteria.

[544] The Court might apply by analogy the provisions of chapter 6 of the Citizenship Directive – which preclude expulsion for economic reasons.

[545] I thank the late Tomas Weterings for having pointed out this particular aspect.

interest to be of sufficient weight to justify a decision that has the result that a Union citizen is forced to leave the territory of the EU as a whole, and that inevitably touches upon the right to family life and the obligation to take into account the best interests of the child. A lack of sufficient resources therefore will not derogate from the right of residence of a third country family member in a situation that satisfies the Zambrano-criterion.

7.4.2.4 The relevant interests in a Zambrano-assessment

In establishing which interests are of relevance in a so-called Zambrano-assessment, it is recalled that this assessment serves to establish whether EU-law is applicable in the first place. It serves to establish whether the decision to deny residence is covered by norms and principles of EU law, or whether it entails a purely internal situation. If indeed it is established that the Zambrano-criteria are fulfilled, this means that the right to genuinely enjoy Union citizenship is at stake. A subsequent question may be whether and on which grounds this right may be restricted.

Given the scope of the Zambrano-criteria, it is obvious that in deciding whether a decision to deny residence to a third country national touches upon the genuine enjoyment of Union citizenship, a possible national interest in denying residence is not of relevance. As regards the individual interest, it is important to note that the Zambrano criterion cannot without further regard be labelled as an assessment of the weight of the individual interest in being granted family reunification on the territory of the host Member State. Admittedly, both the ability of the Union citizen to remain within the territory of the Union and the level of dependency between the Union citizen and his third country national family member strongly relate to the individual interest in being allowed family reunification in the Member State. Nevertheless, if we consider the aspects that are *irrelevant* in a so-called Zambrano assessment, the conclusion must be that such an assessment is not interchangeable with an evaluation of the weight of the individual interest in (a family member) being allowed to reside in the host Member State.

First of all, a Zambrano assessment does not include the extent to which the Union citizen, the third country national, or other persons that may be affected by the expulsion decision, developed personal ties in the host Member State. The same goes for the ties between the persons concerned and the family member's country of origin, or the living conditions in that country. Decisive for the fulfilment of the first part of the Zambrano criterion is the very consequence of the Union citizen being obliged to move outside the territory of the Union. No other consequence of the decision to deny residence to the third country national – no matter how severe - has the capacity of bringing that decision within the sphere of EU law on the basis of the Zambrano criterion. For the same reason, if being obliged to move to a non-Member State would *not* result in a situation detrimental to the Union citizen, this cannot

detract from the fulfilment of the criterion. Furthermore, as regards the required dependency between the Union citizen and the third country national, it is only the dependency between the Union citizen and the third country national that may give rise to speak of a Zambrano-situation. Any of such relationships between the third country national and other family members – as the case of *O, S, and L* shows – are inconclusive for satisfying the Zambrano-criterion.

In accordance with the restricted scope of the Zambrano-criterion, the Court in *Dereci* emphasised that any finding that this criterion is not fulfilled would be 'without prejudice to the question whether, on the basis of other criteria, inter alia, by virtue of the right to the protection of family life, a right of residence cannot be refused.'[546] In this regard, the Court noted that if it would appear that the Zambrano-criterion was not fulfilled this would mean that the situation is not covered by EU law. In that case, it would not be the Charter, but Article 8 ECHR that determines whether the third country national could claim a right of residence. Moreover, the Court would not be the competent instance to make such an assessment:

> 71. However, it must be borne in mind that the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States *only when they are implementing European Union law*. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, *the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it* (*McB.*, paragraph 51, see also Joined Cases C-483/09 and C-1/10 *Gueye and Salmerón Sánchez* [2011] ECR I-0000, paragraph 69).
> 72. Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings *is covered by European Union law*, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation *is not covered by European Union law*, it must undertake that examination in the light of Article 8(1) of the ECHR.[547]

In view of the above, I conclude that a right of residence that has its basis in the fulfilment the Zambrano-criterion depends on aspects relating to the individual interest in being granted a right to family reunification in the host Member State. It would nevertheless be incorrect to maintain that the assessment to establish whether the Zambrano-criterion is fulfilled is interchangeable with an examination of whether the persons concerned have a sufficient individual interest in being granted

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[546] *Dereci* (n 538), para 69.

[547] ibid paras 71-72. Likewise, Case C-87/12 *Kreshnik Ymeraga and Others v Ministre du Travail, de l'Emploi et de l'Immigration* (ECLI:EU:C:2013:291) paras 40-44.

a right to family reunification as such. Perhaps more importantly, the circumstance that the Zambrano-criterion is *not* fulfilled cannot in itself justify the conclusion that the individual interest in being granted family reunification in the host Member State is of insufficient weight to attract legal protection, for example on the basis of Article 8 ECHR.

In cases in which it is established that the Zambrano-criteria are satisfied, the public interest is not categorically excluded from being of any relevance. Nevertheless, as argued above, it is unlikely that the Court will easily accept a public interest to be of sufficient weight to justify a decision that compels a Union citizen to leave the territory of the EU as a whole, and that inevitably touches upon the right to family life and obligation to take into account the best interests of the child.

7.5 Summary

In the previous sections I have discussed income requirements in relation to the right of residence of various categories of Union citizen's family members. In principle, income requirements may only be imposed on Union citizens' family members only insofar Union citizens themselves are subjected to such requirements. The Court's approach to the admissibility of income requirements in relation to family members is therefore not different from that which has been described and analysed in the Chapters 6 and 7 of this book.

If the Union citizen cannot be subjected to income requirements, the possibility of imposing such requirements on this person's family members is equally prohibited.[548] The categorical exemption in this regard means that the Court's conclusions are not the result of an assessment of the weight of the public interest in protecting the public finances or of the individual interest in being granted residence.

If on the other hand income requirements are provided for, the Court undertakes a critical scrutiny of the measure as such. Only if it is established that the Union citizen and his family members indeed pose an unreasonable burden on the host State's social assistance scheme, the final decision on whether residence may be denied involves an evaluation of the consequences of that decision for the persons concerned. Only then, the individual interest in the family member being granted residence may serve as a counterweight for the public interest in protecting the Member State's public finances.[549]

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[548] This is the case with family members of economically active Union citizens, the primary carers of children of (former) Union citizen workers, and with family members of Union citizens who reside in the Member State of which they have the nationality except for persons that satisfy the Zambrano-criterion.

[549] See section 6.4.2. and the discussion of the Zambrano-doctrine in section 7.4.2.3.

The next chapter deals with income requirements that apply in the context of the Family reunification Directive. While initially there were doubts as to whether the right to family reunification for third country nationals as established by this Directive would meet the standards of the right to family life of Article 8 ECHR, the Court's interpretation of this Directive turned out – and this is still an on-going process - to be highly beneficial for the persons falling within its scope.

Chapter 8 Income requirements under the Family Reunification Directive

8.1 Introduction

The coming into force of Directive 2003/86 on the right to family reunification of third country nationals, brought within the judicial scope of the European Court of Justice a type of migration, which, on the European level, until then primarily 'belonged' to the ECtHR. It concerns family reunification that is not related to Union citizens, but that is strictly confined to third country nationals.[550]

This chapter starts with an overview of the provisions relating to income requirements in the Family reunification Directive. I then discuss the judicial approach of the ECJ as to the extent to which Member States may restrict the right to family reunification on the basis of that Directive by means of income requirements. Again, in discussing the cases I first examine the role of the weight of the public interest in upholding such requirements, followed by an examination of the extent to which the various interests at stake have the capacity to determine the outcome of concrete cases.

8.2 Income conditions in the Directive

On the outset, it should be noted that Directive 2003/86 does not grant a right to family reunification to every third country national residing in the territory of a Member State. As regards the person who may serve as a sponsor,[551] Article 3(1) of the Directive confines the scope of application to third country nationals who have a more or less secure residence status:

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[550] Article 3(3) of Directive 2003/86.

[551] 'Sponsor' is, according to Article 2(c) of Directive 2003/86, 'a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her.'

> *Article 3 of the Family reunification Directive*
> 1. This Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status.

The family members with whom third country nationals may pursue family reunification are in any case the sponsor's spouse and his/her minor children, and the children of the spouse.[552] Member States may choose to expand the range of family members with whom the sponsor may pursue family reunification, such as the sponsor's unmarried partner or a dependent first-degree relative in the direct ascending line.[553] In that case the Member State's decisions relating to entry and residence of those family members should be in accordance with Directive 2003/86.[554] Income requirements are provided for in Chapter IV of the Directive, which is entitled 'Requirements for the exercise of the right to family reunification':

> *Article 7 of the Family reunification Directive*
> 1. When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has:
> [...]
> (c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.

On the basis of Article 16(1) of the Directive, in case of a failure to fulfil the sufficient resources requirement as laid down in Article 7(1)(c), Member States may deny (further) residence to the family members concerned:

> *Article 16 of the Family reunification Directive*
> 1. Member States may reject an application for entry and residence for the purpose of family reunification, or, if appropriate, withdraw or refuse to renew a family member's residence permit, in the following circumstances:
> (a) where the conditions laid down by this Directive are not or are no longer satisfied.
> When renewing the residence permit, where the sponsor has not sufficient resources without recourse to the social assistance system of the Member State, as referred to in Article 7(1)(c), the Member State shall take into account the contributions of the family members to the household income;

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[552] Article 4(1) of Directive 2003/86.
[553] Article 4(2) and 4(3) of Directive 2004/86.
[554] Article 4(2) and 4(3) of Directive 2004/86.

If a Member State indeed considers sanctioning a failure to have sufficient resources, Article 17 requires that the personal circumstances of the persons concerned be duly taken into account:

> *Article 17 of the Family reunification Directive*
> Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.

Chapter 6 has demonstrated that with regard to economically non-active Union citizens, Directive 2004/38 does not allow Member States to lay down a fixed amount which is regarded as 'sufficient resources.'[555] Furthermore, Directive 2004/38 does not accept a mere appeal to social assistance as a sufficient justification for expulsion.[556] Rather, economically non-active Union citizens and their family members should not become *an unreasonable burden* on the social assistance scheme. By contrast, Directive 2003/86 states that in evaluating the sponsor's resources Member States may take into account the level of minimum national wages and pensions. Moreover, on the basis of Directive 2003/86 Member States may require stable and regular resources that are sufficient to maintain himself/herself and the members of his/her family, *without recourse to* the social assistance system of the Member State concerned. In view of the aforementioned differences, it may appear that compared to Directive 2004/38, Directive 2003/86 allows Member States to be more demanding when it comes to satisfying the sufficient resources condition. Yet, as shown below, the intensity of the Court's scrutiny with regard to Member States' interpretation of restrictions provided for in Directive 2003/86 is equally rigorous.

8.3 The ECJ's interpretation of Directive 2003/86

Although at the time of writing the number of cases that have passed on Directive 2003/86 is modest, these cases are nevertheless quite indicative for the Court's general attitude towards national schemes of income requirements. It seems that not only cases touching upon free movement of persons require a rigorous assessment of the public interest in protecting the social assistance scheme. In the first case to be discussed, the Court set out the general starting points of interpretation with regard to restricting family reunification on the basis of Directive 2003/86.

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[555] Article 8(4) of Directive 2004/38.
[556] Article 14(3) of Directive 2004/38.

8.3.1 Parliament v Council, Case C-540/03

The first case brought before the ECJ on the interpretation of Directive 2003/86, C-540/03 *Parliament/Council*, concerned an annulment action initiated by the European Parliament.[557] The Parliament had contended that a number of provisions of Directive 2003/86 were contrary to *inter alia* the right to respect for family life as guaranteed by Article 8 ECHR. The main concern regarded the provisions that allowed Member States to derogate from the right to family reunification provided for in the Directive – such as an integration condition for children above the age of twelve[558] and a waiting period of two or three years of lawful residence by the sponsor.[559] It was argued that these provisions would allow Member States to deny family reunification with third country nationals on the mere basis of non-compliance with the conditions at issue, that is, without an additional evaluation of whether non-compliance with the condition indeed necessitated denying family reunification in view of a legitimate aim. In other words, it was feared that these conditions would allow Member States to deny family reunification without a case-by-case examination of whether there is a sufficient public interest in doing so.[560]

The crucial aspect of the Court's reaction to the Parliament's complaints lies in its recognition of an essential difference between the rights and obligations stemming from human rights instruments such as the ECHR and the Convention on the rights of the child on the one hand, and those established by Directive 2003/86. This difference regards the establishment of an actual right to family reunification:

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[557] Case C-540/03 *European Parliament v Council of the European Union* [2006] ECR I-5769.

[558] Article 4(1) of Directive 2003/86.

[559] Article 8 of Directive 2003/86.

[560] C-540/03 *Parliament/Council* (n 557) paras 41,42 and 91.

'41. The Parliament further submits that, since the concept of integration is not defined in the Directive, the Member States are authorised to restrict appreciably the right to family reunification.

42. It states that this right is protected by Article 8 of the ECHR, as interpreted by the European Court of Human Rights, and a condition for integration laid down by national legislation does not fall within one of the legitimate objectives capable of justifying interference, as referred to in Article 8(2) of the ECHR, namely national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others. Any interference must, in any event, be justified and proportionate. However, the final subparagraph of Article 4(1) of the Directive does not require any weighing of the respective interests at issue.'

> 59. These various [human rights] instruments stress the importance to a child of family life and recommend that States have regard to the child's interests *but they do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification*.
> 60. Going beyond those provisions, Article 4(1) of the Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation.[561]

The emphasis placed on the fact that Directive 2003/86 has brought about an individual right that involves immigration[562] posed a strong indication that this Directive would have a considerable impact on Member State's ability to restrict family reunification.[563] Indeed, with the right to family reunification as a starting point, the ECJ, unlike the ECtHR, would not be restricted in its judicial scrutiny of national measures through an omnipotent right of States to control immigration. This proposition became confirmed in the first case in which the Court employed its approach to national restrictions to family reunification in a concrete matter: the case of *Chakroun*.[564]

8.3.2 Chakroun, Case C-578/08

The *Chakroun* case concerns a Moroccan national who had resided in the Netherlands since 1970 and who held a residence permit for an indefinite period. In 2006, Mr Chakroun requested to be joined by his wife, with whom he had been married since 1972. The request was rejected on the ground that Mr Chakroun's unemployment benefit was less than the applicable income standard for family formation.[565]

The Dutch scheme of income requirements at the time distinguished between family reunification and family formation. A request for a residence permit for a family member with whom the family relationship arose before the sponsor's entry into the Netherlands was placed under the heading of family reunification, in which

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[561] C-540/03 *Parliament/Council* (n 557) paras 59-60.

[562] *I.e.* as opposed to a right that not extends to the location where it may be exercised.

[563] Groenendijk has described how nevertheless the effects of Directive 2004/38 had been underestimated. Kees Groenendijk, 'Family Reunification as a Right under Community Law' (2006) 8 European Journal of Migration and Law 215, 221.

[564] Case C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I-01839.

[565] Mr Chakroun's unemployment benefit amounted to EUR 1282,73 net per month, whereas the applicable standard for family formation was EUR 1441,44 per month.

case the amount considered 'sufficient' to fulfil the resources condition was set at the level of the minimum wage. If, on the other hand the family relationship had come into being after the sponsor's entry into the Netherlands, this was labelled as family formation. In the latter case the sponsor's income was considered sufficient if it was at least 120% of the minimum wage.

To justify the 120% norm, the national authorities had put forward that the minimum wage in the Netherlands enabled only essential needs to be met; this level thus could prove to be insufficient to prevent that persons would be eligible for special social assistance benefits that were intended to compensate for certain exceptional individual expenses. Above 120% of the minimum wage, it was contended, it was no longer possible to have recourse to either general or special measures of social assistance.[566] The Court assessed both the 120% norm as such, as well as the distinction that applied between family reunification and family formation.

The Court opened its reasoning by repeating its statement from the case *C-540/03 Parliament/Council*, that Directive 2003/86 has introduced an individual right to family reunification – a right which, however, may be subjected to income conditions:

> 41. Article 4(1) of the Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation (Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 60).
> 42. However, that provision is subject to compliance with the conditions referred to, in particular, in Chapter IV of the Directive. Article 7(1)(c) of the Directive forms part of those conditions and allows Member States to require evidence that the sponsor has stable and regular resources which are sufficient to maintain himself and the members of his family without recourse to the social assistance system of the Member State concerned. That provision also states that Member States are to evaluate those resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.[567]

What follows reveals the significance of taking as a starting point an individual right to immigration rather than the right of States to control immigration. Family reunification is the rule and not the exception, and even though the right to family reunification may be conditioned, this possibility should be interpreted strictly. Important in this regard is the general objective to be kept in mind, which is to *promote* family reunification:

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[566] *Chakroun* (n 564), paras 39-40.
[567] ibid paras 41-42.

> 43. Since authorisation of family reunification is the general rule, the faculty provided for in Article 7(1)(c) of the Directive must be interpreted strictly. Furthermore, the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof.[568]

Thus, the Court keeps away from the deferential Strasbourg approach to national restrictions to family reunification and instead builds on its approach with regard to restrictions to the right of free movement of (economically non-active) Union citizens.[569]

In discussing whether in evaluating the sufficiency of the sponsor's resources a Member State may apply a reference amount of 120% of the minimum wage, the Court observes that the content of the concept of 'sufficient resources to maintain the sponsor and his family members' is connected with that of the concept of 'social assistance':

> 46. The first sentence of Article 7(1)(c) of the Directive sets up, on the one hand, the concept of 'stable and regular resources which are sufficient to maintain [the applicant]' against, on the other, that of 'social assistance'. It follows from this contrast that the concept of 'social assistance' in the Directive refers to assistance granted by the public authorities, whether at national, regional or local level, which can be claimed by an individual, in this case the sponsor, who does not have stable and regular resources which are sufficient to maintain himself and the members of his family and who, by reason of that fact, is likely to become a burden on the social assistance system of the host Member

[568] ibid para 43.

[569] Kunoy and Mortansson have criticised the Court for having based its conclusion that the Dutch income requirement is contrary to the Directive on the very fact that the latter must be interpreted in the light of the ECHR and the Charter (Bjørn Kunoy and Bardur Mortansson, 'Case C-578/08, *Rhimou Chakroun* v. *Minister van Buitenlandse Zaken*, Judgment of the European Court of Justice (Second Chamber) of 4 March 2010' (2010) 47 CMLR 1815 at 1816,1824 (note). They argue that the Court therewith has failed to acknowledge the distinction between the scope of rights following from 8 ECHR and Directive 2003/86. Although I agree on the existence of such distinction, I dispute that the Court in *Chakroun* concluded that the Dutch income requirement was incompatible with the Directive *because* of the interpretation required by 8 ECHR and the Charter. While the Court does note in par. 44 "that the provisions of the Directive, particularly Article 7(1)(c) thereof, *must be interpreted in the light of the fundamental rights and, more particularly, in the light of the right to respect for family life enshrined in both the ECHR and the Charter*", in its reasoning on why precisely the Dutch income requirement was found incompatible with the Directive, any explicit referral to human rights norms is lacking.

> State during his period of residence (see, by way of analogy, Case C-291/05 Eind [2007] ECR I-10719, paragraph 29).[570]

What should be considered sufficient resources is thus to be determined on the basis of what is necessary to prevent a person from being in want of *resources to maintain himself and the members of his family*. Further underpinning a strict interpretation of what may be required on the basis of Article 7(1)(c) of Directive 2003/86, the Court again stresses the objective to promote family reunification:

> 47. The second sentence of Article 7(1)(c) of the Directive allows Member States to take into account the level of minimum national wages and pensions as well as the number of family members when evaluating the sponsor's resources. As has been pointed out in paragraph 43 of the present judgment, that faculty must be exercised in a manner which avoids undermining the objective of the Directive, which is to promote family reunification, and the effectiveness thereof.

Prioritising the objective to promote family reunification thus precludes that Member States without further regard put first the protection of their public finances in examining an application for family reunification.

Besides the promotion of family reunification being the central objective of Directive 2003/86, the Court presents another reason for being strict in the use of reference amounts to evaluate the sufficiency of the sponsor's income in a concrete case:

> 48. *Since the extent of needs can vary greatly depending on the individuals*, that authorisation must, moreover, be interpreted as meaning that the Member States may indicate a certain sum as a reference amount, but *not as meaning that they may impose a minimum income level below which all family reunifications will be refused, irrespective of an actual examination of the situation of each applicant*. That interpretation is supported by Article 17 of the Directive, which requires individual examination of applications for family reunification.[571]

The Court obliges Member States to conduct a case-by-case approach by pointing out that the extent of needs can vary greatly depending on the individuals. Hence, the Court requires an actual examination of the situation of each applicant; not, importantly, to establish the interest of the persons concerned in being granted family reunification, but to establish what in a given case counts as a sufficient level of income. Thus, if for example a person submits that the rent he pays for his place of living is below average, this may influence the level of income that applies to him in order to meet the sufficient resources condition. This obligation to ensure that

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[570] *Chakroun* (n 564), para 47.

[571] ibid para 48 (emphasis added).

income levels are established on the basis of the circumstances of the case at hand is, according to the Court, supported by Article 17 of the Directive. Notably, however, Article 17 of the Directive only contains aspects that refer to the individual interest in being granted residence. This provision therefore may 'support' in general a case-by-case approach, but it does not in itself require a case-by-case establishment of the content of restrictive, public interest-related criteria that apply in a concrete case.[572]

After its general observations on how to approach the sufficient means condition, the Court proceeds by examining the 120% norm as upheld by the Dutch authorities. The Court does not accept that this norm reflects the level of income that is considered necessary for the sponsor and his family members to maintain themselves:

> 49. To use as a reference amount a level of income equivalent to 120% of the minimum income of a worker aged 23, above which amount special assistance cannot, in principle, be claimed, does not appear to meet the objective of determining whether an individual has stable and regular resources which are sufficient for his own maintenance. The concept of 'social assistance' in Article 7(1)(c) of the Directive must be interpreted as referring to assistance which compensates for a lack of stable, regular and sufficient resources, *and not as referring to assistance which enables exceptional or unforeseen needs to be addressed*.
> 50. Furthermore, the figure of 120% used to set the amount required by the Vb 2000 is merely an average figure, determined when the statistics on special assistance granted by the local authorities in the Netherlands and the income criteria taken into account by them are drawn up. As was stated at the hearing, *some local authorities use as their reference amount an income which is lower than that corresponding to 120% of the minimum wage, which contradicts the assertion that income corresponding to 120% of the minimum wage is essential*.
> 51. Finally, it is not for the Court to determine whether the minimum income required by Netherlands legislation is sufficient to enable workers of that State to meet their everyday needs. However, it is sufficient to note, as has been rightly contended by the Commission, that if, in the main proceedings, the family relationship between the Chakrouns had existed before Mr Chakroun's entry into the territory of the Union, the amount of income taken into consideration in the examination of Mrs Chakroun's application would have been the minimum wage and not 120% thereof. The conclusion must therefore be that the

[572] The distinct nature of the circumstances that according to the Court in *Chakroun* must be be taken into account is not broadly recognised. Kunoy and Mortansson contend that a 'holistic approach' unambiguously follows from the text of Article 17. Kunoy and Mortansson (n 570) 1828). See further, Anja Wiesbrock, 'The Right to Family Reunification of Third-Country Nationals under EU Law; Decision of 4 March 2010, Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*' (2010) 6 European Constitutional Law Review 462, 477 (note).

> minimum wage *is regarded by the Netherlands authorities themselves as corresponding to resources which are sufficient* for the purposes of Article 7(1)(c) of the Directive.[573]

The 120% norm lacks the required connection with the concept of social assistance, in that it exceeds the income level necessary for 'maintenance'. In view of the foregoing considerations, the Court concludes that the Dutch practice is not compatible with what may be required on the basis of Article 7(1)(c) of the family reunification Directive:

> 52. Having regard to those factors, the answer to the first question is that the phrase 'recourse to the social assistance system' in Article 7(1)(c) of the Directive must be interpreted as precluding a Member State from adopting rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his income, or income-support measures in the context of local-authority minimum-income policies ('minimabeleid').[574]

As regards the distinction between family reunification and family formation, entailing that only in case of family *formation* the required level of resources was set at 120% of the minimum wage - the Court kept it relatively short. It observed that the Directive does not distinguish between the situation in which the family relationship arose before or after the sponsor's entry into the host Member State,[575] and reiterated once more that the Directive provisions should not be interpreted restrictively. It finally concluded rather drily that it did not see how the time at which the family relationship arose could possibly connect to the amount that is considered sufficient to meet the basic needs of the persons concerned:[576]

> 64. Having regard to that lack of distinction, intended by the European Union legislature, based on the time at which the family is constituted, and taking account of the necessity of not interpreting the provisions of the Directive restrictively and not depriving them of their effectiveness, the Member States did not have discretion to reintroduce that distinction in their national legislation transposing the Directive (see, by way of analogy, Case C-127/08 Metock and Others [2008] ECR I-6241, paragraph 93). Furthermore, the capacity of a sponsor to have regular resources which are sufficient to maintain himself

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[573] *Chakroun* (n 564), paras 49-51.

[574] ibid para 52.

[575] ibid paras 59-63.

[576] For an almost sceptical reaction to the arguments put forward by the Dutch authorities in defence of their point of view in this regard, see the opinion of Advocate-General Sharpston on the Chakroun case.

> and the members of his family within the meaning of Article 7(1)(c) of the Directive cannot in any way depend on the point in time at which he constitutes his family.[577]

Again the Court dismisses a national practice for lacking a 'reality check': imposing a distinct level of income must have its basis, either in an explicit provision in the Directive, or in an actual distinction as regards what is necessary to provide for the costs of maintenance.

In sum, the Court rejected the 120% norm because it did not correspond to the level of income at which a person is indeed likely to become a burden on the social assistance scheme. Moreover, the Court emphasised that the sufficiency of the sponsor's income is to be established on a case-by-case basis in view of the fact that 'the extent of needs can vary greatly depending on the individuals'. An automatic application of reference amounts is therefore not allowed. By restricting the room for manoeuvre for Member States in deciding whether the sponsor's income is sufficient, the Court restricted the scope of the public interest of Member States in protecting their social assistance schemes. Demanding that Member States may not ask for more than what is necessary to prevent the persons concerned from being compensated with public means for costs of maintenance boils down to requiring a case-by-case assessment of the public interest in protecting these public means.

By contrast, the weight of the individual interest in the family member being granted residence in the host Member State has not been established in view of the circumstances of the case at hand. The emphasis placed on the objective of the Directive to promote family reunification reflects the fact that the significance of this interest generally is presupposed. Thus if the residence conditions in the Directive are fulfilled the sponsor has a right of family reunification, irrespective of, for example, the quality of the relation between spouses or the ties of the sponsor to the host Member State. This does not mean, of course, that a case-specific interest in being granted family reunification can never decide the outcome of a case featuring income requirements. If it is found that the sponsor does not have sufficient resources in the sense of that provision, on the basis of Article 17 any decision on the right of entry or residence of the family member must include a case-by-case assessment of the personal circumstances.

In view of the fact that the 120% norm as such was considered incompatible with Directive 2003/86, in the *Chakroun* case, there was no separate role to play for the individual interest at stake in the case at hand. Accordingly, in answering the first question – regarding the acceptability of the 120% as such – the Court did not pay attention to any case-specific aspects relating to the interest of the Chakroun family in being granted family reunification. Admittedly, in discussing the second question

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[577] *Chakroun* (n 564), para 64.

– regarding the distinction between family reunification and family formation – the Court did note that Mr and Mrs Chakroun had been married for 37 years. This remark, however, was not decisive for the conclusion that the distinction between family formation and family reunification was not compatible with the family reunification Directive. Indeed, after having explained that the EU legislator had not intended to distinguish between family reunion and family formation and that there was no reason why this distinction should affect the extend of needs for maintenance, the duration of the marriage was mentioned purely in reaction to a remark made in this regard by the Netherlands government:

> 65. Finally, with regard to the Netherlands Government's argument that authorisation should be granted if so required by Article 8 of the ECHR, suffice it to note that, as emerged at the hearing, Mrs Chakroun has still not been authorised to join her husband, to whom she has been married for 37 years.[578]

While in *Chakroun* the circumstances of the case at hand relating to the individual interest were not of autonomous significance, this is different in the second case in which the sufficient resources condition played a role. Below it is demonstrated that in *O, S,* and *L* the Court did elaborate on the assessment to be made in that regard.

8.3.3 O, S, and L, Joint cases C-356/11 and C-357/11

The joint cases of *O, S,* and *L*[579] both feature a third country national mother of a Union citizen child born out of a previous marriage. The mother had remarried a third country national with whom she had a second child that did not possess the nationality of one of the Member States. The principal issue in these cases was whether denying residence to the second husbands would result in a so-called Zambrano-situation.[580] As discussed earlier, the Court indicated in this regard that the ties between the Union citizen child and the second partner were not such as to constitute the dependency that was required for fulfilling the Zambrano-criterion. Subsequently, however, the Court pointed out that both cases concerned lawfully residing third country nationals seeking family reunification with another third country national, so that the cases fell within the scope of Directive 2003/86. Since the referring court had not submitted any questions with regard to the application of Directive 2003/86, the Court confined itself to providing a general outline of the starting points to be followed by the national authorities in applying the Directive to the case at hand. Because the reason for denying residence to the persons concerned

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[578] ibid para 65 (emphasis added). As argued above, I do not hold the view that the Court based its reasoning in *Chakroun* on Article 8 ECHR. See note 569.

[579] *O, S,* and *L* (n 537).

[580] See section 7.4.2.2 for a detailed description of the *O, S, and L* case.

was a lack of sufficient resources, the Court paid specific attention to Article 7(1)(c) of Directive 2003/86:

> 70. Article 4(1) of Directive 2003/86 imposes on the Member States precise positive obligations, with corresponding clearly defined individual rights. It requires them, in the cases determined by that directive, to authorise the family reunification of certain members of the sponsor's family, without being left a margin of appreciation (see Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 60).
> 71. That provision is, however, subject to compliance with the conditions laid down in particular in Chapter IV of Directive 2003/86. Article 7(1)(c) of that directive forms part of those conditions and allows the Member States to require evidence that the sponsor has stable and regular resources which are sufficient to maintain himself and the members of his family without recourse to the social assistance system of the Member State concerned. That provision also states that Member States are to evaluate those resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members (*Chakroun*, paragraph 42).[581]

As a comment on the circumstance that in both cases residence had been denied because the husbands themselves did not have sufficient income, the Court recalled that Directive 2003/86 requires the *sponsor* to comply with that requirement:

> 72. With respect to Article 4(1) of Directive 2003/86, it must be stressed, first, that, in principle, it is the resources of the sponsor that are the subject of the individual examination of applications for reunification required by that directive, not the resources of the third country national for whom a right of residence is sought on the basis of family reunification (see *Chakroun*, paragraphs 46 and 47).
> 73. Moreover, as regards those resources, the expression 'recourse to the social assistance system' in Article 7(1)(c) of Directive 2003/86 does not allow a Member State to refuse family reunification to a sponsor who proves that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs or income support measures (see *Chakroun*, paragraph 52).
> 74. Next, since authorisation of family reunification is the general rule, the Court has held that the faculty provided for in Article 7(1)(c) of Directive 2003/86 must be interpreted strictly. The margin which the Member States are recognised as having must therefore not be used by them in a manner which would undermine the objective and the effectiveness of that directive (*Chakroun*, paragraph 43).[582]

After this general reiteration of the principles set out in *Chakroun* on the assessment of whether the sponsor's income should be considered sufficient in the sense of Article 7(1)(c) of Directive 2003/86, the Court discussed the role of the individual

[581] *O, S,* and *L* (n 537) paras 70-71.
[582] ibid paras 72-74.

interest in being granted family reunification in the host Member State. It did so by elaborating on the right to family life, in particular the best interests of the child, and on how these aspects should affect the application by Member States of the conditions provided for in Article 7 of the Directive 2003/86:

> 75. Finally, it must be recalled that, as may be seen from recital 2 in the preamble to Directive 2003/86, the directive respects the fundamental rights and observes the principles enshrined in the Charter.
> 76. Article 7 of the Charter, which contains rights corresponding to those guaranteed by Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, recognises the right to respect for private and family life. That provision of the Charter must also be read in conjunction with the obligation to have regard to the child's best interests, recognised in Article 24(2) of the Charter, and with account being taken of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both parents (see *Parliament* v *Council*, paragraph 58, and Case C-403/09 PPU *Detiček* [2009] ECR I-12193, paragraph 54).
> 77. Article 7(1)(c) of Directive 2003/86 cannot be interpreted and applied in such a manner that its application would disregard the fundamental rights set out in those provisions of the Charter.
> 78. The Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the legal order of the European Union (see *Parliament* v *Council*, paragraph 105, and *Detiček*, paragraph 34).
> 79. It is true that Articles 7 and 24 of the Charter, while emphasising the importance for children of family life, cannot be interpreted as depriving the Member States of their margin of appreciation when examining applications for family reunification (see, to that effect, *Parliament* v *Council*, paragraph 59).
> 80. However, in the course of such an examination and when determining in particular whether the conditions laid down in Article 7(1) of Directive 2003/86 are satisfied, the provisions of that directive must be interpreted and applied in the light of Articles 7 and 24(2) and (3) of the Charter, as is moreover apparent from recital 2 in the preamble to and Article 5(5) of that directive, which require the Member States to examine the applications for reunification in question in the interests of the children concerned and with a view to promoting family life.
> 81. It is for the competent national authorities, when implementing Directive 2003/86 and examining applications for family reunification, to make a balanced and reasonable assessment of all the interests in play, taking particular account of the interests of the children concerned.[583]

We can see that the individual interest in being granted family reunification is given a significant role to play in deciding on the outcome of the case. Nevertheless, it is to be recalled that this case-specific individual interest is not constitutive for the applicability of Directive 2003/86. For the Directive to be applicable it is sufficient

[583] ibid paras 75-81.

that one fulfils one of the descriptions enlisted in Articles 3 and 4 thereof. Hence, a case-specific evaluation of aspects relating to the right to family life or of the best interests of the child generally comes into view, only after it is established that the condition of sufficient resources is not fulfilled. Indeed, only as a counterweight for the circumstance that the sponsor does not have sufficient income it may be appropriate to examine whether the weight of the individual interest precludes that residence is denied for failure to comply with the sufficient resources requirement.

8.4 Summary and conclusion

The above analysis of cases featuring income requirements in the context of Directive 2003/86 reveals that the Court's approach in this regard is quite similar to that in cases dealing with economically non-active Union citizens' right to free movement. First of all, in both contexts the Court opts for a strict interpretation of what Member States may require from individuals when applying the sufficient resources condition. In relation to free movement of Union citizens the Court has shown consistent in taking the view that if a certain condition is not explicitly provided for, Member States are not allowed to read-in such condition anyway. In determining to which extent Member States may condition the right to family reunification on the basis of Directive 2003/86, the Court likewise takes a strict approach. It thus confined the concept of 'social assistance' in Article 7(1)(c), in that the income level that may serve as a reference amount should correspond to what is sufficient to provide for basic costs of maintenance. Herewith, the Court has established that eligibility for state funded means exceeding such basic costs may not serve as a basis to refuse family reunification.

In both contexts – *i.e.* the context of free movement of Union citizens and that of family reunification by third country nationals - the Court interprets the scope of restrictions or conditions to the rights at issue in a strict manner. Another similarity regards the argumentation behind that strict approach. The reason why the principle of free movement is given a broad interpretation while exceptions to and derogations from the principle of freedom of movement are interpreted strictly, lies in the Treaty objective to abolish obstacles to free movement of Union citizens and the corresponding establishment of the right to free movement. Although the right to family reunification of third country nationals is not put on a par with the right to free movement of Union citizens, the argumentative construction used by the Court to justify its strict interpretation of Article 7(1)(c) of Directive 2003/86 is still quite familiar. Thus, in *Chakroun* the Court reiterates that the family reunification Directive has established the individual right to family reunification, after which it points out that since authorisation of family reunification is the general rule, the

faculty provided for in Article 7(1)(c) of the Directive must be interpreted strictly. Furthermore, the Court observed that Member States must not use their margin for manoeuvre in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof.

Another parallel regards the case-by-case approach that is required by the Court in establishing whether the sufficient resources condition is fulfilled - the automatic use of fixed standards is principally rejected. With regard to economically non-active Union citizens it appeared that the Court dismissed the use of fixed income levels, as well as fixed periods of time to establish the sufficiency or sustainability of a person's income. In the *Chakroun* case, in a similar manner, the Court obliged Member States to undertake a case-specific evaluation of the extend of needs of the persons concerned in order to establish the income level that is sufficient to meet these needs. As a result, applicants whose income is lower than the minimum wage level, but who prove that they can manage with that income without having recourse to social assistance, cannot without further regard be denied family reunification for failure to fulfil the sufficient resources condition. Thus, the Court here too requires a case-by-case examination of whether a person indeed is likely to become a burden on the Member State's social assistance scheme.

As regards the role of the individual interest, the significance emerged of the establishment of a right to family reunification, that is, an individual right that involves immigration. As a result thereof, the acknowledgment of the right to family reunification does not depend on an evaluation of the individual interest in being granted family reunification in the host Member State in the case at hand. Indeed, such case-specific circumstances only come into view if it has appeared that there is a legitimate interest in denying family reunification – *i.e.* if the sufficient resources condition is not fulfilled. In that case, the circumstances of the case relating to the individual interest may serve as a counterweight to establish whether indeed family reunification may be denied. This argumentative construction, whereby the right of residence of the person concerned is presumed, also features in the Court's case law relating to free movement of Union citizens, where the right to free movement does not depend on the interest of the persons concerned in exercising that right. Only where EU legislation explicitly leaves room to restrict the right to free movement for public interest reasons, the individual interest may come into play as a counterbalance – hence after it appears that there is indeed a legitimate public interest in restricting the right of residence to the person concerned.

The observation that the approach in the context of Union citizens' right to free movement is similar to the approach to family reunification by third country nationals, is confirmed by the circumstance that in its case law relating to Union

citizens' right to free movement the Court has shown to refer to cases that concern the application of the family reunification Directive and *vice versa*.[584]

In view of the foregoing it may be expected that in future cases Member States will continue to find their interpretation of (Article 7(1)(c) of) Directive 2003/86 being dismissed for going further than what on the basis of a strict interpretation of this provision may be required from individuals pursuing family reunification. It is very likely, for example, that while this Directive does provide that Member States may require that the sponsor's income is 'sustainable', the Court will nevertheless restrict Member States in what they may perceive as 'sustainable' income. For example, systematically requiring an employment contract of at least a year, or demanding that in the alternative of such contract the sponsor should establish that in the preceding three years he has continuously obtained a certain level of income, probably will not comply with the strict interpretation of the sufficient resources condition as required by the Court. Furthermore, such practice will likely be considered to go against the stipulation that the establishment of whether in a concrete case a person is likely to become a burden on the social assistance scheme of the host Member State requires to take into account the circumstances of the case at hand.

[584] E.g. *Brey* (n 487), paras 70-71, cited above in section 6.3.7 and *Chakroun* (n 564) para 46, cited in section 8.3.2.

Chapter 9 The consistency of the ECJ's approach to national restrictions

9.1 Introduction

In the preceding chapters of the second part of this book, I have analysed for various categories of persons whose right of residence is covered by EU law, how the EU Court of Justice has assessed national income-related restrictions to entry and residence rights of foreign nationals. While there are differences in the extent to which each of these categories of persons may be subjected to such restrictions, the Court's adjudication follows a consistent pattern of argumentation.

I start out by providing an outline of this pattern. Separate attention is paid to the extent to which the various interests at stake have the capacity to determine whether or not in a concrete case a person has the right of entry or residence. In the remainder of this chapter I shall test the hypothesis that with regard to other restrictive conditions, the Court's approach proves to be similar. The ground for this hypothesis is that, unlike the Strasbourg Court, the ECJ until now has shown to take an approach that is in accordance with the general principles it has set out in this regard.

9.2 Outline of the ECJ's approach to income-related conditions

9.2.1 A strict, purpose-related, case-by-case scrutiny of national restrictions

The first feature of the Court's approach entails its strict scrutiny of whether as such the restrictive condition that was held against the individual is provided for by EU legislation. In determining the extent to which the individual right at stake may be subjected to restrictive conditions, the Court has shown persistent in reinforcing a strict interpretation of national income requirements. This means that if a particular restriction is not expressly provided for in EU legislation or follows from its case law, Member States are not allowed to impose that restriction.

In this narrow interpretation of restrictions and broad interpretation of rights, the Court closely connects to the purpose that is served with these rights and conditions.

For example, the strict scope of what may be required on the basis of the sufficient resource condition is substantiated by pointing out the objective that Union citizens and their family members should not become an 'unreasonable' burden to the public means of the host Member State. Or in the context of the Family reunification Directive, the objective that third country nationals and their family members will not rely on 'social assistance'. In the same way, the broad scope of the worker-definition is established in view of the objective to abolish all obstacles to free movement of persons; the extensive interpretation of the right to free movement of economically non-active Union citizens is placed in view of the establishment of the fundamental status of Union citizenship; and the broad interpretation of the right to family reunification by third country nationals is regarded in the light of the objective to promote family reunification.

In a substantial number of cases, this correlation between a broad interpretation of rights and a narrow interpretation of measures restricting these rights has led to a dismissal of the restriction at issue *as such* for being incompatible with EU law. Examples thereof are the requirement of a minimum income level to qualify as a worker; the denial of that status to workers who rely on social assistance; income requirements imposed to children of former workers or their primary carers; allowing only income obtained by economically non-active Union citizens themselves or their wedded partners; requiring an economically non-active Union citizen's income to be sustainable; and finally, applying an income-level that does not correspond to what is necessary to provide for the basic costs for maintenance. All these conditions were dismissed as such, meaning that it was not just in the case at hand that upholding the criterion at issue was considered problematic. The Court considered the criteria not explicitly provided for by EU law, and the required narrow interpretation of restrictions to the rights at issue prevented that such restrictions could be upheld any way.

In addition to the strict interpretation with regard to what Member States may require from individuals in terms of income, the Court has been equally consistent in conducting a rigorous assessment of whether restrictions imposed by Member States lend themselves for a case-by-case application. The Court systematically rejects the automatic application of restrictive criteria, even if EU law explicitly provides for the criterion at issue or in a definition as set out by the Court. In the context of the worker definition, it emerged that Member States could not evaluate the genuine economical nature of a person's activities on the basis of a fixed set of characteristics, but that instead such evaluation should be case-specific. For example, the mere absence of remuneration in cash may not be considered sufficient to deprive a person's activities of their economical character, while a person who monthly receives an income for having carried out work nevertheless may not be considered a worker if this follows from the particular setting of the employment relationship.

The rejection of automatically applied assessment standards was furthermore at issue with regard to the sufficient resources condition provided for in the Citizenship Directive and the Family reunification Directive. Member States were not allowed to use fixed standards to establish the sufficiency of a person's income, but instead, such assessment was to be customized to the circumstances of the case at hand. Thus, the assessment of whether an appeal to social assistance constitutes an 'unreasonable' burden on the social assistance scheme, should involve an evaluation of the amount of the financial assistance as well as the expected duration of the period in which the persons were to rely on that assistance. Similarly, the income level that is necessary to prevent a person from having recourse to social assistance is to be established on the basis of the extent of needs of the persons concerned to provide for their basic costs of maintenance. And in the same vein, the Court rejected the use of fixed standards to establish the sustainability of a person's income without taking into account the circumstances of the case.

9.2.2 The significance of the individual interest in (a family member) being granted residence

In view of the features described above, the Court's approach to income requirements may be characterised by its primary focus on the legitimacy of the restrictive criterion *as such*. This particular focus has implications for the role left to play by the individual interest at stake in concrete situations. The case-specific interest of individuals in being able to reside in another Member State, or in being granted family reunification in a certain Member State, only rarely constituted a factor to be assessed in establishing whether the individuals concerned indeed had the right to do so. The following overview may exemplify this observation.

If it appears that indeed individual interest-related aspects are relevant for the outcome of a case, it is useful to firstly conduct a closer examination as to the specific context in which such aspects are considered relevant.

Chapter 5 has described how in establishing the scope of the right to free movement of economically active Union citizens, the Court has shown to include general considerations on the significance of being able to enjoy the right to free movement for peoples quality of lives. In this respect it was contended that the concept of worker should include part-time work, since being able to move to another Member State in pursuance of part-time work for many persons could constitute a means to improve their living conditions. Importantly, however, for the issue of whether in a concrete case a person working part-time in another Member State was to be considered a worker, it appeared irrelevant whether that person's living conditions were indeed improved by moving to another Member State. The occurrence of case-specific circumstances indicating the interest of an economically active Union citizen in exercising the right of entry and residence in the host Member

State proved not to be constitutive for whether this person in fact enjoyed that right. This means that neither the occurrence, nor the absence of such circumstances may play a role in the establishment or denial thereof. Thus, a Union citizen whose activities are not of an economical nature cannot be considered a worker, irrespective of the interest he might have in being acknowledged as such.[585] And a Union citizen who works for only a limited number of hours in another Member State may enjoy the worker status, regardless whether he might have given up his well-paid full-time job in his Member State of origin to go and work part-time and for a lower wage in the host Member State.

Because the worker definition does not involve a case-specific individual interest in being granted residence in the host Member State, and since moreover the worker status may not be denied on the basis of any public interest to protect the public finances of the host Member State, balancing competing interests is not at issue here. For this reason, the weight of the individual interest is ruled out as a potential factor of relevance in cases that deal with the right to free movement of economically active Union citizens.

In Chapter 6 it has been observed that the right of entry or residence in another Member State as an economically non-active Union citizen is not defined by the interest of these persons in being able to actually enjoy such right. Indeed, having the nationality of a Member State other than that of residence suffices in this regard.[586] The establishment of an actual interest in being allowed entry or residence is therefore unrelated to the question from whether a person falls within the personal scope of Directive 2004/38. In some cases, however, the individual interest at stake in cases featuring economically non-active Union citizens must be evaluated.

Due to the sufficient resources condition that applies to economically non-active Union citizens, a public interest in denying residence is a potential factor of relevance in establishing individual's right of residence. If a Member State finds that a Union citizen does not satisfy the sufficient resources condition, a final decision on the right of residence of that person requires a balancing assessment, in which the interest in being able to retain the right of residence must be taken into account. In this way, the individual interest may become of importance for the outcome of the case.

Nevertheless, this balancing assessment only comes into play after it is established that the specific criterion that was held against the applicant is in accordance with the stipulation to strictly interpret the scope of national restrictive measures, as discussed above, and that of applying only customized restrictive

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[585] Of course, it may very well be that he may enjoy a right of residence as an economically non-active Union citizen.

[586] Article 2(1) in conjunction with Article 3(1) of Directive 2004/38.

criteria. Only in the *Baumbast* case the Court came to the point of setting out the weight of the public interest against the circumstances of the case relating to the individual interests at stake.[587] The fact that Mr Baumbast had sickness insurance in Germany and had sufficient means to provide for himself and his family members was set out against the fact that he had resided in the United Kingdom for several years accompanied by his family members. Consequently, denying residence was considered disproportionate.

Chapter 7 focused on family members of Union citizens. The extent to which the right of residence of family members can be subjected to income conditions corresponds to the extent to which this is possible in relation to the Union citizens they join or accompany. Insofar, the above observations on the significance of individual interest-related aspects with regard to economically active and economically non-active Union citizens apply here too.

Admittedly, in various situations, prerequisite for acknowledging a right of residence is the establishment of certain ties between the family member and the Union citizen concerned. In some cases the required ties are of a financial nature, while in other cases a physical, emotional, or legal dependency may be at issue. Yet, it is important to note that regardless the exact relation that is required, the case-specific examination of individual interest-related aspects is less comprehensive, and not to be put on a par with an evaluation of the individual interest in the context of balancing the competing interests at stake. In the latter instance it is to be evaluated whether on the whole the individual interest in the family member being granted residence in the host Member State is such as to outweigh an established public interest in protecting the social assistance scheme. By contrast, in a 'dependency assessment', aspects that do not connect to the substance of the particular type of dependency at issue in the case at hand may not add up to, nor detract from the conclusion of whether the dependency criterion is satisfied.[588] Special attention in this regard is paid to so-called *Zambrano*-situations. The fulfilment of the Zambrano-criteria requires a level of dependency between the third country national and the Union citizen that is such to oblige the latter to leave the territory of the Union as a whole if the third country national were to be expelled. The scope of this assessment

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[587] And arguably, a contrario in *Trojani*. See section 6.4.2.

[588] E.g. *Alarape*: 'determining whether an adult child does or does not continue to need the presence and care of his parent in order to pursue and complete his education is a question of fact that falls to be resolved by the national courts. In that regard, the national courts may take into account the particular circumstances and features of the main proceedings which might indicate that the need was genuine, such as, inter alia, the age of the child, whether the child is residing in the family home or whether the child needs financial or emotional support from the parent in order to be able to continue and to complete his education.' *Alarape* (n 519), para 30.

is obviously broader than that which applies to various other types of dependent family members; nevertheless, the Zambrano-criterion is to be distinguished from an examination of the weight of the individual interest in being granted family reunification in the context of a balancing assessment. Aspects such as the strength of ties developed in the host Member State or the situation in the country of destination are irrelevant for establishing whether the Zambrano-criteria are fulfilled. Indeed, these aspects do not concern the level of dependency between the Union citizen and the third country national family member and therefore do not play a role in the outcome of such assessment.[589]

As regards the role of the individual interest in deciding on income requirements in the context of the Family reunification directive, Chapter 8 showed the importance in this regard of the establishment of an individual right to family reunification that is, an individual right that involves immigration. As a result thereof, case-specific circumstances relating to the individual interest only come into view if it has appeared that there is a legitimate interest in denying family reunification – *i.e.* if the sufficient resources condition is not fulfilled. Then, the weight of the individual interest is to be taken into account in order to establish whether indeed family reunification may be denied. This argumentative construction, whereby the right of residence of the person concerned is presumed, also features in the Court's case law relating to free movement of Union citizens, where the existence of the right to free movement does not depend on the interest of the persons concerned in exercising that right. Only where EU legislation explicitly leaves room to restrict the right to free movement for public interest reasons, the individual interest may come into play as a counterbalance – after it appears that there is indeed a sufficient public interest in restricting the right of residence to the person concerned.

9.2.3 A reason-specific approach to national restrictions to free movement and family reunification?

Recalling the analysis of Strasbourg case law in the first part of this book, it must be established whether the argumentation pattern that characterises Luxembourg case law is specific for income requirements or that perhaps, if other public interests are at stake, the Court adapts its judicial approach. I think that it is highly unlikely that the latter is indeed the case.

In the analysis of Strasbourg case law a line of distinction emerged between cases featuring immigration-specific aspects, *i.e.* aspects that only in the context of immigration may result in a person's physical exclusion from society, and cases in which such aspects are absent. In relation to immigration specific aspects, States are accorded a full margin of appreciation. This margin regards both setting out

[589] Section 7.4.2.4.

restrictive criteria for entry and residence and with regard to balancing the competing interests in individual cases. The consequence of this full margin in the area of immigration as such is that in these cases the ECtHR refrains from establishing the weight of the public interest in denying residence. Therewith the individual interest in being granted residence has no stand-alone capacity to outweigh the public interest. Further, the ECtHR has accepted that the generic interest in controlling immigration may pose a stand-alone justification for denying residence in a concrete case, hence, irrespective of any substantive objections against a person's presence in the host State. The reason-specific distinction between argumentation schemes in Strasbourg case law thus has its basis in the predominance of the interest of States in controlling immigration.

In Luxembourg case law it is unthinkable that an interest of Member States to control immigration would have such impact on the adjudication of income-related restrictions. On the contrary, the objective to abolish all obstacles for freedom of movement of Union citizens, the characterisation of the right to free movement as a fundamental right, and the objective to promote family reunification by third country nationals; these elements encompass the exact opposite of prioritising the right of states to control immigration. Hence, the very feature that in Strasbourg case law has resulted in the distinct approaches between the various reasons for denying residence – the immigration control factor - is obviously lacking in Luxembourg case law. For the ECJ, the sovereign right to control immigration does not stand in the way of scrutinising the merits of national restrictive criteria to entry and residence of foreign nationals. Consequently, the ECJ – as opposed to the ECtHR – is able to reason in consistency with its general assessment principles. For this reason, it is asserted here that Luxembourg cases featuring other types of restrictive conditions show the same characteristics as described with regard to income restrictions. To see if this is indeed the case, in the next sections I discuss the ECJ's approach to various restrictive criteria imposed by Member States.

9.3 The ECJ's approach to other types of restrictions

The following discussion of Luxembourg case law is somewhat fragmentary and is not intended to encompass a comprehensive overview of the Court's approach to all types of restrictions that may be imposed on the distinct categories of persons whose right of residence falls within the scope of EU law. It serves the purpose to substantiate the assertion that the Court's approach to restrictive measures other than income-related ones, shows the same features as that which emerged in relation to income-related restrictions. The legal framework providing the basis for imposing

the various restrictions is only addressed to the extent necessary to explain the cases that are explicitly discussed.

9.3.1 Criminal convictions

In all cases where a person's right of residence or to family reunification is based on EU law, this right may be restricted on grounds of public policy or public security. With regard to Union citizens and their family members falling within the scope of Directive 2004/38, Chapter 6 of that Directive explicitly allows for restrictions on the right of entry and the right of residence on grounds of public policy or public security. With regard to persons whose right of residence is based solely on Regulation 1612/68, it is of significance that their rights of residence derive from the right to free movement of workers as established in Article 45 TFEU. The latter provision explicitly allows for limitations of that right on grounds of public policy or public security, so that the same holds true for the right of residence of family members of (former) workers. Under certain circumstances, on the basis of the TFEU a right of residence is acknowledged for (family members of) Union citizens who do not satisfy the conditions of one of the aforementioned Directives, or those of Regulation 1612/86. In these cases, the Court has shown to apply by analogy the conditions of residence that are provided for in EU legislation,[590] hence including those on grounds of public policy or public security. With regard to so-called Zambrano situations, I have argued that fulfilling the Zambrano-criterion has the consequence that the decision to deny residence to the family member concerned falls within the scope of EU law and therefore should comply with the principles laid down therein. If the family member concerned should pose a threat to public policy or public security, the Court cannot directly rely on concrete provisions of EU

[590] This was at issue in *Eind*, where the possibility of a Union citizen who had worked in another Member State to return to his 'own' Member State in the company of his daughter was considered to fall within the scope of the right to free movement of workers. Although the Union citizen's right and therefore neither his daughter's could be subjected to the sufficient resources condition, the provisions relating to the scope of family members who had the right to accompany the Union citizen were applied by analogy (*Eind* (n 524), paras 30, 31, 39). In the same manner, in *Zhu and Chen* the right of residence of the girl's mother could not be based on the Directive, but was established on the basis of the Treaty. The young age of the girl, who did enjoy a right of residence in the host Member State on the basis of the Directive, brought with it that in order to effectuate her right of residence, she should be able to be accompanied by her primary carer. The Court considered in this regard that the mother's right of residence was subjected to the same restrictive provisions as those that applied to her Union citizen daughter (*Zhu and Chen* (n 472), para 47). In this case, this meant that the right of residence of both the child and her mother were subjected to the sufficient resources condition.

legislation, since EU law does not include rules regarding the expulsion of third country nationals of Union citizens who do not reside in a Member State other than that of which they have the nationality. Nevertheless, given the fact that this expulsion decision is considered to fall within the scope of EU law, it should comply with the general principles of EU law, such as the proportionality principle, and furthermore, the provisions of the EU Charter on human rights are applicable here. It is expected that the Court will not easily consider the public interest in protecting public policy or public security to be sufficient to justify a decision that has the result that a Union citizen is forced to leave the territory of the EU as a whole and that inevitably touches upon the right to family life and the best interests of the child.[591]

Finally, in the context of Directive 2003/86, Article 6 thereof provides that grounds of public policy and public security may be put forward to deny a right of residence to family members of third country nationals. In the Court's case law, various restrictions have been placed under the heading of 'public policy'. The following paragraphs address the most common reason to restrict individuals' right of residence on this ground: the commission of criminal offences. The case of *Calfa*[592] concerned the expulsion for life from Greek territory of an Italian national for being found guilty of a drugs offence, for which she had been sentenced to three months imprisonment. As Directive 2004/38 does now, the Directive that then applied stipulated that expulsion on grounds of public policy was to be based exclusively on the personal conduct of the individual concerned. It may be argued that a person having committed a drugs offence may pose an indication of that person's personal conduct. Yet, a strict interpretation of the public policy restriction lead the Court to conclude that this circumstance as such may not be considered sufficient to justify an expulsion decision:

> 21. Under the Court's case-law, the concept of public policy may be relied upon in the event of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society (see Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35).
> 22. In this respect, it must be accepted that a Member State may consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs, in order to maintain public order.
> 23. However, as the Court has repeatedly stated, the public policy exception, like all derogations from a fundamental principle of the Treaty, must be interpreted restrictively.
> 24. In that regard, Directive 64/221, Article 1(1) of which provides that the directive is to apply to *inter alia* any national of a Member State who travels to another Member State as a recipient of services, sets certain limits on the right of Member States to expel foreign

[591] Just before the submission of this book, the Court reasoned accordingly in Case C-304/14, *Secretary of State for the Home Department v CS* (ECLI:EU:C:2016:674).
[592] Case C-348/96 *Donatella Calfa* [1999] ECR I-00011.

> nationals on the grounds of public policy. Article 3 of that directive states that measures taken on grounds of public policy or of public security that have the effect of restricting the residence of a national of another Member State must be based exclusively on the personal conduct of the individual concerned. In addition, previous criminal convictions cannot in themselves constitute grounds for the taking of such measures. It follows that the existence of a previous criminal conviction can, therefore, only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy (*Bouchereau*, paragraph 28).
> 25. It follows that an expulsion order could be made against a Community national such as Ms Calfa only if, besides her having committed an offence under drugs laws, her personal conduct created a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[593]

Establishing that a person has committed an offence thus may not be put on a par with an evaluation of a person's individual conduct. Instead, a strict interpretation of the public policy condition demands that, apart from the aspects of a criminal offence being fulfilled, a stand-alone assessment is made of whether the person's personal conduct created a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[594]

In the Court's case law featuring criminal convictions it is easy to detect the principle that a restriction of rights granted by EU law may not take place on the basis of an automatic application of national criteria. One of the many examples thereof may be found in the joint cases of *Orfanopoulos and Oliveri*.[595] Both cases concerned expulsion decisions by the German authorities imposed on Union citizens with the nationality of another Member State for having committed criminal offences. In relation to the case of *Oliveri*, the question was whether national legislation could provide for a mandatory expulsion based on the fulfilment of fixed conditions – i.e. a final sentence to a term of youth custody of at least two years or to a custodial sentence for an intentional offence against the Law on narcotics, while this sentence has not been suspended. Arguably, the sentence that has been imposed on an individual for the commission of a certain offence may pose an indication of the nature of the personal conduct of the offender, or of the danger that that person represents for the requirements of public policy. Nevertheless, the German practice

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[593] ibid paras 21-25.

[594] The Court's argumentation in this respect has been reiterated in numerous cases. It falls outside the scope of this book to zoom in on this strict, means-end approach in Luxembourg criminal conviction cases. The point here is to note that the ECJ's approach is consistent with the principles of a strict means-end scrutiny of national measures and, as discussed below, the systematic rejection of automatically applied national standards.

[595] Joint cases C-482/01 and C-493/01 *Georgios Orfanopoulos and Others and Raffaele Oliveri v Land Baden-Württemberg* [2004] ECR I-05257.

was rejected because it was still considered an automatic application of restrictive criteria:

> 67. While it is true that a Member State may consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs, the public policy exception must, however, be interpreted restrictively, with the result that the existence of a previous criminal conviction can justify an expulsion only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy (see, in particular, Case C-348/96 *Calfa* [1999] ECR I-11, paragraphs 22 to 24).
> 68. The Court has therefore concluded that Community law precludes the deportation of a national of a Member State based on reasons of a general preventive nature, that is one which has been ordered for the purpose of deterring other aliens (see, in particular, *Bonsignore*, cited above, paragraph 7), in particular where such measure automatically follows a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy (see *Calfa*, paragraph 27, and *Nazli*, paragraph 59).
> 69. The question asked by the national court refers to national legislation which requires the expulsion of nationals of other Member States who have received certain sentences for specific offences.
> 70. It must be held that, in such circumstances, the expulsion automatically follows a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy.
> 71. In the light of the foregoing, the answer to the first question must be that, provided that it is confirmed that the applicant in the main proceedings comes within the scope of one of the provisions of Community law referred to in paragraph 54 of this judgment leading to the application of Directive 64/221, which it is for the national court to determine, those provisions and particularly Article 3 of that directive preclude national legislation which requires national authorities to expel nationals of other Member States who have been finally sentenced to a term of youth custody of at least two years or to a custodial sentence for an intentional offence against the Law on narcotics, where the sentence has not been suspended.[596]

From the above citation I conclude that the second feature of the Court's approach to restrictive conditions may indeed be discerned in criminal conviction cases.

The final feature of the Court's approach to restrictive conditions entails the requirement to undertake a balancing assessment if indeed the person concerned may be considered to pose a threat to an acknowledged public interest, whereby the individual interest is to be evaluated in the context of the various human rights provisions that may be applicable in the case at hand. One of the cases in which this third aspect was raised concerns the case of *Orfanopoulos*. The Court's observations

[596] ibid paras 67-71.

in this regard confirm that indeed this stipulation equally applies to criminal conviction cases:

> 95. So far as the question referred by the national court is concerned, it must be pointed out that the examination on a case-by-case basis by the national authorities of whether there is personal conduct constituting a present threat to the requirements of public policy and, if necessary, of where lies the fair balance between the legitimate interests in issue must be made in compliance with the general principles of Community law.
> 96. It is for the competent national authority to take into account, in its assessment of where lies the fair balance between the legitimate interests in issue, the particular legal position of persons subject to Community law and of the fundamental nature of the principle of the free movement of persons (see, to that effect, *Bouchereau*, cited above, paragraph 30).
> 97. Moreover, it is necessary to take into account the fundamental rights whose observance the Court ensures. Reasons of public interest may be invoked to justify a national measure which is likely to obstruct the exercise of the freedom of movement for workers only if the measure in question takes account of such rights (see, to that effect, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43; Case C-368/95 *Familiapress*[1997] ECR I-3689, paragraph 24; and Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 40).
> 98. It must be noted, in that context, that the importance of ensuring the protection of the family life of Community nationals in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty has been recognised under Community law. It is clear that the removal of a person from the country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8 of the ECHR, which is among the fundamental rights, which, according to the Court's settled case-law, are protected in Community law (see, *Carpenter*, cited above, paragraph 41).
> 99. Finally, the necessity of observing the principle of proportionality must be emphasised. To assess whether the interference envisaged is proportionate to the legitimate aim pursued, in this instance the protection of public policy, account must be taken, particularly, of the nature and seriousness of the offences committed by the person concerned, the length of his residence in the host Member State, the period which has elapsed since the commission of the offence, the family circumstances of the person concerned and the seriousness of the difficulties which the spouse and any of their children risk facing in the country of origin of the person concerned (see, as regards Article 8 of the ECHR, *Boultif* v *Switzerland* (54273/00) [2001] ECHR 493, paragraph 48).[597]

In sum, in cases featuring criminal convictions, the Court indeed follows the same pattern of reasoning as that which has been identified in its case law on income-related restrictions. In the following paragraphs it is examined whether this is also the case with procedural rules relating to entry and residence.

[597] ibid paras 95-99.

9.3.2 Procedural requirements

The types of restrictions that can be labelled as procedural requirements have in common that their function is to enable Member States to evaluate whether substantive criteria are satisfied, such as the sufficient resources condition or the existence of a certain family relationship with a Union citizen residing in the host Member State.[598] This section discusses cases featuring concrete procedural requirements, such as that to have a visa or to provide other documents, or the requirement to register with the authorities of the host Member State. I also pay attention to cases in which residence has been denied because of unlawful entry or residence in the host Member State, or because the person concerned committed identity fraud.

The Court's approach to procedural restrictions perhaps best shows the extent to which the public interest in controlling immigration may still play a role in EU-law. How will the Court, for example, strictly interpret a rather clear-cut requirement such as that to obtain an entry visa, or uphold its stipulation that restrictions to rights are to be applied on a case-by-case basis? And how does the Court examine the weight of the public interest in a case in which 'plain' irregular residence is put forward to deny residence? The cases discussed under this heading show that indeed the central objectives directed at promoting immigration, such as that to eliminate obstacles to free movement of persons, leave no room for prioritisation of the interest in controlling immigration. Restrictions of this kind are met with the same rigorous scrutiny as that which is applied to income restrictions and criminal convictions.

A well-known case featuring a strict interpretation of procedural immigration-rules is *Metock*.[599] In this case, the Irish authorities had denied residence to a third country national family member of a British Union citizen. The reason for denying residence was that the third country national, before entering Ireland, had resided in the United Kingdom without a right of residence. Therefore, he did not satisfy the requirement of 'prior lawful residence'. The Court – after having evaluated every possible provision from which such requirement could be inferred - concluded that no provision of Directive 2004/38 did provide for a requirement of prior lawful residence:

> 49. In the first place, it must be stated that, as regards family members of a Union citizen, no provision of Directive 2004/38 makes the application of the directive conditional on their having previously resided in a Member State.
> 50. As Article 3(1) of Directive 2004/38 states, the directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national, and

[598] See section 2.1.3.

[599] Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-06241.

> to their family members as defined in point 2 of Article 2 of the directive who accompany them or join them in that Member State. The definition of family members in point 2 of Article 2 of Directive 2004/38 does not distinguish according to whether or not they have already resided lawfully in another Member State.
> 51. It must also be pointed out that Articles 5, 6(2) and 7(2) of Directive 2004/38 confer the rights of entry, of residence for up to three months, and of residence for more than three months in the host Member State on nationals of non-member countries who are family members of a Union citizen whom they accompany or join in that Member State, without any reference to the place or conditions of residence they had before arriving in that Member State.
> 52. In particular, the first subparagraph of Article 5(2) of Directive 2004/38 provides that nationals of non-member countries who are family members of a Union citizen are required to have an entry visa, unless they are in possession of the valid residence card referred to in Article 10 of that directive. In that, as follows from Articles 9(1) and 10(1) of Directive 2004/38, the residence card is the document that evidences the right of residence for more than three months in a Member State of the family members of a Union citizen who are not nationals of a Member State, the fact that Article 5(2) provides for the entry into the host Member State of family members of a Union citizen who do not have a residence card shows that Directive 2004/38 is capable of applying also to family members who were not already lawfully resident in another Member State.
> 53. Similarly, Article 10(2) of Directive 2004/38, which lists exhaustively the documents which nationals of non-member countries who are family members of a Union citizen may have to present to the host Member State in order to have a residence card issued, does not provide for the possibility of the host Member State asking for documents to demonstrate any prior lawful residence in another Member State.
> 54. In those circumstances, Directive 2004/38 must be interpreted as applying to all nationals of non-member countries who are family members of a Union citizen within the meaning of point 2 of Article 2 of that directive and accompany or join the Union citizen in a Member State other than that of which he is a national, and as conferring on them rights of entry and residence in that Member State, without distinguishing according to whether or not the national of a non-member country has already resided lawfully in another Member State.[600]

In view of the fact that a condition of prior lawful residence in another Member State was not explicitly provided for, the Court did not accept that Member States would impose such condition anyway. To substantiate this strict interpretation of what on the basis of Directive 2004/38 could be required from third country family members – the Court recalled the purpose of granting residence rights to Union citizens' family members. This purpose was to ensure the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty.[601] The Court's approach in *Metock* is quite

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[600] ibid paras 49-54.

[601] ibid paras 56, 59. With referral to the same purpose, the Court explained why its earlier conclusion made in this regard in *Akrich* should be reconsidered. In that case, the Court had held that in order to benefit from the rights provided for in Article 10 of Regulation

similar to that described in relation to income conditions: first it is established whether the national restrictive condition is in fact provided for by the Directive, whereby the strict interpretation is guided by the objective of the provisions at issue.

Also the second characteristic of the Court's approach to national restrictions, *i.e.* the prohibition to automatically apply such restrictions, is present in relation to cases featuring procedural immigration rules. In *MRAX*,[602] one of the questions was whether the unlawful entry in the host Member State by a third country national family member of a Union citizen, could give reason to refuse a residence permit and to issue an expulsion order against that third country national. In this case, it was given that the third country national had been able to provide proof of his identity and of his family relations with the Union citizen. In earlier case law,[603] the Court had already established – again through a strict interpretation of the then applicable Directive provisions - that the issuance of a residence permit, or the production of the documents required to be issued such a permit, is *not constitutive* for a Union citizen's right of residence, but merely serves as evidence thereof.[604] A failure to comply with such procedural requirements thus could not result in the conclusion that the person concerned did not satisfy the residence conditions. Instead of determining the scope of the right of residence, the function of such requirements was said to *regulate the exercise* thereof:

> 35. The above-mentioned provisions of the directive are intended to determine the practical details regulating the exercise of rights conferred directly by the Treaty.[605]

Consequently, a failure to comply with such administrative restrictions may only be sanctioned in accordance with provisions that allow for general derogations on the grounds of public policy, public security or public health from the right to free movement of persons in respect of whom it is established that they satisfy the residence conditions.

The circumstance of unlawful entry that was at issue in *MRAX* was therefore not considered as an aspect that possibly detracted from whether the person concerned

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No 1612/68, the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated (Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-09607, paras 50-51).

[602] Case C-459/99, Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State [2002] I-06591.

[603] Case C-48/75 *Jean Noël Royer* [1976] Reports of Cases 00497.

[604] The term residence permit is obviously confusing in this regard. The current Directive 2004/38 speaks of 'residence card'.

[605] *Royer* (n 603), para 35.

fulfilled the residence conditions, but as an aspect that potentially posed a general ground for derogation from an established right to free movement. This explains why the Court without further ado discussed the matter in the context of the general public policy exception. The Court observed in this regard that even though the applicable legislation allowed Member States to subject the issuance of a residence permit to the condition to acquire a visa, the mere failure to comply with that condition could not in itself justify measures denying residence to the person concerned:

> 76. Under Article 4(3) of Directive 68/360 and Article 6 of Directive 73/148, a Member State may make issue of a residence permit conditional upon production of the document with which the person concerned entered its territory (see *Roux*, cited above, paragraphs 14 and 15).
> 77. Furthermore, Community law does not prevent the Member States from prescribing, for breaches of national provisions concerning the control of aliens, any appropriate sanctions necessary in order to ensure the efficacity of those provisions (*Royer*, cited above, paragraph 42), provided that those sanctions are proportionate (see, in particular, Case 157/79 *Pieck* [1980] ECR 2171, paragraph 19).
> 78. On the other hand, refusal of a residence permit, and *a fortiori* an expulsion order, based solely on the failure of the person concerned to comply with legal formalities concerning the control of aliens would impair the very substance of the right of residence directly conferred by Community law and would be manifestly disproportionate to the gravity of the infringement (see, by analogy, in particular *Royer*, paragraph 40).
> 79. It is true that Article 10 of Directive 68/360 and Article 8 of Directive 73/148 do not prevent the Member States from derogating from those directives on grounds of public policy, public security or public health, while Article 3(1) of Directive 64/221 lays down that measures taken on grounds of public policy or of public security are to be based exclusively on the personal conduct of the individual concerned. However, failure to comply with the legal formalities concerning the entry, movement and residence of aliens cannot in itself give rise to application of the measures referred to in Article 3 of Directive 64/221 (*Royer*, paragraphs 47 and 48).
> 80. The answer to the second question referred for a preliminary ruling must therefore be that, on a proper construction of Article 4 of Directive 68/360 and Article 6 of Directive 73/148, a Member State is not permitted to refuse issue of a residence permit and to issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a Member State on the sole ground that he has entered the territory of the Member State concerned unlawfully.[606]

In order to accept a general ground of public policy to justify expulsion in a concrete case, the Court requires an evaluation of the personal conduct of the individual concerned. In view of this obligation to evaluate the circumstances of the case at hand, the Court does not accept that residence is denied to a person who failed to provide a document that has the purpose to establish his identity and his relations to

[606] *MRAX* (n 602), paras 76-80.

the Union citizen he intends to join, where that person's identity and his relations to the Union citizen concerned were established otherwise.

A similar manner of reasoning is discerned in *Jipa*.[607] This case concerned the issue of whether 'illegal residence' as such could be placed under the heading of 'grounds of public policy' so as to provide a basis for restricting the right to free movement of Union citizens in the light of Article 27 of Directive 2004/38. The Court reiterated that restricting a Union citizen's right of free movement on grounds of public policy requires a case-by-case approach which should include an assessment of that person's personal conduct:

> 23. In that respect, the Court has always pointed out that, while Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, the fact still remains that, in the Community context and particularly as justification for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions (see, to that effect, Case 36/75 *Rutili* [1975] ECR 1219, paragraphs 26 and 27; Case 30/77 *Bouchereau* [1977] ECR 1999, paragraphs 33 and 34; Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 17; and Case C-36/02 *Omega* [2004] ECR I-9609, paragraphs 30 and 31). The Court's case-law has accordingly made it clear that the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat to one of the fundamental interests of society (see, for example, *Rutili*, paragraph 28; *Bouchereau*, paragraph 35; and Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 66).
>
> 24. Such restrictions on the derogations from the abovementioned fundamental principle that are capable of being invoked by a Member State imply in particular, as is apparent from Article 27(2) of Directive 2004/38, that, in order to be justified, measures taken on grounds of public policy or public security must be based exclusively on the personal conduct of the individual concerned, and justifications that are isolated from the particulars of the case in question or that rely on considerations of general prevention cannot be accepted.[608]

After having set out the assessment scheme to be followed in applying the public order restriction, the Court continued by applying that scheme to the case at hand:

> 26. […] in a situation such as that in the main proceedings, the fact that a citizen of the Union has been subject to a measure repatriating him from the territory of another Member State, where he was residing illegally, may be taken into account by his Member

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[607] Case C-33/07, *Ministerul Administraţiei şi Internelor - Direcţia Generală de Paşapoarte Bucureşti v Gheorghe Jipa* [2008] ECR I-05157.

[608] ibid paras 23-24.

> State of origin for the purpose of restricting that citizen's right of free movement only to the extent that his personal conduct constitutes a genuine, present and sufficiently serious threat to one of the fundamental interests of society.
> 27. The situation that has given rise to the main proceedings does not however seem to meet the requirements set out in paragraphs 22 to 26 of the present judgment. In particular, it appears from the file sent to the Court by the referring court and from the written observations of the Romanian Government that *the request of the Minister to restrict Mr Jipa's right of free movement is based solely on the measure repatriating him from the territory of the Kingdom of Belgium to which he was subject on account of his 'illegal residence' in that Member State; there was no specific assessment of his personal conduct and no reference to any threat that he might constitute to public policy or public security.* Furthermore, the Romanian Government states in its written observations that the decision of the Belgian authorities ordering the repatriation of Mr Jipa was also not founded on reasons of public policy or public security.
> 28. It is nevertheless for the national court to make the necessary findings in this respect, on the basis of the matters of fact and of law justifying, in the main proceedings, the request of the Minister for a restriction on Mr Jipa's right to leave Romania.
> 29. When making such an assessment, the national court will have also to determine whether that restriction on the right to leave is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it. According to Article 27(2) of Directive 2004/38 and the Court's settled case-law, a measure which restricts the right of freedom of movement may be justified only if it respects the principle of proportionality (see, for example, to that effect Joined Cases C-259/91, C-331/91 and C-332/91 *Alluè and Others* [1993] ECR I-4309, paragraph 15; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 91; and Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 43).[609]

The case of *Jipa* shows that 'illegal' residence cannot in itself constitute a public policy ground on the basis of which the right to free movement may be restricted, because as such it does not encompass any substantiation of the conclusion that a person poses a threat to public policy. Justifications that are isolated from the particulars of the case in question or that rely on considerations of general prevention are not accepted. In *Carpenter* too, the mere violation of immigration rules was insufficient to accept a threat to public policy:

> 44. Although, in the main proceedings, Mr Carpenter's spouse has infringed the immigration laws of the United Kingdom by not leaving the country prior to the expiry of her leave to remain as a visitor, her conduct, since her arrival in the United Kingdom in September 1994, has not been the subject of any other complaint that could give cause to fear that she might in the future constitute a danger to public order or public safety.[610]

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[609] ibid paras 26-29 (emphasis added).

[610] Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-06279, para 44.

In a similar manner, in *McCarthy*[611] the Court rejected the British practice on the basis of which third country national family members of Union citizens, who were in the possession of a residence card issued under Article 10 of Directive 2004/38, were required to obtain an additional entry document. The Court did not accept the argument put forward that 'Union' residence cards were susceptible to forgery and that therefore additional documentation was needed. Measures of a general preventive character were as such considered to be in conflict with the required case-by-case approach:

> 55. In the absence of an express provision in Directive 2004/38, the fact that a Member State is faced, as the United Kingdom considers itself to be, with a high number of cases of abuse of rights or fraud committed by third-country nationals resorting to sham marriages or using falsified residence cards cannot justify the adoption of a measure, such as that at issue in the main proceedings, founded on considerations of general prevention, to the exclusion of any specific assessment of the conduct of the person concerned himself.
> 56. Indeed, the adoption of measures pursuing an objective of general prevention in respect of widespread cases of abuse of rights or fraud would mean, as in the case in point, that the mere fact of belonging to a particular group of persons would allow the Member States to refuse to recognise a right expressly conferred by Directive 2004/38 on family members of a Union citizen who are not nationals of a Member State, although they in fact fulfil the conditions laid down by that directive. The same would be true if recognition of that right were limited to persons who are in possession of residence cards issued by certain Member States, as the United Kingdom has envisaged.
> 57. Such measures, being automatic in nature, would allow Member States to leave the provisions of Directive 2004/38 unapplied and would disregard the very substance of the primary and individual right of Union citizens to move and reside freely within the territory of the Member States and of the derived rights enjoyed by those citizens' family members who are not nationals of a Member State.
> 58. In the light of the foregoing considerations, Article 35 of Directive 2004/38 must be interpreted *as not permitting a Member State to require, in pursuit of an objective of general prevention,* family members of a Union citizen who are not nationals of a Member State and who hold a valid residence card, issued under Article 10 of that directive by the authorities of another Member State, to be in possession, pursuant to national law, of an entry permit, such as the EEA family permit, in order to be able to enter its territory.[612]

The foregoing does not mean that expulsion for a failure to comply with procedural requirements is impossible altogether. Indeed, the stipulation that a Union citizen must be able to identify himself is the one procedural requirement that is in fact a

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[611] Case C-202/13, *The Queen, on the application of Sean Ambrose McCarthy and Others v Secretary of State for the Home Department* (ECLI:EU:C:2014:2450).

[612] ibid paras 55-58 (emphasis added).

precondition for making use of the right to free movement.[613] If it appears that a person is actually incapable of providing his identity altogether, this person does not satisfy the very substance of the condition of identification, a residence condition explicitly provided for in the Directive 2004/38 and may therefore be expelled.[614] However, the mere fact that a person does not have a passport cannot suffice to justify expulsion. In *Oulane*,[615] the Court held in this regard the following:

> 53. It should be borne in mind, first, that evidence of identity and nationality may be provided by other means (see paragraph 25 of this judgment) and, second, that where it is not specified which means of evidence are admissible for the person concerned to establish that he comes within one of the categories referred to in Articles 1 and 4 of Directive 73/148, it must be concluded that evidence may be adduced by any appropriate means (see, to that effect, Case C-363/89 *Roux* [1991] ECR I-273, paragraphs 15 and 16).
> 54. Without prejudice to the questions pertaining to public policy, public security and public health, it is for the nationals of a Member State residing in another Member State in their capacity as recipients of services, to provide the evidence establishing that they are lawfully resident in that other Member State.
> 55. If a national of a Member State is not able to prove that the conditions for a right of residence as a recipient of services within the meaning of Directive 73/148 are fulfilled, the host Member State may undertake deportation subject to the limits imposed by Community law.[616]

The foregoing examples of procedural rules in the case law of the ECJ confirm the proposition that here too, the Court upholds the prohibition to apply fixed assessment

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[613] Articles 5 and 6 of Directive 2004/38. Arguably, the condition to prove one's identity is to be distinguished from other procedural requirements: enforcing this condition does not so much enable Member States to establish whether a person satisfies the substantive conditions for residence, but rather it allows Member States to establish whether the person making use of the right of residence is indeed the same person of whom it is established that he satisfies the substantive residence conditions.

[614] Given the nature of this condition, a decision to deny residence because of a failure to produce evidence of identity and nationality does not require an ultimate evaluation of the comparative weight of competing interests. Indeed, different from for example a requirement to provide proof of one's income, the requirement to produce evidence of identity and nationality does not aim at allowing Member States to deny residence to persons whose presence is detrimental to the former's public interests. Instead, it aims at 'simplifying the resolution of problems relating to evidence of the right of residence not only for citizens but also for national authorities and, second, at establishing the maximum that Member States may require of the persons concerned with a view to recognising their right of residence' (Case C-211/03 *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie* [2005] ECR I-1245, para 22).

[615] ibid.

[616] ibid paras 53-55.

criteria in deciding on the scope of free movement rights. At the time of writing, the Court has not yet dealt with this type of restrictions in relation to Directive 2003/86.

As regards the third feature, *i.e.* the obligation to balance the competing interests after it is established that there is a public interest that objects against a person's presence in the host Member State, the Court in the case of *Metock* confirmed that when it comes to controlling immigration, Member States are generally bound to Chapter VI of the Directive 2004/38:

> 74. Second, Directive 2004/38 does not deprive the Member States of all possibility of controlling the entry into their territory of family members of Union citizens. Under Chapter VI of that directive, Member States may, where this is justified, refuse entry and residence on grounds of public policy, public security or public health. Such a refusal will be based on an individual examination of the particular case.
> 75. Moreover, in accordance with Article 35 of Directive 2004/38, Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by that directive in the case of abuse of rights or fraud, such as marriages of convenience, it being understood that any such measure must be proportionate and subject to the procedural safeguards provided for in the directive.[617]

This means that Member States must evaluate the weight of the public policy grounds and that, if indeed it may appear that there are grounds to expel a person, the host Member State 'shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.'[618] Nevertheless, we have seen that the Court has shown consistent in rejecting 'the mere' failure to comply with procedural criteria as being autonomously capable of posing a sufficient ground of public policy. The generic interest in controlling immigration has in fact been dismissed as an interest in view of which denying residence may be justified. Consequently, when it comes to procedural immigration restrictions, an actual evaluation of the weight of competing interests will not easily come into question. Based on the foregoing I conclude that the Court' approach to procedural restrictions corresponds to its approach in relation to the types of restrictions that have been discussed so far.

9.3.3 Personal ties

In the Chapters featuring the right of entry and residence of family members, we have come across various situations in which a certain extent of dependency between

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[617] *Metock* (n 599), paras 74-75.

[618] Article 28(1) of Directive 2004/38. A comparable obligation is laid down in Article 17 of Directive 2003/86.

family members proved constitutive for falling within the scope of persons that may enjoy a right of residence as a family member. As regards national measures entailing a restriction of the scope of persons who may qualify as dependant relatives, here too, the Court's approach to such restrictions follows the pattern of reasoning described in relation income requirements. Interestingly, the Court's strategy seems to be to consistently frame the interpretation of personal scope criteria that are entailed *in EU law* in terms of *national restrictive measures*. As a result, the question is not under which circumstances an individual may said to have sufficiently strong family ties, but whether it was necessary to impose the national restrictive criterion relating to the personal scope of entry and residence rights and whether this did not conflict with the purpose of promoting free movement or family reunification.

In *Reyes*,[619] a Philippines citizen at the age of 24 had applied as a family member of her mother, who had moved to Sweden about one-and-a-half years earlier, and her Norwegian cohabiting partner. Her application had been rejected, since Ms Reyes had not proved that the money which was indisputably transferred to her by her mother and her partner had been used to supply her basic needs in the form of board and lodging and access to healthcare in the Philippines. Furthermore, it was in question whether, in order to be regarded as dependent, proof could be required of the fact that Ms Reyes had tried without success to find employment or to obtain subsistence support from the authorities of the country of origin and/or otherwise tried to support himself.

The Court's response clearly shows the principle of a strict interpretation of what may be required from individuals to establish that the residence conditions at issue are satisfied. Firstly, the Court recalls what is to be understood by the concept of 'dependency':

> 20. [I]n order for a direct descendant, who is 21 years old or older, of a Union citizen to be regarded as being a 'dependant' of that citizen within the meaning of Article 2(2)(c) of Directive 2004/38, the existence of a situation of real dependence must be established (see, to that effect, *Jia*, paragraph 42).
> 21. That dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse (see, to that effect, *Jia*, paragraph 35).
> 22. In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, the direct descendant, who is 21 years old or older, of a Union citizen, is not in a position to support himself. The need for material support must exist in the State of origin of that descendant or the

[619] Case C-404/12 *Flora May Reyes v Migrationsverket* (ECLI:EU:C:2014:16).

> State whence he came at the time when he applies to join that citizen (see, to that effect, *Jia*, paragraph 37).[620]

The following shows that the criterion, entailing that the financial and social conditions of a person should be such as that the latter can be said not to be in a position to support himself, is to be interpreted strictly:

> 23. However, there is no need to determine the reasons for that dependence or therefore for the recourse to that support. That interpretation is dictated in particular by the principle according to which the provisions, such as Directive 2004/38, establishing the free movement of Union citizens, which constitute one of the foundations of the European Union, must be construed broadly (see, to that effect, *Jia*, paragraph 36 and the case-law cited).
> 24. The fact that, in circumstances such as those in question in the main proceedings, a Union citizen regularly, for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen.
> 25. In those circumstances, that descendant cannot be required, in addition, to establish that he has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself.[621]

Besides pointing out the need of a broad interpretation of provisions establishing the free movement of Union citizens to underpin its corollary, i.e. the need for a narrow interpretation of restrictions; the Court provided a second, rather practical reason for the need of a strict interpretation of the dependency criterion:

> 26. The requirement for such additional evidence, which is not easy to provide in practice, as the Advocate General noted in point 60 of his Opinion, is likely to make it excessively difficult for that descendant to obtain the right of residence in the host Member State, while the facts described in paragraph 24 of this judgment already show that a real dependence exists. Accordingly, that requirement is likely to deprive Articles 2(2)(c) and 7 of Directive 2004/38 of their proper effect.
> 27. Furthermore, it is not excluded that that requirement obliges that descendant to take more complicated steps, such as trying to obtain various certificates stating that he has not found any work or obtained any social allowance, than that of obtaining a document of the competent authority of the State of origin or the State from which the applicant came attesting to the existence of a situation of dependence. The Court has already held that such a document cannot constitute a condition for the issue of a residence permit (*Jia*, paragraph 42).

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[620] ibid paras 20-22.

[621] ibid paras 23-25. A similar strict interpretation may be found in *Metock*, where the Court considered that Member States could not exclude from the scope of family members, persons who had not previously resided lawfully in another Member State or family members with whom the family relation had been established after the Union citizen had moved to the host Member State.

> 28. Accordingly, the answer to the first question is therefore that Article 2(2)(c) of Directive 2004/38 must be interpreted as meaning that a Member State cannot require a direct descendant who is 21 years old or older, in circumstances such as those in the main proceedings, in order to be regarded as dependent and thus come within the definition of a family member under Article 2(2)(c) of that provision, to have tried unsuccessfully to obtain employment or to obtain subsistence support from the authorities of his country of origin and/or otherwise to support himself.[622]

Thus, a broad interpretation of the provisions laying down the right to free movement not only from a substantive point of view, but also in a practical sense requires a strict interpretation of restrictive conditions, so that the effectiveness of that right remains guaranteed.

The Court's consistence in applying the second feature of the Court's approach, *i.e.* the categorical rejection of automatically applied criteria, may be illustrated on the basis of the case of *Jia*.[623] In this case, the question concerned the extent to which Member States could require that specific types of documents be submitted in order to prove a person's situation of dependency. The Court, with reference to its case law on procedural restrictions, explained that the essence of the dependency criterion constituted a person's factual ('real') dependency. Purely formal restrictions, relating to the means to prove such dependency could not be accepted as a stand-alone justification to deny such status:

> 40. When exercising their powers in this area Member States must ensure both the basic freedoms guaranteed by the EC Treaty and the effectiveness of directives containing measures to abolish obstacles to the free movement of persons between those States, so that the exercise by citizens of the European Union and members of their family of the right to reside in the territory of any Member State may be facilitated (see, by analogy, Case C-424/98 *Commission* v *Italy* [2000] ECR I-4001, paragraph 35).
> 41. With regard to Article 6 of Directive 73/148, the Court has held that, given the lack of precision as to the means of acceptable proof by which the person concerned can establish that he or she comes within one of the classes of persons referred to in Articles 1 and 4 of that directive, it must be concluded that evidence may be adduced by any appropriate means (see, inter alia, Case C-363/89 *Roux* [1991] ECR I-1273, paragraph 16, and Case C-215/03 *Oulane* [2005] ECR I-1215, paragraph 53).
> 42. Consequently, a document of the competent authority of the State of origin or the State from which the applicant came attesting to the existence of a situation of dependence, albeit appearing particularly appropriate for that purpose, cannot constitute a condition for the issue of a residence permit, while a mere undertaking from a Community national or his spouse to support the family member concerned need not be regarded as establishing the existence of that family member's situation of real dependence.

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[622] ibid paras 26-28.

[623] Case C-1/05 *Yunying Jia v Migrationsverket* [2007] ECR I-00001.

> 43. In those circumstances, the answer to Question 2(a) and (b) must be that Article 1(1)(d) of Directive 73/148 is to be interpreted to the effect that 'dependent on them' means that members of the family of a Community national established in another Member State within the meaning of Article 43 EC need the material support of that Community national or his or her spouse in order to meet their essential needs in the State of origin of those family members or the State from which they have come at the time when they apply to join the Community national. Article 6(b) of that directive must be interpreted as meaning that proof of the need for material support may be adduced by any appropriate means, while a mere undertaking from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence.[624]

Again, when it comes to applying conditions that have the effect of restricting the scope of a right of residence, the Court demands a 'reality-check'. It does not accept an automatic application of restrictive norms under the presumption that these norms generally correspond with the purpose to be served with that restriction – not even if the restriction appears 'particularly appropriate for that purpose'.

The dependency-criterion poses a constitutive criterion for the right of residence of family members. If the dependency criterion is not satisfied, the fact that there is no public interest weighing against his residence cannot weigh in favour of acknowledging a right of residence. Furthermore, individual interest-related aspects that do not connect to the substance of the dependency criterion may not add up to, nor detract from the conclusion of whether the dependency criterion is satisfied. If it is established that a person does not satisfy the dependency criterion, the conclusion is simply that the applicable instrument of EU-law does not cover the person concerned. In relation to this type of criteria, the feature of balancing the competing interests is therefore lacking. Finally, if the dependency criterion is satisfied, public interest reasons may result in the loss of a person's right of residence, but that decision does fall within the scope of protection of EU law and in that case, balancing is of course required.

9.3.4 Integration requirements

The ability to impose integration measures in the context of entry and residence of persons is a type of restriction that does not occur in relation to the right of free movement of Union citizens and their family members. Integration requirements are provided for in Directive 2003/86. Compared to the fundamental status that has been conferred upon the right to free movement of Union citizens, the right to family reunification of lawfully residing third country nationals is obviously less elaborate and subjected to more restrictions. Nevertheless, the analysis in Chapter 8 has revealed that the principles followed by the Court to adjudicate Member States'

[624] ibid paras 40-43.

interpretation of the sufficient resources condition provided for in Directive 2003/86 are the same as those apply in relation to the sufficient resources condition provided for in Directive 2004/38. The paragraphs below confirm the consistency of the Court's approach in relation to integration requirements.

9.3.4.1 Legal framework in relation to integration requirements

Article 4(1) of Directive 2003/86 states that the authorisation of entry and residence of family members is subjected to compliance with certain conditions:

> *Article 4 - Directive 2003/86*
> 1. The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members: […]

Chapter IV of Directive 2003/86, which is entitled 'Requirements for the exercise of the right to family reunification', in Article 7(2) provides for integration measures:

> *Article 7 - Directive 2003/86*
> 2. Member States may require third country nationals to comply with integration measures, in accordance with national law. With regard to the refugees and/or family members of refugees referred to in Article 12 the integration measures referred to in the first subparagraph may only be applied once the persons concerned have been granted family reunification.

While Article 4(1) of Directive 2003/86 provides that Member States shall authorise the entry and residence of family members where the conditions referred to in Chapter IV are complied with, Article 16 states that family reunification may be denied if the conditions laid down by the Directive are not or are no longer satisfied:

> *Article 16(1) - Directive 2003/86*
> 1. Member States may reject an application for entry and residence for the purpose of family reunification, or, if appropriate, withdraw or refuse to renew a family member's residence permit, in the following circumstances: (a) where the conditions laid down by this Directive are not or are no longer satisfied.

9.3.4.2 Uncertainty about the conditioning capacity of integration requirements

Article 7(2) seen in the light of Article 4(1) and 16(1) has led some academics to defend the view that the right to family reunification as such can be made conditional on complying with integration measures, therewith identifying integration measures as one of the conditions referred to in Article 4(1) and 16(1).[625] However, the phrase

[625] De Vries has not accepted a distinction between the scope of the terms 'requirement' and 'condition'. She argues that both the income requirement in Article 7(1)(c) and the

in Article 4(1) that *entry and residence of family members is subjected to compliance with the conditions laid down in Chapter IV* does not rule out another interpretation.[626]

Given the title of Chapter IV - 'Requirements *for the exercise of* the right to family reunification' - not every 'requirement' provided for in that Chapter necessarily relates to the *establishment* of a right of family reunification. Rather, it may very well be that a distinction is to be drawn between on the one hand requirements that need to be fulfilled in order to *establish* a right of entry and residence – which therewith would qualify as conditions in the sense of Article 4(1) -, and on the other hand requirements that 'merely' cover the *exercise* of an established right of residence. Indeed, there are various examples of requirements in EU law that may be imposed on individuals in the context of the exercise of a residence right, but that cannot be sanctioned with a denial of the right at stake.[627] Thus, it may be that Article 4(1) and Article 16(1) must be interpreted as only referring to those requirements that at the same time qualify as conditions for the establishment of a right of residence.

A distinction between requirements that are constitutive for the right to family reunification and those that are not, would explain why only the requirements enlisted in the first paragraph of Article 7 – *i.e.* those relating to housing, sickness insurance, and sufficient resources – include the provision of documentary evidence and why this is not the case with the integration requirements provided for in the

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integration requirements in Article 4(1) final subparagraph and Article 7(2) of Directive 2003/86 qualify as conditions 'that must be met if family reunification is to be granted.' Karin de Vries, *Integration at the Border: The Dutch Act on Integration Abroad and International Immigration Law* (Hart Publishing 2013) 157.

[626] E.g. Kees Groenendijk, 'Legal Concepts of Integration in EU Migration Law' (2004) 6 European Journal of Migration and Law, 111. While I agree with Groenendijk insofar he sees a distinction between the scope of Article 4(1) final subparagraph and that of Article 7(2) of Directive 2003/86, I do not think that this distinction in essence hinges on the use of the term integration 'measure' in the latter provision.

[627] See the case of *Royer* (n 604), discussed above, in which the Court in relation to a registration requirement imposed on workers distinguished between requirements that were considered constitutive for the right to free movement, and requirements merely regulating the details of the exercise of that right. See furthermore *Commission/Netherlands* that dealt with the requirement to pay administrative charges for the issuance of a residence permit connected to the status as a long-term resident third country national. The Court explicitly distinguished the requirement connected to the *issuance of the residence permit* from the conditions to be complied with in order to obtain the status of long-term-resident as such (Case C-508/10 *European Commission v Kingdom of the Netherlands* (ECLI:EU:C:2012:243), paras 68-69).

second paragraph. Indeed, it seems logical that only with regard to requirements that are in fact constitutive for the right of residence it is crucial that evidence of the fulfilment thereof is provided upon an application for family reunification. Similarly, the aforementioned distinction between constitutive and non-constitutive requirements would explain why the derogation provided for in Article 4(1), final paragraph, entailing a limited possibility to impose a 'condition for integration', is addressed in terms of a derogation, and why, furthermore, that provision, differently from Article 7(2), *does* allow Member States to 'verify' whether that condition is fulfilled before authorising entry and residence:

> By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.

It appears that different from the integration requirement provided for in Article 7(2), compliance with the condition for integration included in Article 4(1) final paragraph should be regarded as constitutive for the right to family reunification.

9.3.4.3 K and A[628]

The case of *K and A* dealt with precisely this issue as regards the conditioning capacity of the integration requirement of Article 7(2) of the Family reunification Directive. The specific question addressed in this regard was phrased as follows:

> 44. By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether the first subparagraph of Article 7(2) of Directive 2003/86 must be interpreted as meaning that Members States may require third country nationals to pass a civic integration examination, such as the one at issue in the main proceedings, which consists in an assessment of basic knowledge both of the language of the Member State concerned and of its society and which entails the payment of various costs, before authorising that national's entry into and residence in the territory of the Member State for the purposes of family reunification.[629]

To properly understand the approach to this question, it is important to firstly establish whether the Court perceives the requirement to pass an integration exam as a requirement that is constitutive for the right to family reunification. In other words, it must be established whether the Court takes the view that the establishment of a right to family reunification can be made dependent on passing the exam, and therefore qualifies as a 'condition'; or, whether it considers the integration

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[628] Case C-153/14 *Minister van Buitenlandse Zaken v K and A* (ECLI:EU:C:2015:453).
[629] ibid para 44.

requirement to govern the *exercise* an already established right to family reunification. If indeed passing the integration exam is considered a condition for family reunification, a failure to satisfy that condition may have the result that the persons concerned cannot claim a right to family reunification. Furthermore, in that case any decision to deny the right to family reunification would – in accordance with Article 17 of the Family reunification Directive and the Charter – have to involve an evaluation of the individual interests at stake: the interests of the persons concerned in being granted the right to family reunification.[630]

If, however, the compliance with the requirement to pass an integration exam is not constitutive for the right to family reunification, and hence does not qualify as a 'condition', this would imply that the existence of the right to family reunification could not be made dependent on passing the exam. Any sanction following non-compliance with that requirement – hence, other than to deny the right to family reunification altogether, because that would be categorically ruled out – should be the result of a balancing assessment.[631] In that case, the aims to be pursued by enforcing the requirement would have to be set out against the individual interests at stake. Importantly, the scope of the competing interests would be different compared to when the failure to pass an integration exam would result in denying the right to family reunification altogether: the individual interest-related aspects of relevance would be confined to the interest in being exempted from the requirement to pass the exam. Indeed, if the requirement to pass the integration exam cannot affect the existence of a right to family reunification, there is no reason to take into account the full-range individual interest in being granted that particular right. That interest would simply not be at stake.

From the Court's reasoning in *K and A,* the conclusion may be drawn that the requirement to pass the integration exam is not regarded as a condition in the sense of Article 4(1) of the Family reunification Directive. The first indication for this is the manner in which the Court on the outset confines the scope of the integration measures provided for in Article 7(2):

> 45. Under Article 4(1) of Directive 2003/86, the Member States are to authorise the entry and residence of the sponsor's spouse for the purposes of family reunification, provided that the conditions laid down in Chapter IV of that directive, entitled 'Requirements for the exercise of the right to family reunification', are complied with.
> 46. The Court has already held that that provision imposes specific positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by that directive, to authorise family reunification

[630] See for the assessment prescribed in this regard of the individual interest, *O, S and L* (n 538), discussed in section 8.3.3.

[631] Compare *Royer* (n 604) and *Commission/Netherlands* (n 627).

> of certain members of the sponsor's family, without being left a margin of appreciation (judgment in *Chakroun*, C-578/08, EU:C:2010:117, paragraph 41).
> 47. Amongst the requirements referred to in Chapter IV of Directive 2003/86, the first subparagraph of Article 7(2)(1) of that directive provides that a Member State may require third country nationals to comply with integration measures, in accordance with national law.
> 48. Furthermore, the second subparagraph of Article 7(2) of Directive 2003/86 provides that with regard to refugees and/or family members of refugees the integration measures referred to in the first subparagraph of Article 7(2) of that directive may be applied only once the persons concerned have been granted family reunification.
> 49. Consequently, in the context of family reunification other than that of refugees and their family members, the first subparagraph of Article 7(2) of Directive 2003/86 does not preclude Member States from subjecting the granting of authorisation of entry into the territory for the sponsor's family members to the observance by those family members of certain integration measures prior to entry.[632]

When it comes to integration measures on the basis of Article 7(2), it is not the right to family reunification that is at stake here, or the right to entry and residence as such, but only *the grant of authorisation of entry into the territory*.[633] Further on, the Court confirms that integration measures taken on the basis of Article 7(2) may not be used to determine whether or not the individuals concerned may exercise their right to family reunification:

> 57. The integration measures referred to in the first subparagraph of Article 7(2) of Directive 2003/86 must be aimed *not at filtering those persons who will be able to exercise their right to family reunification*, but at facilitating the integration of such persons within the Member States.[634]

Persons who 'will be able to exercise their right to family reunification' may therefore not be 'turned into' persons who will not be able to exercise their right to family reunification because of a failure to comply with integration measures.

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[632] *K and A* (n 628), paras 45-49.

[633] Compare the text of para 49 of *K and A* with its counterpart in *Chakroun*, where the sufficient resources condition is explicitly addressed as part of the conditions referred to in Article 4(1): '[The obligation of Article 4(1) to authorise family reunification, with corresponding clearly defined individual rights EH] is subject to compliance with the conditions referred to, in particular, in Chapter IV of the Directive. Article 7(1)(c) of the Directive forms part of those conditions and allows Member States to require evidence that the sponsor has stable and regular resources which are sufficient to maintain himself and the members of his family without recourse to the social assistance system of the Member State concerned.' *Chakroun* (n 565), para 41, 42).

[634] *K and A* (n 628), para 57.

That indeed compliance with integration requirements does not *establish* a right to family reunification but rather *governs the exercise* of an already established – though not yet exercised - right, is furthermore reinforced by the fact that the Court in *K and A* consistently speaks of integration measures as bearing on the *exercise* of the right to family reunification, for example in paragraph 59:

> such a requirement could form a difficult obstacle to overcome in making the right to family reunification recognised by Directive 2003/86 *exercisable*.[635]

Finally, as emerges below, in addressing the balancing assessment to be carried out the Court has no regard to any aspects that relate to the consequences of denying family reunification altogether, but instead its scope is confined to aspects that regard the ability of the family member concerned to pass the integration exam. This reinforces that the right to family reunification as such is not at stake.

On the basis of the foregoing, it appears that the integration requirements as provided for by Article 7(2) do not have the status of conditions as referred to in Article 4(1) or in Article 16(1) of Directive 2003/86. Instead, they concern requirements that may be imposed within the context of the exercise of that right.

9.3.4.4 A strict, means-end, case-by-case scrutiny

The Court's approach to integration requirements follows the general pattern that emerged in all the foregoing categories of restrictions. The observation that Article 7(2) of Directive 2003/86 does not preclude Member States from subjecting the granting of authorisation of entry into the territory for the sponsor's family members to the observance by those family members of certain integration measures prior to entry, is immediately followed by stressing the need of a strict interpretation of that possibility. Additionally, the Court points out the relevance of the proportionality principle in this regard:

> 50. However, since authorisation of family reunification is the general rule, the first subparagraph of Article 7(2) of Directive 2003/86 must be interpreted strictly. Furthermore, the leeway given to the Member States must not be used by them in a manner which would undermine the objective and effectiveness of that directive, which is to promote family reunification (see, to that effect, judgment in *Chakroun*, C-578/08, EU:C:2010:117, paragraph 43).
> 51. In that regard, in accordance with the principle of proportionality, which is one of the general principles of EU law, the measures implemented by the national legislation transposing the first subparagraph of Article 7(2) of Directive 2003/86 must be suitable for achieving the objectives of that legislation and must not go beyond what is necessary

[635] ibid para 59. The Court repeatedly speaks in *K and A* of the *exercise* of the right to family reunification that is at stake, and not the *existence* of that right.

> to attain them (see, by analogy, judgment in *Commission* v *Netherlands*, C-508/10, EU:C:2012:243, paragraph 75).[636]

In its assessment of whether the Dutch integration exam was in accordance with the proportionality principle, the Court distinguished between two aspects of the requirement to pass the integration exam: the substance of this requirement, and its application in practice. As a general principle, the Court sets out that the legitimacy of an integration measure depends on its capacity to 'facilitate the integration of the sponsor's family members'. Applying that principle to the case at hand, the Court reasoned that considering the content – i.e. the acquisition of knowledge of the language and society – and the level of the exam, the requirement to pass a civic integration examination in principle were capable of facilitating the integration of the sponsor's family members:

> 52. Accordingly, in so far as the first subparagraph of Article 7(2) of Directive 2003/86 concerns only measures of 'integration', it is clear that the measures which the Member States may require on the basis of that provision can be considered legitimate only if they are capable of facilitating the integration of the sponsor's family members.
> 53. Against that background, it cannot be disputed that the acquisition of knowledge of the language and society of the host Member State greatly facilitates communication between third country nationals and nationals of the Member State concerned and, moreover, encourages interaction and the development of social relations between them. Nor can it be contested that the acquisition of knowledge of the language of the host Member State makes it less difficult for third country nationals to access the labour market and vocational training (see, concerning the interpretation of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44), judgment in *P and S* (C-579/13, EU:C:2015:369, paragraph 47)).
> 54. From that perspective, the requirement to pass a civic integration examination at a basic level is capable of ensuring that the nationals of third countries acquire knowledge which is undeniably useful for establishing connections with the host Member State.
> 55. Furthermore, in the light of the level of knowledge required to pass the civic integration examination at issue in the main proceedings, it must be considered, in principle, that the requirement to pass such an examination does not undermine the aims of family reunification pursued by Directive 2003/86.[637]

However, the circumstance that requiring persons to pass a civic integration examination *in principle* is capable of facilitating that person's integration proved insufficient to justify the final conclusion that enforcing such requirement is proportionate. An additional evaluation was to be made as regards the general application of that requirement in practice. Again, the capacity of the measure to

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[636] ibid paras 50-51.
[637] ibid paras 52-55.

facilitate the integration of the sponsor's family members served as a guideline – only this time in a practical sense:

> 56. However, in any event, the principle of proportionality requires *the conditions of application of such a requirement* not to exceed what is necessary to achieve those aims. That would, in particular, be the case if the application of that requirement were systematically to prevent family reunification of a sponsor's family members where, despite having failed the integration examination, they have demonstrated their willingness to pass the examination and they have made every effort to achieve that objective.
> 57. The integration measures referred to in the first subparagraph of Article 7(2) of Directive 2003/86 must be aimed not at filtering those persons who will be able to exercise their right to family reunification, but at facilitating the integration of such persons within the Member States.[638]

The Court thus clarifies that family reunification as such cannot be made conditional upon *passing* an integration exam. It observes in this regard that integration requirements referred to in Article 7(2) may not filter those persons who will be able to exercise their right to family reunification. Another point of assessment concerns the obligation that restrictive measures should involve an evaluation of the circumstances of the case at hand:

> 58. Moreover, specific individual circumstances, such as the age, illiteracy, level of education, economic situation or health of a sponsor's relevant family members must be taken into consideration in order to dispense those family members from the requirement to pass an examination such as the one at issue in the main proceedings when, due to those circumstances, they are unable to take or pass that examination.
> 59. Were that not the case, in such circumstances such a requirement could form a difficult obstacle to overcome in making the right to family reunification recognised by Directive 2003/86 exercisable.
> 60. That interpretation is supported by Article 17 of Directive 2003/86, which requires applications for family reunification to be examined on a case-by-case basis.[639]

The very fact that specific individual circumstances should be taken into account in order to assess whether a person is to be dispensed from the requirement to pass the examination reinforces the earlier observation that the right to family reunification cannot be made conditional on having passed the integration exam. The purpose is not to reassure that persons do not circumvent requirements, but to reassure that integration requirements do not end up to be a condition: it must remain possible to eventually exercise the established right to family reunification.

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[638] ibid paras 56-57.
[639] ibid paras 58-60 (emphasis added).

After having set out the guidelines to evaluate the Dutch practice regarding the civic integration examination, the Court zooms in on the specifics of the Dutch practice. It is considered firstly, that due to the limited possibility to be exempted from the requirement, the Dutch practice does not comply with the stipulation that integration requirements should not filter persons who will be able to exercise their right to family reunification:

> 61. However, in this case, according to the order for reference, leaving aside the case in which a family member shows that, due to a mental or physical disability, he is permanently unable to take the civic integration examination at issue in the main proceedings, it is only in the case where the hardship clause provided for in Article 3.71a(2)(d) of the Vb 2000 applies that the request for authorisation of entry and residence cannot be rejected.
> 62. Also according to the order for reference, it is only if, as a result of a set of very special individual circumstances, the third country national is permanently unable to pass that examination that the hardship clause is to apply.
> 63. It therefore appears that the hardship clause provided for in Article 3.71a(2)(d) of the Vb 2000 is *not capable of dispensing the members of the sponsors' family concerned*, in the light of the individual circumstances of their situations, from the requirement to pass the civic integration examination *in all possible cases* where maintaining that requirement would make family reunification impossible or excessively difficult.[640]

A second reason why the application of the civic integration examination is considered not in accordance with the obligation not to make the exercise of the right to family reunification impossible or excessively difficult, regards the costs relating to the civic integration examination. Again, the strict interpretation of what may be required from individuals is regarded in the light of the objective of the provisions laying down the right at issue:

> 64. Finally, concerning in particular the various costs relating to the civic integration examination at issue in the main proceedings, it must be pointed out that, whilst the Member States are free to require third country nationals to pay various fees related to integration measures adopted under Article 7(2) of Directive 2003/86 as well as to determine the amount of those fees, the fact remains that, in accordance with the principle of proportionality, the level at which those costs are determined must not aim, nor have the effect of, making family reunification impossible or excessively difficult if it is not to undermine the objective of Directive 2003/86 and render it redundant.
> 65. That would in particular be the case if the amount of the fees required to be paid to take the civic integration examination at issue in the main proceedings were excessive in the light of its significant financial impact on the third country nationals concerned (see, by analogy, judgment in *Commission* v *Netherlands*, C-508/10, EU:C:2012:243, paragraph 74).

[640] ibid paras 61-63 (emphasis added).

> 66. In that regard, it must be noted that, as is clear from the order for reference, under the national legislation at issue in the main proceedings, both the course fees for taking the civic integration examination at issue in the main proceedings and the fees relating to its preparation must be paid by the relevant family members of the sponsor.
> 67. It must also be noted that the cost of the examination preparation pack, charged as a single payment, is EUR 110 and the course fees are EUR 350. The relevant family members of the sponsor incur the course fees every time that they take the examination.
> 68. It is also clear from the order for reference that a relevant family member of the sponsor who has not paid the course fees is not allowed to take the civic integration examination at issue in the main proceedings.
> 69. In those circumstances, as the Advocate General stated in point 53 of her Opinion, the inevitable conclusion is that the amount of the fees relating to the civic integration examination at issue in the main proceedings is, in circumstances such as those at issue in the main proceedings, capable of making family reunification impossible or extremely difficult.
> 70. It is *a fortiori* thus where the course fees must be paid every time the examination is taken and by each of the sponsor's family members wishing to join the sponsor in the host Member State and, in addition to those fees, there are those costs which the relevant family members of the sponsor must incur in order to travel to the closest Netherlands mission to take the examination.[641]

The case of *K and A* shows that the Court's approach features a strict interpretation of restrictions to the right to family reunification. As to what Member States may require from individuals to comply with integration requirements, the Court demands that both the substance and the application of such requirements should be in accordance with the objective to facilitate integration of family members. This strict interpretation is called for, given the general objective of the Directive to promote family reunification. Furthermore the Court demands a balancing assessment, which involves a case-by-case examination of whether a person should be exempted from being subjected to comply with the requirement at issue, so that in all cases where compliance with the requirement was not possible or excessively difficult, the person concerned can be dispensed. The Court's approach to integration requirements therewith shows the same features that emerged in its case law dealing with other types of restrictions.

9.3.4.5 The conditioning capacity of integration requirements

As I have argued in the preceding sections, integration requirements – unlike for example income conditions - may not have the effect that the exercise of the right to family reunification is made impossible. For this reason, they cannot be regarded as 'conditions' to be complied with in order to establish a right to family reunification. Still, the Court did establish in *K and A* that family members are to be dispensed

[641] ibid paras 64-70.

from compliance with integration requirements if they 'have demonstrated their willingness to pass the examination and they have made every effort to achieve that objective'. This suggests that if a person is unwilling to pass the examination or has not made every effort to achieve that objective, a Member State is not obliged to exempt that person from compliance with the requirement. Does this mean that the requirement to try your best to comply with integration requirements nevertheless may be qualified as a 'condition' in the sense of Article 4(1)?

Obviously, the obligation to demonstrate one's willingness to comply with an integration measure and to make every effort to achieve that objective has the effect of restricting a person in the exercise of his right to family reunification. Indeed, the persons concerned will have to make an effort to be able to actually exercise one's right to family reunification. Nevertheless, such an obligation does not for that reason qualify as a condition, since it does not have the capacity to *exclude* persons from being able to exercise their right to family reunification. First of all, it may be assumed that practically, no person is prevented from trying his best to comply with an integration requirement. Furthermore, in *K and A* the Court has established the obligation for Member States to assess the circumstances of the case in such a way that dispensation indeed is granted *in all possible cases* where maintaining that requirement would make family reunification impossible or excessively difficult. In this constellation, there is no single person who, due to the obligation to try one's best to satisfy an integration requirement, can be prevented from exercising their right to family reunification. Indeed, it is impossible to distinguish between persons who are able to try their best and those who are not.[642] Of course, this means that the circumstances under which it is accepted that a person cannot be required to comply with the requirement, or the burden of proof placed on individuals to establish the occurrence of such circumstances, may not in itself create an obstacle to exercise the right to family reunification.[643] Otherwise, the requirement at issue would still have the capacity to make family reunification impossible or excessively difficult, and would therefore still function as a 'condition'. It is therefore to be expected that the Court will subject any restrictions in this regard to its common rigorous scrutiny. It will not accept the use of a fixed list of circumstances or standardised burdens of

[642] In a similar manner, it may be argued that the requirement entailed in Article 5 of Directive 2004/38 to show a valid passport or identity card on entry does not have the capacity to detract from Union citizens' right to free movement, since Member States are in principle required to issue a passport or an identity card. In relation to Union citizens, this requirement therefore does not function as a 'condition', since it cannot distinguish between Union citizens who can and Union citizens who cannot make use of their right to enter another Member State.

[643] See also *Reyes* (n 619), para 26, cited in section 9.3.3.

proof for determining whether maintaining the requirement at issue would make family reunification impossible or excessively difficult.

A final remark to be made in relation to the case of *K and A* is that it offers some interesting perspectives on what we may expect in future cases in which the Court has to decide on the scope of integration requirements provided for in Article 7(2). This regards in particular the extent to which Member States may require that an integration examination is to be taken abroad. Indeed, it seems inevitable that in many cases a requirement to take an integration examination abroad cannot be said to 'facilitate a family member's integration in the host Member State'. If, for example, the family member concerned already resides in the host Member State it is questionable whether requiring that person to return to his Member State of origin for the sole purpose to take an exam will have the required facilitating effect.

9.4 Conclusion: A common approach to national measures restricting the right to free movement and family reunification

9.4.1 A strict means-end-based interpretation of restrictions to rights and the obligation to apply only customised assessment standards

In this Chapter I have examined whether the characteristics of the ECJ's approach to income requirements to free movement and family reunification also applied to other grounds for restricting entry and residence rights. From the analysis of a number of cases dealing with criminal convictions, non-compliance with procedural requirements, an alleged lack of personal ties and integration requirements, it emerged that this is indeed the case. The cases discussed in section 9.3 showed that here too, the ECJ is strict when it comes to what Member States may require from individuals to establish or exercise their right to free movement or family reunification. This strict interpretation furthermore was consistently placed in view of the objective of the rules laying down the rights and restrictions at issue. Importantly, the tenor of these objectives consistently entails the promotion of individual rights that involve immigration. Immigration rights – irrespective of whether they concern the right to free movement of Union citizens or the right to family reunification - are therefore not a derivative from other rights or interests, such as for example an individual right to respect for family life or the public interest in establishing a common market, but have an autonomous status. The significance thereof has become especially apparent in the evaluation of the extent to which the various public and private interests at stake have the capacity to determine the outcome of the case. Finally, the analysis of cases featuring other grounds than income requirements has shown that here too, a categorical rejection of applying

fixed assessment standards proved to be characteristic for the ECJ's adjudication of national restrictive practices.

9.4.2 The relevance of the interests at stake according to the type of restriction

As regards the possible relevance of the various interests at stake in enforcing restrictive entry and residence criteria it emerged that both the question whether a particular interest should be taken into account at all, and the scope of the aspects relevant for establishing that interest, are determined by the type of restriction that is at issue. The following contains an overview of (the scope of) the relevant interests according to the type of restriction at issue: conditions that determine whether a person's right of entry or residence is established or retained, requirements that govern the exercise of an established right of residence, and general grounds on the basis of which the right to free movement may be restricted. With regard to the former type of restriction, *i.e.* conditions that determine whether a person's right of entry or residence is established or retained, two types of condition may be distinguished. The first type of condition regards the personal scope of a right. These conditions identify (the qualities of) those whose right of entry or residence is covered by a particular instrument of EU law.[644] The second type of condition determines the circumstances under which Member States may invoke the public interest to deny the right of entry or residence to persons who fall within the personal scope of the legal instrument at issue.

9.4.2.1 Conditions determining the personal scope of individual rights

As mentioned above, personal scope conditions identify (the qualities of) those whose right of entry or residence is covered by a particular instrument of EU law. Examples are the condition of fulfilling the worker definition, the condition of being a Union citizen residing in another country, the condition that a family member is dependent on a Union citizen, and the condition in Directive 2003/86 to hold a residence permit issued by a Member State for a period of validity of one year or more in order to be eligible for family reunification.

In the analysis of Luxembourg case law, the discussion of whether a person falls within the scope of an instrument of EU law is separated from the question whether a public interest may object to a person's presence in the host State. Thus, an appeal to social assistance is of no influence on whether a person qualifies as a worker, and Directive 2003/86 governs an application for entry and residence even if the sponsor lacks sufficient resources. In other words, in determining whether a person satisfies

[644] Eleanor Spaventa 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects.' (2008) 45 CMLR 13, 14.

a personal scope condition, public interest-related objections against that person's presence in the host State are irrelevant.

The scope of individual interest-related aspects to be examined in relation to personal-scope conditions is confined to the scope of that very condition. If for example a condition entails that a person is financially dependent on a Union citizen, the range of relevant aspects and the means to proof their occurrence do not extend beyond such dependency. A person who is not financially dependent on a Union citizen cannot claim a right of entry or residence on this basis by invoking special ties to the host Member State. Nor may a Member State deny a right of entry or residence to a person that satisfies the condition of being financially dependent by pointing out that this person has strong ties with his country of origin. In the same vein, a person who does not qualify as a worker or a jobseeker cannot invoke a right to free movement as a worker or a jobseeker on the ground that he has a particular interest in being able to exercise such right. And a Member State may not deny the right to free movement to a worker who is thought to have no particular interest in being able to exercise this right. In sum, to the extent that individual interest-related aspects are not incorporated in a personal scope criterion, these aspects cannot determine whether a person falls within the personal scope of the right to free movement or family reunification.

If - after it is established that the Member State has satisfied the obligation to strictly interpret limitations to EU rights in view of the purpose to promote free movement and family reunification and with the obligation to apply only customised assessment standards – it is found that a personal scope condition is not fulfilled, the person concerned does not fall within the scope of persons who may enjoy the right at issue. No additional examination is to be made in which the public interest and the individual interest are set out against each other so as to establish whether that person may still be considered to fall within the scope of persons who are granted such right. Moreover, while the EU Charter of fundamental rights or other international human rights instruments may be relevant for the interpretation of the scope of the condition as such, these instruments cannot be invoked to the effect that a person who does not satisfy the personal scope-condition nevertheless falls within the scope of the right at issue.[645]

9.4.2.2 Conditions relating to a public interest in denying residence

Conditions that determine the circumstances under which Member States may invoke the public interest to deny the right of entry or residence become relevant only after it is established that the person concerned satisfies the aforementioned personal scope-conditions and therewith falls within the scope of (the applicable

[645] *Dereci* (n 538), discussed in section 7.4.2.4.

instrument of) EU law. As noted above, if it is established that there is a public interest in denying residence to a person who falls within the personal scope of the applicable instrument of EU law, this cannot have the consequence that an eventual decision to deny residence is not subjected to norms and principles of EU law.[646]

Public interest-related conditions include the sufficient resources condition and the condition to have comprehensive sickness insurance as provided for in Directive 2004/38 and in Directive 2003/86; but also the grounds of public policy, public security or public health on the basis of which Member States may refuse to issue or renew, or to withdraw a residence permit in the context of Directive 2003/86.[647] If it is found – after it is established that the national interpretation of the condition satisfies the requirements of a strict interpretation of what may be required from individuals and that of the application of customised assessment standards – that there is indeed a relevant public interest in denying residence, it is to be evaluated whether the individual interests at stake may be such as to outweigh the public interest in denying residence in the case at hand. Since at this point it has been established that the person concerned falls within the personal scope of the (applicable instrument of) EU law, Member States are also bound in this respect to take account of the relevant provisions of the Charter and, if applicable, of relevant provisions of international law. Self-evidently, the range of aspects of relevance in this assessment is broader than the range of aspects connected to the personal scope criterion.

9.4.2.3 Requirements governing the exercise of established rights

The next type of restriction governs the exercise of a right to free movement or family reunification, but as such has no bearing on whether such right exists. Examples thereof are the requirement to register with the authorities of the host Member State provided for in Directive 2004/38, the payment of administrative charges for issuance of certain documents, and the integration requirements provided for in Article 7(2) of Directive 2003/86.[648]

The fact that it is only the *exercise* of the right to free movement or family reunification, and not the very establishment or retention of these rights that is at stake here, has implications for the scope of the interests to be taken into account in

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[646] This also follows from *Rottmann* (n 540).

[647] The general restrictions on grounds of public order, public security or public health as provided for in Directive 2004/38 do not qualify as conditions, because the establishment of a person's right of residence does not depend on 'the fulfilment thereof'.

[648] The proposition that integration requirements are not to be regarded as conditions but as requirements governing the exercise of an existing right to family reunification is defended in section 9.3.4.3.

evaluating whether (enforcement of) the restriction is compatible with EU law. Indeed, an evaluation of requirements governing the exercise of an existing right of free movement or family reunification takes place with the starting point that the right of free movement or family reunification of the persons that must fulfil the requirement is not at stake.[649] Hence, the relevant individual interest-related aspects do *not* concern the impact of denying that right altogether, but instead concern the impact of imposing the requirement on the enjoyment of a person's right. Concretely, this means that it is evaluated whether the person concerned may reasonably be expected to comply with the requirements or that perhaps there are circumstances that would considerably delay the right to free movement or family reunification being exercised. Aspects to be examined in this regard are the burden of proof that applies to establishing whether the requirement at issue is satisfied with, the money or time that must be invested in order to comply with the requirement, or the occurrence of reasons to be dispensed from satisfying that requirement.[650] The purpose of such examination is thus to make sure that these requirements do not have the effect of making the exercise of the right at issue impossible or excessively difficult; to make sure that the requirement does not in fact comprise a condition the fulfilment of which is crucial to establish or maintain a right.[651]

Another consequence of the fact that restrictions of this type cannot bear on the very existence of the right to free movement or family reunification is that once it is established that their enforcement would have the practical effect of excluding a person from the scope of the right at issue, public interest-related aspects cannot be invoked to justify such enforcement anyway.

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[649] Of course, only after it is confirmed that sanctioning the requirement as such is legitimate and necessary in view of the purpose that is served with the inclusion of the requirement at issue in EU law, an evaluation takes place of enforcing the requirement in the case at hand. Compare the contrasting approach of the ECtHR, in which the relative impact of a national measure is considered to be of decisive importance without firstly having been established that the measure served a substantive public interest.

[650] In this regard, the relevant provisions of the Charter and, if applicable, of international law, are to be duly observed. As mentioned above, however, aspects that reflect the consequences of denying the existence of that right altogether are not part of the examination.

[651] At face value it may seem that this assessment is familiar to the assessment conducted in Strasbourg cases featuring immigration-specific aspects. The difference between the Strasbourg and the Luxembourg assessment is that the Strasbourg assessment is not preceded by a substantive evaluation of the public interest in upholding the requirement and moreover, in the Strasbourg assessment the very interest in controlling and restricting immigration is accepted as a stand-alone justification for enforcing the restrictions irrespective of their substance.

9.4.2.4 General grounds to restrict the right to free movement of Union citizens and their family members

The final type of restriction that may affect individual rights of entry and residence only occurs – at least within the scope of this research - in relation to the right to free movement of Union citizens and their family members. It concerns the general grounds on the basis of which Member States may restrict the right to free movement and residence of Union citizens and their family members who otherwise fulfil the conditions to exercise these rights. In Directive 2004/38, Chapter VI governs the possibility to impose this category of restrictions on grounds of public policy, public security or public health.[652]

If it is established that there are general grounds to deny residence to a Union citizen or his family members, naturally an existing right of residence is at stake.[653] Accordingly, the scope of the individual interest that is to be taken account of in the subsequent balancing assessment must reflect the interest in being granted residence in the host State. Article 28 of Directive 2004/38 provides in this regard that

> [b]efore taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

Since, moreover, in these cases it is established that the person concerned falls within the personal scope of the right at issue, the relevant provisions of the Charter and, if applicable, of international law, are to be duly observed.

The scope of the public interest that may play a role in determining whether a Union citizen or his family members may be denied residence on general public interest-related grounds is, given the nature of the aforementioned grounds, rather broad, albeit that on the basis of Article 27 of Directive 2004/38 these grounds may not be invoked to serve economic ends. Moreover, the Articles 28 and 29 provide for considerable thresholds that have to be met in order to consider these grounds to provide a sufficient justification for an expulsion decision.

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[652] As observed above, in Directive 2003/86, the occurrence of such grounds – or rather establishing the absence thereof – has been made part of the conditions to establish a right to family reunification.

[653] Compare this type of restriction with personal scope conditions: the establishment of non-compliance with the latter type of restriction does not affect an existing right of entry or residence and therefore does not instigate a subsequent balancing assessment.

9.4.3 The significance of generic interests in controlling or restricting immigration in Luxembourg scrutiny

As regards the extent to which the Luxembourg Court gives room to considerations relating to the interest of Member States in controlling immigration as such, the Luxembourg approach shows a clear contrast with the approach identified in relation to Strasbourg case law. The rejection of the public generic interest in controlling and restricting immigration as stand-alone justifications for denying residence is reflected in various aspects of the Luxembourg case law. First of all, the principle that individual rights are to be interpreted extensively while limitations to these rights are to be interpreted strictly precludes prioritisation of interest in restricting immigration. Moreover, the aims in view of which the legitimacy of restrictions is interpreted entail the *promotion* of rights that involve immigration: the abolition of obstacles to free movement of Union citizens and the promotion of family reunification by third country nationals. A generic interest in ensuring effective immigration control or in quantitatively restricting immigration is not considered a legitimate justification for denying entry or residence. Further, the stipulation that restrictive criteria by no means may be applied automatically and always require a case-by-case evaluation of whether it is necessary to enforce the restriction at issue leaves no room for attaching significance to the very interest in upholding restrictive criteria as an autonomous justification for denying residence.

Another feature of Luxembourg scrutiny that has the effect of restricting the significance of the generic interest in controlling or restricting immigration entails the strict separation in the Court's assessment of the various types of restrictions to individual entry and residence rights. In the analysis, the following types of restrictions have been distinguished: conditions that must be fulfilled in order to fall within the personal scope of a right; conditions, the fulfilment of which may be required by Member States to protect certain, substantive public interests, restrictions governing the exercise of an established right of residence, and finally, general grounds to restrict the right to free movement.

When it comes to the interpretation of conditions that determine the personal scope of individual rights, the analysis of Luxembourg case law has shown that this interpretation is to take place in view of the aim pursued by the legal instrument at issue, *i.e.* the abolition of obstacles to free movement of Union citizens or the promotion of family reunification by third country nationals. In establishing whether a person falls within the scope of EU law, the issue of whether there are substantive objections against a person's presence in the host State may not be taken into account. The separated assessment of personal scope conditions from other types of restrictions thus precludes that the interests of Member States in denying residence may play a role in determining the personal scope of EU entry and residence rights.

Moreover, once it is established that a person satisfies the conditions relating to the personal scope of the right at issue, this means that subsequent decisions relating to that person's right fall within the scope of EU law. Hence, even if it appears that this person does not satisfy conditions the fulfilment of which may be required by Member States to protect certain, substantive public interests, or if it appears that there are general grounds of public policy, public security or public health to restrict that person's right to free movement, any decision that affect that person's right of residence must comply with the strict, means-end, case-by-case assessment-standard of EU law. The separated assessment of personal scope conditions from other types of restrictions thus precludes, that individuals who are considered a threat to the interests of a Member State cannot rely on the rights-based scrutiny that is required on the basis of EU law.

The same mechanism can be discerned in cases where the ECJ stresses the distinction between conditions, the fulfilment of which determines whether a person does or does not have a right to free movement or family reunification and restrictions that merely govern the exercise of an already established right of residence. The Court has repeatedly held that Member States may not apply the latter type of restriction with the effect that individuals whose right of free movement or family reunification has been established will not be able to exercise that right. The sanction to non-compliance with such restriction may therefore not result in denying residence to the person concerned altogether. Again, the strict separation between the distinct types of restrictions limits the extent to which Member States may pursue the interest in restricting immigration.

In conclusion, Luxembourg scrutiny of national legal restrictions may be said to mirror the approach of the Strasbourg Court to national immigration policies. While there are differences in the scope of the various entry and residence rights granted by EU law, as well as in the extent to which these rights may be restricted, the ECJ's approach to such restrictions follows an utterly consistent pattern of argumentation. Arguably, this consistency may be explained by the simple fact that there is no reason why the Court should be inconsistent. Different from the ECtHR, the ECJ is not tied by the right of States to control immigration, an 'external' principle that prevents it from acting in accordance with its own assertion that national immigration decisions that touch upon family or private life are not as such excluded from the protection of Article 8 ECHR and that even where immigration is concerned, the extent of a State's obligations will depend on the weight of the competing interests at stake.

PART III CONCLUSION

Chapter 10 The interest of States in controlling and restricting immigration as a marker for the scope of judicial scrutiny

10.1 Introduction

In this book I have investigated the public interest role in denying residence to foreign nationals in the case law of the ECtHR and the ECJ. The starting point for the investigation were the contrasting paradigms employed by these Courts in relation to immigration: the Strasbourg acknowledgment of the right of States to control immigration versus the promotion of free movement and family reunification in EU law. For various reasons, it was foreseeable that Luxembourg scrutiny of national restrictions would prove stricter than the Strasbourg approach.[654] However it was not yet clear how in concrete cases the scope of scrutiny depends on whether national immigration criteria are examined in the light of Article 8 ECHR or against standards of EU law. The main cause for this has been a widespread lack of insight into the boundaries of Strasbourg scrutiny in Article 8 ECHR immigration cases.

This research has confirmed the common perception of the Strasbourg case law as lacking transparency and consistency. At the same time, however, this research has also uncovered a clear pattern of adjudication in the body of Article 8 ECHR immigration cases. The identification of the Strasbourg boundaries of scrutiny and the core premises on which these boundaries rest, thus have allowed for establishing on a detailed level to which extent the scrutiny of national restrictions differs according to whether the measure is evaluated in the light of Article 8 ECHR or against standards of EU law. The basis for the findings of this research has been a systematic content analysis of Strasbourg Article 8 ECHR immigration cases,

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[654] Costello (n 353); Virginie Guiraudon, 'European Courts and Foreigners' Rights: A Comparative Study of Norm Diffusion' (2000) 34 International Migration Review 1088, 1094.

Luxembourg cases on free movement of Union citizens and their family members and Luxembourg cases on family reunification by third country nationals on the basis of Directive 2003/86.

10.2 Strasbourg: A decision-model that leaves the legitimacy of controlling and restricting immigration unquestioned

The first part of this book has examined the Strasbourg approach to the public interest in denying residence to foreign nationals. In the analysis, six categories of reasons for denying residence were distinguished. Each category was examined regarding whether the ECtHR evaluates the circumstances of the case to establish the weight of the public interest in denying residence. If it appeared that the Court did not evaluate the weight of the public interest on a case-by-case basis, it was noted which other aspects were addressed in order to conclude on the matter. The analysis of Strasbourg case law revealed a line of distinction between on the one hand cases featuring decisions on grounds relating to criminal convictions, national security, and national health; and on the other hand, cases featuring non-compliance with income-related criteria, procedural rules of immigration law and individual interest-related criteria.

In relation to the first three categories of reasons the Court was observed to critically evaluate the circumstances invoked by the State relating to the public interest in denying residence to the individual concerned. Furthermore, the Court did not automatically follow the national authorities in their appreciation of the facts and circumstances in these cases. Consequently, the Court may disagree on the seriousness of crimes, or risk of re-offending, or the extent to which a foreign national poses a threat to national security or health. In relation to the latter three categories of reasons, a different picture emerges. While the ECtHR makes explicit evaluative comments on the facts invoked to justify denying residence, in none of the cases was this evaluation at variance with that of the national authorities. In addition, there is no proportionate link between the appreciation of the facts underlying the decision to deny residence and the outcome of a case. Instead, factors other than the relative weight of the competing interests at stake emerged as being indicative for the outcome of individual cases. These factors concern the issue of whether the national criterion has been applied correctly and consistently, and whether there was a good excuse for non-compliance with that criterion. Furthermore, it appears that the Court accepts as a stand-alone legitimate interest, a generic interest in controlling immigration. This means that the interest per se in upholding national rules of immigration law may justify a decision to deny residence,

irrespective of whether there are substantive objections against this person's presence in the host State.

A further exploration of the link between the occurrence of the aforementioned indicative factors and the outcome of a case resulted in a flowchart that shows how Article 8 ECHR immigration cases can be distinguished between cases in which the outcome arguably results from a balancing structure,[655] and cases in which the outcome follows a decision-model based on indicative factors. In the latter category of cases, there is a strict correlation between the outcome of the case and the correct and consistent application of national immigration criteria and the occurrence of a good excuse for non-compliance with these criteria. The correlation entails that if in relation to these criteria the applicable national rules have been applied correctly and consistently, denying residence is not considered to violate Article 8 ECHR, unless a good excuse has been accepted for non-compliance with the criterion at issue. In these cases, the weight of the individual interests at stake, in itself, was not capable of tipping the scales.

The systematic content analysis of Article 8 ECHR immigration cases disclosed a clear distinction between cases in which the ECtHR can be said to conduct a balancing assessment, and cases in which the outcome corresponds to a decision-model that implies a full margin of appreciation being accorded to States.[656] The 'logic' behind this distinction has been revealed by focusing on the emphasis placed by the ECtHR on the right of States to control immigration.

The distinctive feature of cases to which a full margin of appreciation applies is the occurrence of so-called immigration-specific aspects: aspects that only in the context of immigration may determine whether a person is to be physically excluded from society as a whole.[657] In cases without immigration-specific aspects, the Court has shown to evaluate the weight of the competing interests on a case-by-case basis, without necessarily deferring to national authorities in this regard. By contrast, in cases that do feature immigration-specific aspects, the Court will not conclude that denying residence violates Article 8 ECHR if this would compromise the validity of the national restrictive criterion at issue or the manner in which the competing

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[655] That is, an assessment in which the Court's approach entails an evaluation of the weight of the competing interests on the basis of the circumstances of the case at hand, without one of the interests being capable to trump the other interest irrespective of the weight of the former or the latter. See extensively, chapter 4.

[656] A decision-model based on whether the national criterion has been applied correctly and consistently, and whether there was a good excuse for non-compliance with that criterion.

[657] E.g. a failure to satisfy income requirements, or the end of a marriage. By contrast, aspects such as commission of crimes or posing a threat to national health are not immigration-specific: these aspects may also in other context determine a person's physical exclusion from society, through imprisonment or quarantine.

interests were balanced on the national level. Evidence for this full margin of appreciation is the aforementioned strict correlation in these cases between the outcome of the case and the aforementioned decision-model based on indicative factors. By accepting a violation of Article 8 ECHR only in case of an incorrect or inconsistent application of national criteria, or in case of a good excuse for non-compliance; the ECtHR, without this being its explicit purpose, secures that a violation never results in a State having to reconsider the validity of its restrictive criteria or the relative weight attached to non-compliance with such criteria. The dividing-line found in Strasbourg cases thus reflects the limits of Strasbourg scrutiny; the crossing of which would compel the Court to interfere with national exclusion policies specific to immigration, and in which, accordingly, States have no alternative instrument to physically exclude the person concerned from society as a whole.

The link between immigration-specific aspects and the outcome of Strasbourg cases has provided clarity on the outcome of controversial Strasbourg judgements in which it was difficult to understand why the Court had not considered the individual interests at stake such as to outweigh the public interest.[658] The fact that this explanation exists in a full margin of appreciation being accorded to States in matters specific to immigration, however, gave rise to criticism of this judicial tool in Article 8 ECHR immigration cases. The ECtHR's consistent presentation of cases as being the result of balancing, while in fact in a substantive number of these cases a full margin applies, has resulted in a widespread distorted perception of the scope of Strasbourg scrutiny. Further, with this practice, the Court has created a potential bias in the political and legal discourse on the national level.

By not being explicit on the scope of the margin of appreciation left to States in immigration cases and presenting the outcome of every case as guided by the principle of balancing competing interests, the Strasbourg Court − albeit unwittingly − has obscured the significance of accepting the generic interest in controlling immigration as an autonomous justification for denying residence. This public interest, as it deals with the interest in controlling and restricting immigration per se, technically does not *allow* for making a substantive distinction between justified and unjustified decisions to deny residence. In cases where the generic interest in controlling immigration is accepted as an autonomous justification for denying residence, it is not even possible for the Court to follow a different approach than to examine whether the criterion has been applied correctly and consistently, and − to a limited extent − whether there was a good excuse for non-compliance with the criterion at stake. There is, in other words, a technical reason for the fact that the

[658] E.g. Smyth (n 21); Spijkerboer (n 21).

ECtHR's approach in a substantial part Article 8 ECHR immigration cases does not provide substantive protection against arbitrary State decision-making.

10.3 No easy remedy for the Strasbourg contradiction

The criticism about the ECtHR's approach to Article 8 ECHR immigration cases cannot easily be remedied within the boundaries of the current premises employed by the Court. To maintain the assertion that immigration cases affecting family or private life are not categorically excluded from the protection of Article 8 ECHR, the ECtHR must either conduct substantive scrutiny of the public interest in denying residence, or acknowledge a concrete minimum threshold of substantive protection of an individual interest in being granted entry or residence. Article 8 ECHR, since it allows for general exceptions to rights in view of pursuing the public interest, cannot provide protection if there is no substantive minimum-level of protection of the individual interest in being granted residence, nor any substantive scrutiny of the public interest in denying residence.

If the ECtHR included substantive scrutiny of reasons for denying residence, this would mean that procedural immigration rules and individual interest-related criteria could no longer be invoked as an autonomous reason for denying residence.[659] And if the Court acknowledged a substantive minimum-threshold of protection below which denying residence would violate Article 8 ECHR, this would boil down to accepting a right that involves immigration.[660] Clearly, this would not entail a right to immigrate as such: given the scope of Article 8 ECHR this right would be connected with the right to respect for private or family life.[661] Obviously, both

[659] This approach is defended by a.o. Bas Schotel, *On the Right of Exclusion: Law, Ethics and Immigration Policy* (Routledge 2012) chapter 7.

[660] Ryszard Cholewinski, 'Family Reunication and Conditions Placed on Family Members: Dismantling a Fundamental Human Right' (2002) 4 European Journal of Migration and Law 271.

[661] That this is currently not the case follows a.o. from *Üner*: 'While a number of Contracting States have enacted legislation or adopted policy rules to the effect that long-term immigrants who were born in those States or who arrived there during early childhood cannot be expelled on the basis of their criminal record (see paragraph 39 above), such an absolute right not to be expelled cannot, however, be derived from Article 8 of the Convention, couched, as paragraph 2 of that provision is, in terms which clearly allow for exceptions to be made to the general rights guaranteed in the first paragraph.' *Üner* (n 307), para 55.

options would seriously impair the 'well-established right of States to control the entry of aliens into its territory and their residence there'.[662]

To be sure, the decision-model in cases where the generic interest in controlling immigration is at stake cannot be considered as a minimum-level of judicial protection that would derive from Article 8 ECHR. First of all, the situations in which a good excuse may lead to being exempted from having to satisfy immigration-specific criteria is limited. The most striking case in point of an immigration-restricting aspect that cannot be 'remedied' by a good excuse concerns the nationality attributed at birth. This aspect lies at the basis of every immigration-decision and yet, no one can be held accountable for nationality of birth.[663] To the extent that the Court lacks judicial power to include in its assessment aspects of accountability in relation to failure to satisfy criteria for entry and residence; all that remains for the Court to do is to verify whether these criteria, whatever their scope of restriction, were enforced correctly and consistently. Under vigour of such a limited examination, the scope of the interest in family and private life protected 'under Article 8 ECHR' is in fact determined by the restrictive criteria set out by the State, and therefore not follow from Article 8 ECHR.

Admittedly, the Court may dismiss a State's assertion on whether a foreign national's individual ties qualify as family or private life, as it did in for example *Berrehab*.[664] However, the Court has no means to dismiss a State's assertion on what in substance qualifies as 'respect' for family or private life. With only an examination of the correct and consistent application of national procedural rules and individual interest-related criteria, the Court cannot restrict States imposing immigration criteria that have the effect of limiting the enjoyment of such family or private life. The limits of Strasbourg scrutiny in this regard have been exemplified

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[662] Dembour has noted in this regard that 'once the necessity of a justification is recognised in relation to a case which from a migrant's perspective would be crying out for one, it should be easier to win the argument that justification is also required in respect of a case which initially does not appear to demand it as strongly. A domino effect towards justification could thus eventually result in having all cases of migrant exclusion by the State appear suspicious.' Dembour 2015 (n 21) 29.

[663] For an interesting critical account of "birthright citizenship as a complex type of inherited property", see Ayelet Shachar *The Birthright Lottery* (Harvard University Press 2009). Shachar uses an analogy between inherited property and birthright citizenship, which allows us to look at birthright citizenship 'as a carefully regulated system for limiting access to scarce resources to those that "naturally" belong within its bounds as the heirs, not of "one's body," but of the *body politick* itself.' (ibid 43).

[664] *Berrehab* (n 266). What constitutes family life is therefore to be distinguished from the question when family life may give rise to a right of entry or residence.

by its deference with regard to the obligation for individuals residing in the host State to apply for a residence permit abroad, and the Danish criterion that accepted only foreign nationals who had lived in Denmark for at least 28 years to be sufficiently 'attached' to Denmark so as to be eligible for family reunification.

The aim of this book is not to propose what should be done to include immigrants' family and private life within the scope of protection of Article 8 ECHR. Rather, the purpose here is to show the implications for the scope of judicial protection under Article 8 ECHR of accepting the interest per se in controlling or restricting immigration as an autonomous justification for denying residence, and to demonstrate how difficult it is to recognise when immigrants' family and private life are categorically being excluded from the scope of judicial protection under Article 8 ECHR.[665]

10.4 Justifying the Strasbourg status quo?

In order to make it appear as if a non-violation 'logically' follows from the circumstances of the case at hand when the generic interest in controlling or restricting immigration is at stake, it is crucial that the value of pursuing this generic interest remains outside the scope of scrutiny. This may be illustrated by the following argument made by Endicott, who - clearly unaware of the fact that the Strasbourg approach is meticulously consistent with what he proposes to be the correct approach in Article 8 ECHR immigration cases - argues why in his view the expulsion of irregular migrants does not, in principle, violate Article 8 ECHR.

Endicott has recognised, albeit not on the same grounds as proposed in this research, that it is impossible for courts to establish the weight to be accorded to the expulsion of irregular migrants in a given case.[666] At the same time, he asserts that the expulsion of irregular migrants does not violate Article 8 ECHR, based on the assumed legitimacy of immigration controls:

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[665] See also Cornelisse's historical analysis of how membership of the territorially defined became a necessary condition for supposedly universal rights (Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff Publishers 2010) Chapter 3), and Shachar's discussion of popular justifications for the right of each country to define and enforce its membership boundaries according to birthright rules (Shachar, (n 663) Chapter 5).

[666] Endicott argues that 'the public interest, assuming that there is one – and if it were fully specified – would involve the achievement of complex goods that are deeply different in kind from the complex goods that may be involved in a family's uninterrupted life in the UK'. Endicott (n 26) 316.

> In balancing the public purpose in deportation against the impact of a deportation on family life, the courts treat people with no lawful immigration status as if they were unlucky victims of a policy not addressed to them, and not as persons who are answerable to the country's immigration law or who have responsibility for their own family life. Suppose that the immigration controls are legitimate (and the judges have never contested that).[n 36] Suppose in addition (as is actually the case in the leading judicial decisions on deportation and Article 8) that an irregular migrant knows his immigration status, and is capable of making decisions about his family life, and is responsible for his movements. Suppose, that is, that he developed family ties in the United Kingdom knowing that he was subject to deportation, and knowing the impact that deportation would have on him, and on his loved ones. In that case – in all of the deportation cases discussed here – it would show no disrespect for his family life to say that he cannot remain in Britain, even if deportation is a disaster for his family life. In fact, it would show no disrespect for the family life of his son or daughter. The impact of applying the immigration rules, however disastrous, is the father's [sic] responsibility.
> The person's interest in staying with family in the country does not actually belong in the scales. Yet in all these cases, the judges have held that deportation violates Article 8, if the impact on the family outweighs the benefit to the unspecified public purpose.[667]

The contention that expulsion shows no disrespect for family life but rather concerns the responsibility of parents, clearly rests on the assumption that the immigration controls are legitimate. For this assumption, however, no substantiation is provided other than the fact that the UK judges have never contested the legitimacy of immigration controls. In fact, in the text of footnote 36 in this quote, Endicott notes that

> [i]t is beyond the scope of this paper to assess the supposition [that the immigration controls are legitimate EH]. Suppose, instead, that the immigration controls are not legitimate. […] Then can the doctrine on deportation and family life be justified as a judicial initiative to restrict the effect of unjust restrictions on migration? No such injustice could be remedied by a measure that prefers people who develop family ties over other candidates. The judges have no effective techniques for imposing a sound immigration policy on the state, and there is no lawful ground for them to do so.[668]

Hence, while the legitimacy of immigration controls is the core aspect justifying the proposition that the consequences of expulsion do not belong in the balancing act, there is - due to both formal and substantive obstacles - no way to confirm or deny the legitimacy of immigration controls.

The avoidance to discuss the substance of the public interest in controlling immigration again emerges when the position is defended that in some cases the Court should nevertheless conclude that Article 8 ECHR is violated. Endicott accepts

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[667] ibid 330, 331.
[668] ibid 331 note 36.

violations of Article 8 ECHR in these expulsion cases as a relatively unharmful 'pathology' in judicial reasoning; a form of 'proportionality overspill', which, he argues, should be 'cherished', as long as it is 'kept in its place' and preserved for situations in which 'good governance demands that an interest of the claimant should be protected against disproportionate detriment.'[669] Of course, it is impossible to establish a 'disproportionate detriment' caused by immigration controls if it is impossible to identify the public interest that is at stake. This example shows that attempts to discuss the 'legitimacy' and 'proportionateness' of measures pursuing the generic interest in controlling immigration are bound to spawn inconsistent reasoning.[670]

Criticism of the Court's approach to Article 8 ECHR immigration cases cannot easily be remedied within the boundaries of the current premises employed by the Court. To maintain the assertion that immigration cases that relate to family or private life are not categorically excluded from the protection of Article 8 ECHR, the Court must either conduct a substantive scrutiny of the public interest in denying residence, or acknowledge a concrete minimum threshold of substantive protection of the individual interest in being granted entry or residence.

To accept the generic interest of States in controlling or restricting immigration as an autonomous justification for denying residence denotes recognition that cases in which this particular interest is at stake do not fall within the scope of Article 8 ECHR. To substantiate such assertion, however, requires taking the position that as a matter of fact, not of principle, an established generic interest in controlling immigration automatically trumps any individual interests that may be at stake. In any other case, the ECtHR may elaborate regarding the difficulties that individuals may encounter upon expulsion, the precarious situation of children, the lack of ties in the host State, the importance of ensuring effective immigration control in general, or the seriousness of the breaches of immigration rules in the case at hand, but such considerations provide no technical bearing on the legitimacy of the decision that is at stake. The following quote of Aleinikoff may appropriately describe the Strasbourg approach in cases where the generic interest in controlling immigration is at stake:

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[669] ibid 334.

[670] An additional inconsistency in Endicott's argument is that the very premise that is crucial for his justification of a full margin of appreciation in immigration cases - *i.e.* the assumed legitimacy of national immigration policies - conflicts with the institutional premise that he considers essential for accepting the Strasbourg to pass judgment on the justice of pursuing the public interest in controlling immigration in the first place - *i.e.* the assumed risk that national policy and decision makers *cannot* be relied upon to properly prioritise individual and public interests. ibid 326.

> Although [the Court's opinion] uses all the right words, in the end they are simply that: just words. No conviction, no belief in the justness of the result informs the opinion. Balancing has become mechanical jurisprudence. It has lost its ability to persuade.[671]

Arguably, however, the core problem with the generic interest in controlling immigration within the Strasbourg context, is that its lack of substance is unrecognised. In fact, when it comes to ensuring effective immigration control, it seems that a very strong conviction, a very strong belief in the justness of the result informs the opinion. Indeed, the persuasive power of balancing in the light of immigration control has shown to be immense.

10.5 Luxembourg: prioritisation of immigration as a starting point

10.5.1 Strict, means-end, case-by-case, substantive scrutiny of national restrictions

The analysis of Luxembourg case law, as expected, showed a different picture of judicial scrutiny concerning national restrictions on entry and residence of foreign nationals. In light of EU aims to abolish the obstacles to free movement of Union citizens and, in relation to Directive 2004/38, to promote family reunification, the ECJ demands that the rights at issue are interpreted broadly and any relevant restrictions, stringently. National constraints that are not explicitly provided for by EU law or directly follow from definitions deployed by the ECJ are prohibited. Accordingly, the Court rejected a required minimum income-level to satisfy the worker-definition; the restriction entailing that economically non-active Union citizens themselves must provide sufficient income; and the restriction that only family members of Union citizens who had lawfully resided in another Member State could join the Union citizen: no rule had explicitly provided for such requirements to be imposed by the Member States. Further, the ECJ dismissed the failure to comply with registration requirements as posing a basis for denying entry and residence rights altogether. Such restrictions were only allowed as means to regulate the exercise of existing rights, not as conditions that had to be fulfilled in order to obtain such rights. Sanctioning infringement could therefore only entail measures that did not detract from the right of entry or residence as such.

In examining the scope of restrictions that are incorporated in EU law, such as the sufficient resources condition or restrictions regarding the personal scope of individual rights, the ECJ has been shown to evaluate whether the restriction deployed by the Member State is in accordance with the particular purpose of the

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[671] Aleinikoff (n 346) 983. Aleinikoff's comment is directed at the United States practice of balancing and does not regard immigration control.

inclusion of such restriction in EU law. Again the starting point here is that the right at issue is interpreted broadly and any restrictions are interpreted strictly. Hence, the requirement that the sponsor should have an income of 120% of the minimum wage was considered disproportionate because it went further than the stipulation that Member States may require evidence that the sponsor has sufficient means to prevent him from becoming a burden on the social assistance scheme. Also, a strict interpretation of integration requirements in light of the aim to facilitate the integration of family members in the host State precluded Member States imposing examination fees or other limitations that are capable of making family reunification impossible or extremely difficult. Furthermore, a strict interpretation of the 'dependency' requirement in view of the aim to abolish obstacles to free movement of Union citizens and their family members, prohibited Member States requiring evidence of the reasons for dependency of a family member of a Union citizen. Here the significance becomes apparent of the fact that the principal aims of EU law in view of which the legitimacy of national measures is assessed, coincide with the individual interest in being granted a right of residence, rather than being opposed to that interest. The interpretation of personal scope criteria in EU law are therefore consistently framed as *national measures restricting EU rights*.[672]

A final characteristic of the ECJ's approach to national restrictions concerns the obligation it imposes on Member States to apply only customised assessment standards. The Court consistently demands that in enforcing restrictive criteria, Member States are to take into account the circumstances of the case. Firstly, this means that Member States may not fix the means by which a person must prove that he satisfies certain criteria: there are various ways to prove one's identity or one's dependence on another person. Further, it means that generally, Member States may not apply fixed standards that should be met. With regard to the sufficient resources condition, the ECJ established that since the needs of people vary, what is considered sufficient to prevent a person from becoming a burden on the social assistance scheme should not be measured on the basis of fixed levels of income. Furthermore, since the economic nature of a person's activities depend on a multitude of aspects, Member States may not deny the worker status to a person on the basis of a single aspect, such as the number of working hours per week. Of particular interest is the ECJ's case law on procedural restrictions to entry and residence rights. The Court has consistently emphasised that infringement of procedural requirements in relation to Union citizens cannot serve as providing sufficient grounds for denying residence.

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[672] Considering the fact that it is not the ECJ's primary task to examine the circumstances in individual cases it is obvious that the Court does not aims its scrutiny at the individual interests at stake but rather at the national criteria that are at stake, but the point here is to note the consequences thereof for the scope of scrutiny in individual cases.

Such reasons must always take into account personal conduct of the individual concerned in relation to the public interest. General prevention, *i.e.* the interest in preventing *other* persons from violating procedural rules, is categorically dismissed as a legitimate interest.

10.5.2 The link between promoting an aim that involves immigration and the scope of judicial scrutiny

Contrasting the Strasbourg approach with the manner in which national restrictions are scrutinised under EU law immediately shows the paramount importance of either accepting or rejecting a generic interest in controlling or restricting immigration. The effect of taking the abolition of obstacles to free movement of Union citizens and the promotion of family reunification by third country nationals as starting points for judicial scrutiny is visible in various features of the Luxembourg case law.

First of all, the aims against which the legitimacy of restrictions is interpreted entail the *promotion* of rights that involve immigration. The principle that individual rights are to be interpreted extensively while limitations to these rights are to be interpreted strictly precludes the prioritisation of interest in restricting immigration. The inclusion in EU law of public interest-related criteria potentially restricting entry or residence rights, such as income or integration requirements, therefore, may not be interpreted in a manner that takes as a starting point that Member States have discretionary powers to impose such public interest-related restrictions unless the text of EU law explicitly indicates otherwise. The necessity of the restriction at issue must always be argued for.

Moreover, the aim to *promote* rights involving immigration is reflected in the stipulation that restrictive criteria may not be applied automatically and always requires a case-by-case evaluation of whether it is necessary to enforce the restriction. A generic interest in ensuring effective immigration control or in quantitatively restricting immigration is not considered a legitimate justification for denying entry or residence. Judicial considerations that are found in *Nunez* endorsing general deterrence as a means to ensure effective immigration control, consequently, play no role in relation to entry and residence rights accorded by EU law. Likewise, the issue of whether the applicants were entitled to expect that any right of residence would be conferred upon them cannot be invoked to justify denying residence: in EU law, previous non-compliance with restrictive criteria cannot be held against a person presently satisfying the relevant criteria.

Another feature of Luxembourg scrutiny that has the effect of limiting the significance of the generic interest in controlling or restricting immigration entails the strict separation in the Court's assessment of the various types of restrictions to individual entry and residence rights. In the analysis, the following types of restrictions were distinguished: conditions that must be fulfilled in order to fall

within the personal scope of a right; conditions, required by Member States to protect certain substantive public interests; restrictions governing the exercise of an established right of residence; and finally, general grounds to restrict the right to free movement.

In establishing whether a person falls within the scope of EU law, the issue of whether there are substantive objections against a person's presence in the host State may not be taken into account. The separate assessment of personal scope conditions from other types of restrictions effectively precludes that the interests of Member States in denying residence play a role in determining the personal scope of EU entry and residence rights.

Moreover, once it is established that a person satisfies the conditions relating to the personal scope of the right at issue, this means that subsequent decisions relating to that person's right fall within the scope of EU law. Hence, even if it appears that this person does not satisfy conditions required by Member States to protect certain, substantive public interests, or if it appears that there are general grounds of public policy, public security or public health to restrict that person's right to free movement, any decision affecting that person's right of residence must comply with the strict, means-end, case-by-case assessment-standard of EU law. The separated assessment of personal scope conditions from other types of restrictions thus prevents, that individuals who are considered a threat to the interests of a Member State cannot rely on the rights-based scrutiny that is required on the basis of EU law.

The same mechanism can be discerned in cases where the ECJ stresses the distinction between conditions determining whether a person has a right to free movement or family reunification and restrictions that merely govern the exercise of an already established right of residence. The Court has repeatedly held that Member States may not apply the latter type of restriction with the effect that individuals whose right of free movement or family reunification has been established will not be able to exercise that right. The sanction for non-compliance with such restriction may not result in denying residence to the person concerned altogether. Again, the strict separation between the distinct types of restrictions limits the extent to which Member States may pursue the interest in restricting immigration.

In sum, to take into account 'the circumstances of the case' in judicial scrutiny of national restrictions to entry and residence of foreign nationals means something completely different according to whether the assessment takes place under Article 8 ECHR or under EU law. Contrasting the Strasbourg and the Luxembourg approach has illustrated how the scope of scrutiny of national immigration criteria depends on the extent to which the public interest in controlling immigration is being prioritised or marginalised.

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Summary

ADJUDICATING THE PUBLIC INTEREST IN IMMIGRATION LAW

A Systematic Content Analysis of Strasbourg and Luxembourg Case Law on Legal Restrictions to Immigration and Free Movement

This book investigates the public interest role in denying residence to foreign nationals in the case law of the ECtHR and the ECJ. The starting point for the investigation are the contrasting paradigms employed by these Courts in relation to immigration: the Strasbourg acknowledgment of the right of States to control immigration versus the promotion of free movement and family reunification in EU law. For various reasons, it was foreseeable that Luxembourg scrutiny of national restrictions would prove stricter than the Strasbourg approach. However it was not yet clear how in concrete cases the scope of scrutiny depends on whether national immigration criteria are examined in the light of Article 8 ECHR or against standards of EU law. The main cause for this has been a widespread lack of insight into the boundaries of Strasbourg scrutiny in Article 8 ECHR immigration cases.

This research has confirmed the common perception of the Strasbourg case law as lacking transparency and consistency. At the same time, however, this research has also uncovered a clear pattern of adjudication in the body of Article 8 ECHR immigration cases. The identification of the Strasbourg boundaries of scrutiny and the core premises on which these boundaries rest, have allowed for establishing on a detailed level to which extent the scrutiny of national restrictions differs according to whether the measure is evaluated in the light of Article 8 ECHR or against standards of EU law. The basis for the findings of this research has been a systematic content analysis of Strasbourg Article 8 ECHR immigration cases, Luxembourg cases on free movement of Union citizens and their family members and Luxembourg cases on family reunification by third country nationals on the basis of Directive 2003/86.

Strasbourg: A decision-model that leaves the legitimacy of controlling and restricting immigration per se unquestioned

The first part of this book examines the Strasbourg approach to the public interest in denying residence to foreign nationals. In the analysis, six categories of reasons for denying residence were distinguished. In chapter 2, each category was examined regarding whether the ECtHR evaluates the circumstances of the case to establish the weight of the public interest in denying residence. If it appeared that the Court

did not evaluate the weight of the public interest on a case-by-case basis, it was noted which other aspects were addressed in order to conclude on the matter. The analysis of Strasbourg case law revealed a line of distinction between on the one hand cases featuring decisions on grounds relating to criminal convictions, national security, and national health; and on the other hand, cases featuring non-compliance with income-related criteria, procedural rules of immigration law and individual interest-related criteria.

In relation to the first three categories of reasons the Court was observed to critically evaluate the circumstances invoked by the State relating to the public interest in denying residence to the individual concerned. Furthermore, the Court did not automatically follow national authorities in their appreciation of the facts and circumstances in these cases. Consequently, the Court may disagree on the seriousness of crimes, risk of re-offending, or the extent to which a foreign national poses a threat to national security or health. In relation to the latter three categories of reasons, a different picture emerges. While the ECtHR makes explicit evaluative comments on the facts invoked to justify denying residence, in none of the cases was this evaluation at variance with that of the national authorities. In addition, there is no proportionate link between the appreciation of the facts underlying the decision to deny residence and the outcome of a case. Instead, factors other than the relative weight of the competing interests at stake emerged as being indicative for the outcome of individual cases. These factors concern the issue of whether the national criterion has been applied correctly and consistently, and whether there was a good excuse for non-compliance with that criterion. Furthermore, it appears that the Court accepts as a stand-alone legitimate interest, a generic interest in controlling immigration. This means that the interest per se in upholding national rules of immigration law may justify a decision to deny residence, irrespective of whether there are substantive objections against this person's presence in the host State.

In chapter 3, a further exploration of the link between the occurrence of the aforementioned indicative factors and the outcome of a case resulted in a flowchart that shows how Article 8 ECHR immigration cases can be distinguished between cases in which the outcome arguably results from a balancing structure, and cases in which the outcome follows a decision-model based on indicative factors. In the latter category of cases, there is a strict correlation between the outcome of the case and the correct and consistent application of national immigration criteria and the occurrence of a good excuse for non-compliance with these criteria. The correlation entails that if in relation to these criteria the applicable national rules have been applied correctly and consistently, denying residence is not considered to violate Article 8 ECHR, unless a good excuse has been accepted for non-compliance with the criterion at issue. In these cases, the weight of the individual interests at stake, in itself, was not capable of tipping the scales.

Chapter 4 explains how the systematic content analysis of Article 8 ECHR immigration cases disclosed a clear distinction between cases in which the ECtHR can be said to conduct a balancing assessment, and cases in which the outcome corresponds to a decision-model that implies a full margin of appreciation being accorded to States. The 'logic' behind this distinction has been revealed by focusing on the emphasis placed by the ECtHR on the right of States to control immigration.

The distinctive feature of cases to which a full margin of appreciation applies is the occurrence of so-called immigration-specific aspects: aspects that only in the context of immigration may determine whether a person is to be physically excluded from society as a whole.[673] In cases without immigration-specific aspects, the Court has shown to evaluate the weight of the competing interests on a case-by-case basis, without necessarily deferring to national authorities in this regard. By contrast, in cases that do feature immigration-specific aspects, the Court will not conclude that denying residence violates Article 8 ECHR if this would compromise the validity of the national restrictive criterion at issue or the manner in which the competing interests were balanced on the national level. Evidence for this full margin of appreciation is the aforementioned strict correlation in these cases between the outcome of the case and the aforementioned decision-model based on indicative factors. By accepting a violation of Article 8 ECHR only in case of an incorrect or inconsistent application of national criteria, or in case of a good excuse for non-compliance; the ECtHR, without this being its explicit purpose, secures that a violation never results in a State having to adjust its policy in relation to immigration-specific criteria. The dividing-line found in Strasbourg cases reflects the limits of Strasbourg scrutiny; the crossing of which would compel the Court to interfere with national exclusion policies specific to immigration, and in which, accordingly, States have no alternative instrument to physically exclude the person concerned from society as a whole.

The link between immigration-specific aspects and the outcome of Strasbourg cases has provided clarity on the outcome of controversial Strasbourg judgements in which it was difficult to understand why the Court had not considered the individual interests at stake such as to outweigh the public interest. The fact that this explanation exists in a full margin of appreciation being accorded to States in matters specific to immigration, however, gave rise to criticism of this judicial tool in Article 8 ECHR immigration cases. The ECtHR's consistent presentation of cases as being the result of balancing, while in fact in a substantive number of these cases a full margin

[673] E.g. a failure to satisfy income requirements, or the end of a marriage. By contrast, aspects such as commission of crimes or posing a threat to national health are not immigration-specific: these aspects may also in other context determine a person's physical exclusion from society, through imprisonment or quarantine.

applies, has resulted in a widespread distorted perception of the scope of Strasbourg scrutiny. Further, with this practice, the Court has created a potential bias in the political and legal discourse on the national level.

By not being explicit on the scope of the margin of appreciation left to States in immigration cases and presenting the outcome of every case as guided by the principle of balancing competing interests, the Strasbourg Court – albeit unwittingly – has obscured the significance of accepting the generic interest in controlling immigration as an autonomous justification for denying residence. This public interest, as it deals with the interest in controlling and restricting immigration per se, technically does not *allow* for making a substantive distinction between justified and unjustified decisions to deny residence. In cases where the generic interest in controlling immigration is accepted as an autonomous justification for denying residence, it is not even possible for the Court to follow a different approach than to examine whether the criterion has been applied correctly and consistently, and – to a limited extent – whether there was a good excuse for non-compliance with the criterion at stake. There is, in other words, a technical reason for the fact that the ECtHR's approach in a substantial part Article 8 ECHR immigration cases does not provide substantive protection against arbitrary State decision-making.

No easy remedy for the Strasbourg contradiction

The criticism about the Court's approach to Article 8 ECHR immigration cases cannot easily be remedied within the boundaries of the current premises employed by the Court. To maintain the assertion that immigration cases affecting family or private life are not categorically excluded from the protection of Article 8 ECHR, the Court must either conduct substantive scrutiny of the public interest in denying residence, or acknowledge a concrete minimum threshold of substantive protection of an individual interest in being granted entry or residence. Article 8 ECHR, since it allows for general exceptions to rights in view of pursuing the public interest, cannot provide protection if there is no substantive minimum-level of protection of the individual interest in being granted residence, nor any substantive scrutiny of the public interest in denying residence.

If the Court included substantive scrutiny of reasons for denying residence, this would mean that procedural immigration rules and individual interest-related criteria could no longer be invoked as an autonomous reason for denying residence. And if the Court acknowledged a substantive minimum-threshold of protection below which denying residence would violate Article 8 ECHR, this would boil down to accepting a right that involves immigration. Clearly, this would not entail a right to immigrate as such: given the scope of Article 8 ECHR this right would be connected with the right to respect for private or family life. Obviously, both options would

seriously impair the 'well-established right of States to control the entry of aliens into its territory and their residence there'.

To be sure, the decision-model in cases where the generic interest in controlling immigration is at stake cannot be considered as a minimum-level of judicial protection that would derive from Article 8 ECHR. First of all, the situations in which a good excuse may lead to being exempted from having to satisfy immigration-specific criteria is limited. The most striking case in point of an immigration-restricting aspect that cannot be 'remedied' by a good excuse concerns the nationality attributed at birth. This aspect lies at the basis of every immigration-decision and yet, no one can be held accountable for nationality of birth. To the extent that the Court lacks judicial power to include in its assessment aspects of accountability in relation to failure to satisfy criteria for entry and residence; all that remains for the Court to do is to verify whether these criteria, whatever their scope of restriction, were enforced correctly and consistently.Under vigour of such a limited examination, the scope of the interest in family and private life protected 'under Article 8 ECHR' is in fact determined by the restrictive criteria set out by the State, and therefore not follow from Article 8 ECHR.

Admittedly, the Court may dismiss a State's assertion on whether a foreign national's individual ties qualify as family or private life, as it did in for example *Berrehab*. However, the Court has no means to dismiss a State's assertion on what in substance qualifies as 'respect' for family or private life. With only an examination of the correct and consistent application of national procedural rules and individual interest-related criteria, the Court cannot restrict States imposing immigration criteria that have the effect of limiting the enjoyment of such family or private life. The limits of Strasbourg scrutiny in this regard have been exemplified by its deference with regard to the obligation for individuals residing in the host State to apply for a residence permit abroad, and the Danish criterion that accepted only foreign nationals who had lived in Denmark for at least 28 years to be sufficiently 'attached' to Denmark so as to be eligible for family reunification.

The aim of this book is not to propose what should be done to include immigrants' family and private life within the scope of protection of Article 8 ECHR. Rather, the purpose is to show the implications for the scope of judicial protection under Article 8 ECHR of accepting the interest per se in controlling or restricting immigration as an autonomous justification for denying residence, and to demonstrate how difficult it is to recognise when immigrants' family and private life are categorically being excluded from the scope of judicial protection under Article 8 ECHR.

Luxembourg: prioritisation of immigration as a starting point

The analysis of Luxembourg case law, as expected, showed a different picture of judicial scrutiny concerning national restrictions on entry and residence of foreign nationals. The second part of the book describes how in light of EU aims to abolish the obstacles to free movement of Union citizens and, in relation to Directive 2004/38, to promote family reunification, the ECJ demands that the rights at issue are interpreted broadly and any relevant restrictions, stringently. National constraints that are not explicitly provided for by EU law or directly follow from definitions deployed by the ECJ are prohibited. Accordingly, the Court rejected a required minimum income-level to satisfy the worker-definition; the restriction entailing that economically non-active Union citizens themselves must provide sufficient income; and the restriction that only family members of Union citizens who had lawfully resided in another Member State could join the Union citizen: no rule had explicitly provided for such requirements to be imposed by the Member States. Further, the Court dismissed the failure to comply with registration requirements as posing a basis for denying entry and residence rights altogether. Such restrictions were only allowed as means to regulate the exercise of existing rights, not as conditions that had to be fulfilled in order to obtain such rights. Sanctioning infringement could therefore only entail measures that did not detract from the right of entry or residence as such.

In examining the scope of restrictions that are incorporated in EU law, such as the sufficient resources condition or restrictions regarding the personal scope of individual rights, the ECJ has been shown to evaluate whether the restriction deployed by the Member State is in accordance with the particular purpose of the inclusion of such restriction in EU law. Again the starting point here is that the right at issue is interpreted broadly and any restrictions are interpreted strictly. Hence, the requirement that the sponsor should have an income of 120% of the minimum wage was considered disproportionate because it went further than the stipulation that Member States may require evidence that the sponsor has sufficient means to prevent him from becoming a burden on the social assistance scheme. Also, a strict interpretation of integration requirements in light of the aim to facilitate the integration of family members in the host State, precluded Member States imposing examination fees or other limitations that are capable of making family reunification impossible or extremely difficult. Furthermore, a strict interpretation of the 'dependency' requirement in view of the aim to abolish obstacles to free movement of Union citizens and their family members, prohibited Member States requiring evidence of the reasons for dependency of a family member of a Union citizen. Here the significance becomes apparent of the fact that the principal aims of EU law in view of which the legitimacy of national measures is assessed, coincide with the

individual interest in being granted a right of residence, rather than being opposed to that interest. The interpretation of personal scope criteria in EU law are therefore consistently framed as *national measures restricting EU rights*.

A final characteristic of the ECJ's approach to national restrictions concerns the obligation it imposes on Member States to apply only customised assessment standards. The Court consistently demands that in enforcing restrictive criteria, Member States are to take into account the circumstances of the case. Firstly, this means that Member States may not fix the means by which a person must prove that he satisfies certain criteria: there are various ways to prove one's identity or one's dependence on another person. Further, it means that generally, Member States may not apply fixed standards that should be met. With regard to the sufficient resources condition, the ECJ established that since the needs of people vary, what is considered sufficient to prevent a person from becoming a burden on the social assistance scheme should not be measured on the basis of fixed levels of income. Furthermore, since the economic nature of a person's activities depend on a multitude of aspects, Member States may not deny the worker status to a person on the basis of a single aspect, such as the number of working hours per week. Of particular interest is the ECJ's case law on procedural restrictions to entry and residence rights. The Court has consistently emphasised that infringement of procedural requirements in relation to Union citizens cannot serve as providing sufficient grounds for denying residence. Such reasons must always take into account personal conduct of the individual concerned in relation to the public interest. General prevention, *i.e.* the interest in preventing *other* persons from violating procedural rules, is categorically dismissed as a legitimate interest.

The significance of marginalising the role of the generic interest in controlling or restricting immigration in judicial reasoning

Contrasting the Strasbourg approach with the manner in which national restrictions are scrutinised under EU law immediately shows the paramount importance of either accepting or rejecting a generic interest in controlling or restricting immigration. The effect of taking the abolition of obstacles to free movement of Union citizens and the promotion of family reunification by third country nationals as starting points for judicial scrutiny is visible in various features of the Luxembourg case law.

First of all, the aims against which the legitimacy of restrictions is interpreted entail the *promotion* of rights that involve immigration. The principle that individual rights are to be interpreted extensively while limitations to these rights are to be interpreted strictly precludes the prioritisation of interest in restricting immigration. The inclusion in EU law of public interest-related criteria potentially restricting entry or residence rights, such as income or integration requirements, therefore, may not be interpreted in a manner that takes as a starting point that Member States have

discretionary powers to impose such public interest-related restrictions unless the text of EU law explicitly indicates otherwise. The necessity of the restriction at issue must always be argued for.

Moreover, the aim to *promote* rights involving immigration is reflected in the stipulation that restrictive criteria may not be applied automatically and always requires a case-by-case evaluation of whether it is necessary to enforce the restriction. A generic interest in ensuring effective immigration control or in quantitatively restricting immigration is not considered a legitimate justification for denying entry or residence. Judicial considerations such as those found in *Nunez*, endorsing general deterrence as a means to ensure effective immigration control, consequently, play no role in relation to entry and residence rights accorded by EU law. Likewise, the issue of whether the applicants were entitled to expect that any right of residence would be conferred upon them cannot be invoked by States to justify denying residence: in EU law, previous non-compliance with restrictive criteria cannot be held against a person presently satisfying the relevant criteria.

Another feature of Luxembourg scrutiny that has the effect of limiting the significance of the generic interest in controlling or restricting immigration, entails the strict separation in the Court's assessment of the various types of restrictions to individual entry and residence rights. In the analysis, the following types of restrictions were distinguished: conditions that must be fulfilled in order to fall within the personal scope of a right; conditions, required by Member States to protect certain substantive public interests; restrictions governing the exercise of an established right of residence; and finally, general grounds to restrict the right to free movement.

In establishing whether a person falls within the scope of EU law, the issue of whether there are substantive objections against a person's presence in the host State may not be taken into account. The separate assessment of personal scope conditions from other types of restrictions effectively precludes that the interests of Member States in denying residence play a role in determining the personal scope of EU entry and residence rights.

Moreover, once it is established that a person satisfies the conditions relating to the personal scope of the right at issue, this means that subsequent decisions relating to that person's right fall within the scope of EU law. Hence, even if it appears that this person does not satisfy conditions required by Member States to protect certain, substantive public interests, or if it appears that there are general grounds of public policy, public security or public health to restrict that person's right to free movement, any decision affecting that person's right of residence must comply with the strict, means-end, case-by-case assessment-standard of EU law. The separated assessment of personal scope conditions from other types of restrictions thus

precludes that individuals who are considered a threat to the interests of a Member State cannot rely on the rights-based scrutiny that is required on the basis of EU law.

The same mechanism can be discerned in cases where the ECJ stresses the distinction between conditions determining whether a person has a right to free movement or family reunification and restrictions that merely govern the exercise of an already established right of residence. The Court has repeatedly held that Member States may not apply the latter type of restriction with the effect that individuals whose right of free movement or family reunification has been established will not be able to exercise that right. The sanction for non-compliance with such restriction may not result in denying residence to the person concerned altogether. Again, the strict separation between the distinct types of restrictions limits the extent to which Member States may pursue the interest in restricting immigration.

This book demonstrates that to take into account 'the circumstances of the case' in adjudicating national restrictions in immigration law means something completely different according to whether the assessment takes place under Article 8 ECHR or under EU law. A systematic comparison of the Strasbourg and the Luxembourg approach has revealed how the scope of scrutiny of national immigration criteria depends on the extent to which the public interest in controlling immigration is being prioritised or marginalised.