Palacký University in Olomouc

Faculty of Law

How can the ECtHR case-law on family migration be more consistent and fair?

Doctoral Dissertation

Jennie Edlund

2022

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“I hereby declare that this Doctoral Dissertation on the topic of ‘How can the ECtHR case-law on family migration be more consistent and fair?’ is my original work and I have acknowledged all sources used.

In Olomouc on the 2022

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ABBREVIATIONS

EU	European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
CFR	Charter of Fundamental Rights of the European Union
CJEU	The Court of Justice of the European Union
CRC	The United Nations Convention on the Rights of the Child
FRD	Council Directive 2003/86/EC on the right to family reunification
GC	General Comment
ICCPR	International Covenant on Civil and Political Rights
TCN	Third Country National
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
VCLT	1969 Vienne Convention on the Law of Treaties

1. INTRODUCTION

Family unification is one of the main routes to legal migration. Statistics show that family reasons are the most important reasons to come to the European Union (EU) for people with a valid residence permit,[1] and according to the European Migration Network, one third of all arrivals of Third Country Nationals (TCN) to Europe is due to family reasons.[2] Migrants who move primarily for family reasons form a diverse group, which can include among others people accompanying migrant workers or refugees, people reuniting with family members who have migrated previously or people forming new family units with nationals of the destination countries. Family migrants also have different types of family links with their counterparts in the destination country, as spouses, children, parents or siblings. Since family migration is one of the main legal migration routes to European States, it is crucial for both migrants and destination countries to have clear and predictable legalisation concerning family migration in place that is safeguarding human rights while controlling migration.

In response to the rapid increase in the number of asylum seekers arriving in Europe in 2015, several European States have restricted family unification rights. Some States have implemented stricter rules for family migration than others. These restrictions include high visa and application fees; substantial income thresholds to qualify; mandatory sickness insurance; no access to social benefits for substantial periods; language tests; integration tests; more restricted categories of family members eligible for admission.[3] These different rules among European States are a source to friction between some States and the EU.[4] While government imposed restrictions on immigration can reduce overall migration the restrictions can also be ineffective or counterproductive by pushing more aspiring migrants into unauthorized channels and unintentionally lead to an increase in illegal immigration flows which results in a costly and unsustainable need for greater border enforcement.[5]

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[1] Statistics from the European Commission by the end of 2019
[2] EMN, EMN Synthesis Report for the EMN Focused Study 2016, Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices (2017), 4
[3] GUILD, Elspeth, EU Citizens, Foreign Family Members and European Union Law, *European Journal of Migration and Law*, vol 21, 2019, p. 361
[4] Ibid.
[5] See SIMON, Miranda et. al., A data-driven computational model on the effects of immigration policies, *Proceedings of the National Academy of Sciences of the United States of America,* 115 (34), 2018

States have a sovereign right to control immigration, but are limited in this sovereign competence by the European Convention of Human Rights (ECHR). This means that States are able to set requirements for family unification in order to achieve public policy goals. It also means that both the right of States to control immigration and the human right to family life are qualified rights where derogations from both rights can be made. This makes the realisation of the right to family life a balancing exercise in which the human right to family life of the applicant must be weighed against the interests of the State to control immigration. This is challenging since the individual human right to family life stands in opposition to the sovereign right of States to control immigration. Even though the European Court of Human Right's (ECtHR's) case law allows the State an area of discretion the Court is not determined where to draw the line and when a State has overstepped its margin of appreciation.[6]

In cases where there is a dispute whether the State has complied with its obligations under the ECHR, i.e., whether a violation of the human right of family life has taken place, the ECtHR can examine applications from individuals and inter-State applications, lodged by a State against another State party to the Convention.[7] The Court's work has a significant impact since the judgements are binding for the member States. Therefore, it is of outmost relevance for the Court to maximise the president value of its judgements by making the case law predictable and consistent, otherwise the case law will lead to legal uncertainty for contracting parties and individuals which generates widely diverging practices by the States which could lead to an increase in illegal immigration flows.

1.1 Objectives and main research questions of the thesis

The concept of 'family' has an important place in international human rights law. The Universal Declaration of Human Rights (UDHR) describes the family as 'the natural and fundamental group of unity in society', and that it 'is entitled to protection by society and the State'.[8] The right to respect for family life can be seen as a recognised human right and has a

[6] See SPIJKERBOER, Thomas, Structural Instability: Strasbourg Case Law on Children's Family Reunion, *European Journal of Migration and Law*, 11, 2009

[7] Article 33 and 34 ECHR

[8] Universal Declaration of Human Rights, GA Res. 217 A 9III), UN Doc. A/810, Art. 16 (3)

prominent position in many international instruments.[9] Due to the wide recognition of the right, it can be assumed that States may not arbitrarily interfere in family life.[10] However, there is no instrument or provision in international human rights law that protects the right of family members to live together in one State. Yet, asylum seekers and migrants continue to settle in EU Member States and Council of Europe member States and the human right to respect for family life is therefore playing a crucial role for national and supranational judicial examination in this area. Family decisions about where to live and when and whether to reunite are often determined by migration status and migration control.[11]

Migrants right to enter and reside on the territory of the EU Member States based on family ties has been developed through different EU regulations. In order to know under what regulation the immigrant falls the family member's status has to be clarified. To bring a situation within the scope of EU law it requires a transnational element to activate the free movement provisions, or according to the Court of Justice of the European Union (CJEU) case-law, "*establishing an interference with the genuine enjoyment of the substance of the rights of EU Citizenship*".[12] Family unity for migrant EU Citizens is a *right* and in the CJEU case-law the Court has recognized various TCN family members of EU Citizens an EU right to reside.[13] The residence rights are rationalized as necessary to avoid barriers to free movement for the EU Citizens, which require that the EU Citizen be able to live a 'normal family life'. In most cases concerning family migration the CJEU refers to both Article 7[14] of the Charter of Fundamental Rights of the EU (CFR) and Article 8[15] of the ECHR and its interpretation by the ECtHR.

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[9] See for instance Art 12 UDHR, Art 17 International Covenant on Civil and Political Rights (ICCPR), Article 16 (1) The United Nations Convention on the Rights of the Child (CRC) and Art 8 ECHR

[10] See Art 17(1) ICCPR, which states that "*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*" Similar protection is also provided for in Art 8 ECHR

[11] COSTELLO, Cathryn, *The Human Rights of Migrants and Refugees in European Law*, Oxford: Oxford Studies in European Law, 2016, p. 103

[12] Case C-34/09 *Gerardo Ruiz Zambrano* v. *Office national de l'emploi* (ONEM) [2011] ECR I-1177, para 45

[13] Case C-60/00 *Carpenter* [2002] ECR I-6279. Case C-413/99 *Baumbast* [2002] ECR I-7091. Case C-200/02 *Chen* [2004] ECR I-9925

[14] '*Everyone has the right to respect for his or her private and family life, home and communications.*'

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

In cases where migrants can't bring their situation under the scope of EU law but are requesting an entry or requesting to regularise their irregular migration status based on their family life or when settled migrants with a right of residence is invoking their family ties in defence not to be expelled, the situation falls under national legislation. The protection of the right to respect for family life looks different in different States where different requirements for TCNs to enter and reside based on their family ties have been implemented. Although, according to the ECHR the Contracting Parties have the primary responsibility to secure the rights and freedoms defined in the Convention.[16] This also includes the right to respect for family life in Article 8 of the ECHR. Even though the ECHR is silent when it comes to immigration and the right to enter a foreign country or the right not to be expelled under certain circumstances, numerous applications brought before the ECtHR have claimed a right for a national or a lawfully established migrant in the host country to be joined by non-national family members, as well as the right for a migrant not to be expelled from the territory of the host State in defence to the family links they have established based on Article 8 of the ECHR. The ECtHR has established that as a matter of international law, States are free to determine which foreign nationals are allowed to enter and reside, but are limited in this sovereign competence by the ECHR.[17] The State has to strike a fair balance between the personal interests of the immigrant, on the one hand, and the interests of the community as a whole, on the other.

Since the ECtHR plays a subsidiary role in the protection of human rights in Council of Europe member States, it is essential that the different administrative and judicial bodies in the States have sufficient guidance in the interpretation of the rights laid down in the ECHR. However, a problem when determining compliance with Article 8 is that immigration cases under ECHR involve the interference of an international Convention in a field where the competence in principle remains to the national legislation and public authorities.[18] This makes the ECtHR having to deal with the

[16] In the Preamble of Article 1, Protocol 15, the subsidiary role the Court plays in the protection of the rights set forth in the Convention is made explicit. The Preamble reads: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'.

[17] See, among many other authorities, ECtHR *Abdulaziz, Cabales and Balkandali v. the United Kin*gdom, judgment of 28 May 1985, Application No. *9214/80; 9473/81;9474/81* para. 67; ECtHR *Boujlifa v. France*, judgment of 21 October 1997, 122/1996/741/940, para. 42

[18] MILIOS, Georgios, The Immigrants' and Refugees' Right to 'Family Life': How Relevant are the Principles Applied by the European Court of Human Rights? *International Journal on Minority and Group Rights*, 2018, p. 2

role of the human right to respect for family life in the context of immigration control, which is part of State sovereignty.

This problematic struggle can be seen in the current case-law of the Court. The case-law lacks consistency in terms of procedural and substantive protection. The application of Article 8 of the ECHR remains very much State-biased, with marginal impact on sovereign discretion.[19] Cases often turn on distinguishing facts rather than principles and the multi-factor approach produces much uncertainty.[20] Different types of immigration cases are determined differently which results in unequal level of protection under Article 8 and the case-law has shown an uneven and uncertain application of the child's best interests. The inconsistent case-law makes it difficult for national authorities to apply Article 8 which leads to widely diverging practices by the Contracting Parties and the precedent value of the Court's judgements is minimised. This widely diverging practice can also push migrants into unauthorised channels to find host States where the regulations on family migration are less strict and subsequently unintentionally lead to an increase in illegal immigration flows. In light of the inconsistent and unfair case-law and it's problematic consequences, this thesis aims at examining this topical issue which also is of utmost practical relevance.

Main research question

In this thesis the object of the inquiry is whether and how the case-law of the ECtHR on the right to respect for family life in the immigration context can be more consistent and fair among all applicants in order to give Contracting Parties and individuals more certainty and generate a more convergent practice by the States and increase the precedent value of the Court's judgements. In order to answer the research question three assumptions, which are based on the three main problematic developments within the case-law, are made in this thesis.

Assumptions

[19] DRAHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Modern Studies in European Law, Hart Publishing, UK, 2017, p. 387
[20] COSTELLO, Cathryn, *The Human Rights of Migrants and Refugees in European Law*, Oxford Studies in European Law, Oxford, UK, 2016, p. 128

The first assumption is that the case-law of the ECtHR on the right to respect for family life is inconsistent and unpredictable. Cases often turn on distinguishing facts rather than principles and the multi-factor approach produces much uncertainty.[21] Even though the ECtHR's case-law allows States an area of discretion and even if developing systematic and reasonably foreseeable principles is a difficult task due to the nature of individual circumstances particular to each case, clearer rights and more rigorous proportionality assessments could be achieved as can be seen in the context of EU law and within the case-law of the CJEU.

The second assumption is that the differentiation in the level of protection between settled migrants[22] and migrants seeking an entry or requesting to regularise their irregular migration status is not defendable and is in contrast with the ECtHR's own case-law, which establishes that similar considerations should be applied regarding positive and negative obligations that derive from Article 8.[23] In cases where migrants requesting an entry based on their family ties the Court assumes that a State is not interfering in established family life when refusing an entry. This argument is not convincing as the reasoning solely relates to circumstances concerning the immigration status and not to the family life itself. The lack of justifying the refusal in these kinds of cases is a problem and has resulted in a very high threshold for the cases to comply with Article 8 in comparison to cases where settled migrants with a right of residence is invoking their family ties in defence not to be expelled.

The third assumption is that the Court doesn't examine the full range of relevant rights in the United Nations Convention on the Rights of the Child (CRC) when applying the principle of the best interests of the child. The ECtHR's immigration case-law on Article 8 of the ECHR has shown an uneven and uncertain application of the child's best interests. Little significance is attached to the child's respect for family life when determining whether the immigration measure is compatible with the ECHR. It is also uncertain what weight the child's best interests is given in the balancing exercise which generates unpredictability.

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[21] COSTELLO, Cathryn, *The Human Rights of Migrants and Refugees in European Law* (Oxford Studies in European Law, Oxford, UK, 2016, p. 128

[22] When using the term 'settled foreign national' or 'settled migrant' the author is referring to foreign nationals with a long term lawful residence right.

[23] GEORGIOS, Milios, The Immigrants' and Refugees' Right to 'Family Life': How Relevant are the Principles Applied by the European Court of Human Rights? *International Journal on Minority and Group Rights*, 2018, p. 30

Focus

The focus of the analysis lies mostly on the ECtHR's case-law on Article 8 of the ECHR in the migration context, but also on EU regulations and CJEU case-law concerning migrants right to enter and reside on the territory based on family ties. The reason for this is that both courts are dealing with the respect for family life in the migration context. The ECtHR's use of unsound reasoning and multi-factor approach is in a contrast to the EU law's clearer rights and more rigorous proportionality assessments.[24] This is illustrated by the case law on EU Citizens' TCN family members.[25] EU Member States have harmonised their immigration policy because of the removal of border controls between the Member States to which the Schengen framework applies. Within the context of the EU, the free movement of persons is one of the fundamental freedoms of the EU. This fundamental freedom implies that in principle all EU citizens and their family members, irrespective of their citizenship, are free to move and reside within the territory of the EU. In this way, the free movement of persons includes a right to respect for family life for those EU citizens who do make use of their right to the free movement of persons. Also, TCNs who lawfully reside in one of the member States of the EU have a right to family reunification based on Directive 2003/86/EC on the right to family reunification (FRD) subject to the requirements laid down in this Directive. A creative engagement between ECtHR and CJEU may therefore offer the best way to contest inconsistency under the right circumstances. Research shows that in judgments concerned with asylum and migration policies, the cross-references to CJEU case-law indicate that the ECtHR leans on the CJEU in a legal domain for which that Court has more expertise.[26] The ECtHR interprets the Convention in the awareness that the CJEU refers to the ECHR and the ECtHR's case-law as the principal sources of its human rights jurisprudence.[27] Knowing that its case law will serve as the EU's constitutional human rights standard in

[24] For an explanation of the three-part test of proportionality as it has been developed by for instance the CJEU see chapter 2.2.4. See also GERARDS, Janneke, *How to improve the necessity test of the European Court of Human Rights*, Oxford University Press and New York University School of Law, 2013, p. 469 and COSTELLO, Cathryn, *The Human Rights of Migrants and Refugees in European Law*, Oxford Studies in European Law, Oxford, UK, 2016, p. 169

[25] See C-578/08 *Rhimou Chakroun v. Minister van Buitenlandse Zaken* [2010] ECR-I-01839.

[26] FRESE, A., PALMER OLSEN, H, 'Spelling It Out−Convergence and Divergence in the Judicial Dialogue between CJEU and ECtHR', *Nordic Journal of International Law,* 88, 2019, p. 450.

[27] See among many cases from the CJEU case law, ECJ judgment of 16 June 2005, Case C–105/03, *Pupino* [2005] ECR I-5285, para 60

immigration cases could therefore motivate the ECtHR to tighten its control intensity and pay less attention to the Contracting Parties' margin of appreciation.[28]

Another part of the focus will be put on the CRC. This is due to the fact that the CRC is signed and ratified by all EU Member States and all Council of European States and the case-law of the ECtHR and the legal and policy development at the EU level are influenced by the CRC. Article 16 (1) [29] in the CRC corresponds with Article 8 in ECHR and Article 7 in CFR and is only one of many rights relating to the concept of family unity in the CRC.[30] Hence, family unity can be seen as an established norm in the CRC and family unity should therefore be the default position in family migration cases concerning children.[31] Article 3 (1) of the CRC, which states that the signatory states must make the best interests of the child a primary consideration in all actions concerning children, is repeated both in Article 24(3) of the CFR and in Article 5(5) Council Directive 2003/86/EC on the right to family reunification (FRD). The best interests of the child does not appear in the text of the ECHR. Still, the ECtHR is adopting the best interests of the child principle within its decisions with respect to Article 8 of the ECHR in the immigration context. Thus, it can't be denied that within the context of family migration, children's rights are of great importance.

Aims

The objective of this study is to find out whether and how the ECtHR's case-law can be more consistent and fair when determining compliance with Article 8 of the ECHR in the immigration context. The first aim of the study is to determine whether the inconsistent case law can be helped by the influence of EU regulations and the CJEU case-law. The second aim of the study is to find out whether the unequal level of protection in different migration cases can be reduced by determining all cases under the same test and distinguishing cases based on family matters instead of migration status. The third aim of the study is to clarify whether the application of the best

[28] See THYM, Daniel, Respect for private and family life under Article 8 ECHR in immigration cases: A human right to regularize illegal stay? *International and Comparative Law Quarterly*, vol. 57, 2008, p. 111

[29] *1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*

[30] See for instance CRC Articles 7(1), 8(1), 9, 10(1), 18(1) and 22(2)

[31] Committee on the Rights of the Child, 'General Comment No. 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration' UN Doc CRC/C/GC/14 (29 May 2013) Supra note 61, para 66

interests of the child can be more certain and predictable by examining the full range of relevant rights in the CRC and by providing guidance on which factors it would weigh more heavily in the balancing exercise.

Since the ECtHR plays a subsidiary role in the protection of human rights in Council of Europe member States, it is essential that the different administrative and judicial bodies in the contracting States have sufficient guidance in the interpretation of the rights laid down in the ECHR. Therefore, this study aims to contribute a practical impact on an unfolding situation where the inconsistent case-law leads to legal uncertainty for contracting parties and individuals which generates widely diverging practices by the States which minimises the precedent value of the Court's judgements.

1.2 Structure and sub questions

In order to answer the main research question and investigate whether the tree assumptions made in the thesis can be answered, an explanation of the ECtHR's case law on family migration is required where the Court's application of Article 8 will be clarified. To better understand the Court's application of Article 8 in the migration context and its use of unsound reasoning and multi-factor approach in comparison to the EU law's clearer rights and more rigorous proportionality assessments, a short introduction of the ECHR's background and it's principles of interpretation are outlined as well as EU regulations and the CJEU case-law concerning migrants right to enter and reside on the territory based on family ties. In this context an overview of the CRC and the best interests of the child's principle will be given. This is to highlight the importance of giving the child's best interests a primary consideration in cases concerning family migrations.

In connection with the described legal framework protecting the right to family life under the ECHR, EU law and CRC, the thesis will outline and analyse the effects and possible causes for the three assumptions, i.e., the three problematic developments in focus of this study, namely the Court's inconsistency when applying Article 8, the Court's unequal treatment of different immigration cases and the uncertain application of the child's best interests by the Court. This analyse brings the study to the next part of the thesis which will inquire whether there are any possible solutions for these problematic developments. Based on the outcome of this part, the

thesis will be able to answer the main research question of the thesis, whether and how the case-law of the ECtHR on the right to respect for family life in the immigration context can be more consistent and fair among applicants.

In chapter 2 of this thesis the legal framework of the ECHR, EU law and regulations as well as the CRC in the context of family migration will be explained.

In chapter 2.1 the background of the ECHR and the Court's application of different approaches, such as the living instrument approach and margin of appreciation and the concept of autonomous meaning which has formed the Court's current case law will be explained.

In chapter 2.2 an explanation of the Court's application of Article 8 in the migration context will be outlined. The Court's current application of different tests for different immigration cases in order to determine compliance with Article 8 of the ECHR is clarified.

Chapter 2.3 of this thesis analyzes EU regulations and the CJEU case-law in the context of migrants right to enter and reside on the territory based on family ties to EU citizens. This chapter includes an analyse of the free movement of persons, the Zambrano ruling of the CJEU as well as the CJEU case law in general when it comes to family migration. An explanation of the use of the three part test of proportionality will be outlined.

Chapter 2.4 explains the application of the CRC in cases concerning family migration. The focus will be put on Article 3 (1), where identifying the best interests of the child and the weight put on the best interests of the child will be defined.

Chapter 3 of this thesis is outlining the three main assumptions of the study and analysing the effects and possible causes for these statements.

Chapter 3.1 analyses possible causes to why the case-law is inconsistent. The chapter presents the current case-law of the Court and different causes for the inconsistency, such as the margin of appreciation given to States, and the way the ECtHR uses the proportionality test as well the fact that the Court is struggling to deal with the role of the human right to respect for family life in the context of immigration control, which is part of State sovereignty.

Chapter 3.2 is focusing on the second assumption, that the unequal level of protection for different immigration cases is unfair. The chapter examines how the different tests used by the Court when determining compliance with Article 8 causes problems. More specific, how the unequal treatment of different cases is contradicting the Court's own caselaw, how the lack of justifying refusals as well as the marginalisation of insiders rights are problematic when determining compliance with Article 8.

Chapter 3.3 is devoted to analyse the third assumption that the Court doesn't examine the full range of relevant rights in the CRC when applying the principle of the best interests of the child and that the Court is inconsistent when weighing the child's interests against other interests.

Chapter 4 of this thesis aims to inquire whether there are any possible solutions for the assumptions made in chapter 3. As stated above the objective of this thesis is whether and how the case-law of the ECtHR on the right to respect for family life in the immigration context can be more consistent and fair among applicants.

Chapter 4.1 aims to answer the question whether the inconsistent case law can be improved by the influence of EU law and regulations and CJEU case-law. In this chapter the research question is whether the use of the three part test of proportionality could make the case law more consistent and whether more focus on the individual and more engagement between the ECtHR and the CJEU would be possible solutions for a more consistent case law.

Chapter 4.2 is seeking to find out whether the same tests for different immigration cases would improve the unfair treatment. The research question is whether the justification of refusals can change the unfair treatment and whether paying more attention to insiders interests and seeing migration cases as cases concerning family matters and not only as immigration cases can improve the unfair treatment.

In chapter 4.3 the research will investigate whether the Court's application of the best interests of the child can be less arbitrary by providing guidance on which factors it would weigh more heavily in the balance when applying the best interests principle.

Chapter 5, which is the concluding chapter of the thesis, offers an overview of the outcomes stated in chapter 4. By concluding and summarising the answers to all three assumptions the thesis will be able to answer the main research question whether and how the case-law of the ECtHR on the right to respect for family life in the immigration context can be more consistent and fair to all applicants in order to give Contracting Parties and individuals more certainty and generate a more convergent practice by the States and increase the precedent value of the Court's judgements.

1.3 Scope and methodology

In this thesis the right to respect for family life under Article 8 of ECHR is the topic of analysis. The right to respect for private life, home and correspondence, which are the other interests identified under Article 8 of the ECHR, fall outside the scope of this study. The reasons for not focusing on the other interests protected by the Article are because only when it comes to settled migrants will the Court consider whether the expulsion constitutes an interference with his or her right to respect for private life, regardless of the existence of a 'family life'.[32] Additionally, the three main problematic developments in focus of this thesis are mainly shown in cases concerning migrants requesting an entry or migrants requesting to regularise their irregular migration status based on their family life. In these kind of cases the interference with the right to respect for private life won't come into question.[33] Therefore, the focus of the paper will mainly be on these kind of cases, and the expulsion of settled migrants will mostly be included for the purpose of comparing them with cases concerning migrants requesting an entry or migrants requesting to regularise their irregular migration status based on their family life and explaining the different treatment. Moreover, the thesis will only focus on the right to respect for family life in the context of immigration and the ECtHR's application of this human right. The definition of family life is not at issue in this study. In all cases referred to, family life has been established.

The choice has been made to concentrate on three problematic developments, namely the Court's inconsistency when applying Article 8, the Court's unequal treatment of different immigration cases and the uncertain application of the child's best interests by the Court. All other issues related

[32] See ECtHR *Maslov and Others v. Austria*, Judgement of 23 June 2008 , Application No. 1638/03, para 63.
[33] For an explanation on the application of the right to respect for private life see Council of Europe, Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence, Updated on 31 August 2020, para 68 ff.

to the right to respect for family life in the context of immigration fall outside the scope of this thesis. One reason for focusing on these specific topics is that according to the Court's case-law and scholarly literature, these issues seem to be the most important reasons for the problematic development of the Court's case-law on family migration. Nevertheless, it won't be feasible to include other possible issues concerning family migration within this study.

When comparing the ECtHR's case-law with EU law and CJEU case-law the choice has been made to only focus on family migration of TCN family members of insiders who are EU citizens. The reason for only focusing on TCN family members of insiders who are EU citizens is twofold. Firstly, to include all insiders and the different EU instruments regulating family unification would not be feasible within this thesis. Secondly, TCN family members of EU citizens are provided with greater protection under EU law compared to TCN family members of EU citizens protected under the ECHR. Therefore, cases where TCN family members of EU citizens can bring their case within the scope of EU law in comparison with cases where TCN family members can't bring their case within the scope of EU law are very interesting and relevant for the research question.

Legal method for conducting this study is based on traditional doctrinal procedures, using especially descriptive and analytical method when looking at the research question while using comparative method. The comparative approach includes identification and description of similarities and differences when it comes to the application of the human right to family life within the ECtHR's and the CJEU's case-law. The research has be conducted by scrutinising legal rules found in primary sources such as statutes, regulations and cases, in addition to a review of scholarly literature. Legal issues and problematic developments have been identified and an analyse of the issues has been conducted and put in context in order to come to a conclusion. By conducting this analysis, the study has be able to address the challenges in the ECtHR's case law in ensuring a consistent and fair practice by the States and suggest possible improvements which subsequently can be used as tools for developments in the field.

2. THE PROTECTION OF THE RIGHT TO FAMILY LIFE UNDER THE ECHR, EU LAW AND CRC

In order to analyse and scrutinize the problems and possible causes for the Court's inconsistent and unfair case-law, which will be dealt with in chapter 3 of the thesis, this part of the thesis is meant to be explanatory. It will describe the legal framework protecting the right to family life under the ECHR, EU law and CRC. To better understand the Court's application of Article 8 of the ECHR, a short introduction to the ECHR and it's principles of interpretation will be outlined. The Court's determination of States negative and positive obligations under Article 8 of the ECHR will then be explained. In order to research whether the influence of EU law and the CJEU case-law can improve the ECtHR's inconsistent case-law, which will be dealt with in chapter 4 of the thesis, this chapter explains the EU regulations and the CJEU case law concerning migrants right to enter and reside on the EU territory based on family ties to EU citizens. Since many cases concerning family immigration involve children and all Council of Europe member States and EU member States have ratified the CRC and are bound by international law, this chapter is also giving a short introduction to the CRC and explaining the application of the best interests of the child, which should be a primary consideration in all cases concerning children.

2.1 The ECHR

The ECHR was opened for signature in Rome on 4 November 1950 and entered into force on 3 September 1953. It was the first instrument to make several of the rights stated in the UDHR binding. The Convention is the cornerstone of the human rights organisation, Council of Europe. All member States of the organisation have to sign and ratify the ECHR. Today 47 Council of Europe member States, which include all 27 EU member States, have signed up to the ECHR, which is designed to protect human rights, democracy and the rule of law. The Convention lays down absolute rights which cannot be breached by the States, such as the right to life or the prohibition of torture. It also protects certain rights and freedoms which can only be restricted by law when necessary in a democratic society, for instance the right to respect for private and family life. The ECtHR is the judicial organ of the Council of Europe and oversees the implementation of the Convention in the member States. The Court examines applications from individuals and

inter-State applications, lodged by a State against another State party to the Convention.[34] The member States have the primary responsibility to protect the rights and freedoms laid down in the Convention.[35] It is their responsibility to incorporate these rights in their domestic legal systems. The ECtHR plays a subsidiary role in protecting the rights. The supranational Court will only intervene when the domestic authorities fail to sufficiently protect the rights and freedoms laid down in the Convention. However, in order for the Court to intervene, the applicant has to exhaust all domestic legal remedies against a violation of the Convention before applying to the ECtHR.[36] The Court's work has a significant impact since the judgements are binding for the member States. Thus, a State which is found to have committed a violation of the Convention will be required to provide redress for the damage caused for the applicant. The State also has to make sure that no similar violations occurs in the future which can result in amending their legislation or practice to bring them into line with the Convention. Thus, a single judgement by the ECtHR may have an impact on the whole population of a State. Therefore, in order for the States to apply the case law in a correct way it is of great importance that the Court's judgement are consistent, predictable and transparent.

2.1.1 The ECtHR's interpretation of the ECHR

When the ECtHR is interpreting the Convention it is subject to the rules of interpretation of treaties set out in Articles 31-33 of the 1969 Vienne Convention on the Law of Treaties (VCLT). However, there are few references to the VCLT Article 31-32 in the ECtHR's case law. The Golder case[37] is the most important case regarding the discussion on the VCLT and the relevant rules of interpretation. It is also the first major case in its early years where the old Court had to take a stance on what should be the general theory of interpreting the Convention and the relevance of textualism and intentionalism. In the *Golder* case the Court referred to Articles 31–33 of the VCLT and held that, though not in force at the time, these Articles expressed general principles of international law which it had to take into account. It remarked that *"[i]n the way in which it is presented in the 'general rule' in Article 3l of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same*

[34] Article 33 and 34 ECHR
[35] See for example ECtHR *Markovic and others v Italy,* Judgement of 14 December 2006, Application No. 1398/03
[36] Article 35 (1) ECHR
[37] ECtHR *Golder v. The United Kingdom*, Judgement of 21 February 1975, Application No. 4451/70

footing the various elements enumerated in the four paragraphs of the Article".[38] The *Golder* case was regarding unenumerated rights, rights which are not expressly mentioned in the text of the Convention but which it is proposed should nevertheless be 'read into' it. The unenumerated right in Golder was that of access to court under Article 6 ECHR. The applicant, a prisoner serving his sentence, had been denied permission to consult a solicitor with a view to instituting libel proceedings against a prison officer. Interpretation was based on "the very terms" of article 6 (1) right to fair trial. The Courts line of reasoning:

(1) In interpretation, one should look at the object and purpose of the law.
(2) The object and purpose of the ECHR is to promote the rule of law.
(3) One can scarcely conceive of the rule of law in civil matters without right of access to court.
(4) The right of access to court is inherent in the right to fair trial under article 6 ECHR.
(5) The ECHR protects the right of access to court.

The Court followed this reasoning without feeling the need to resort to supplementary means of interpretation such as the preparatory works. It felt confident that 'the object and purpose' of the ECHR contains the ideal of the rule of law which leaves no ambiguity which triggers resort to supplementary means under Article 32 VCLT as to whether it contains a right of access to court. The Court's use of the VCLT in the *Golder* case initiated the Court's rejection of originalism (in both the textualist and the intentionalist strands) and paved the way for the development of interpretative principles such as living instrument, margin of appreciation and autonomous concepts which play an important part of the ECtHR's case-law on family migration.

2.1.1.1 Living Instrument

The living instrument approach means the Convention is a 'living instrument' which must be interpreted in the light of present-day conditions rather than what the drafters thought back in 1950. In the *Tryer* case[39] the Court had to decide whether judicial corporal punishment of juveniles amounted to degrading punishment within the meaning of Article 3 of the Convention. The punishment, having the form of bare-skin birching carried out by a policeman at a police station.

[38] ECtHR *Golder v. The United Kingdom*, Judgement of 21 February 1975, Application No. 4451/70, para 30.
[39] ECtHR *Tyrer v. United Kingdom*, Judgement of 15 March 1978, Application No. 5856/72

The Court drew a stark contrast here between what public opinion thinks about birching and what is the real character of this punishment and added: *The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.*[40] The Court based its decision directly on substantive considerations. It held that the very nature of judicial corporal is that it involves one human being inflicting physical violence on another human and that it is an institutionalized assault on a person's dignity and physical integrity, which is precisely what Article 3 of the Convention aims to protect. In *Marckx*,[41]'living instrument' meant, above all, keeping in pace with evolving European attitudes and beliefs, rather than with some specific legislation to be found in the majority of Member States.[42] For the Court it is not sufficient that there has been a change in attitudes amongst contracting States since the drafting; for the change to affect the interpretation of an ECHR right the change must constitute an improvement, moving closer to the truth of the substantive protected right.[43] The ECtHR case law suggest that the Court is primarily interested in evolution towards the moral truth of the ECHR rights, not in evolution towards some commonly accepted standard, regardless of its content. Therefore, in terms of the migratory influx towards European States and the different measurements and requirements States are implementing regarding TCNs right to enter and reside based on their family ties, it is of great importance to know where the ECHR, as a living instrument, stands in this regard. The study will be focusing on this challenge in subchapter 3.1.2.3 where the Court's struggle to deal with the role of the human right to respect for family life in the context of immigration control is discussed.

2.1.1.2 Margin of appreciation

The term 'margin of appreciation' refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the ECHR. Given the diverse cultural and legal traditions embraced by each Contracting State, it was difficult

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[40] ECtHR *Tyrer v. United Kingdom*, Judgement of 15 March 1978, Application No. 5856/72, para 31

[41] ECtHR *Marckx v. Belgium*, Judgement of 13 June 1979, Application No. 6833/74

[42] LETSAS, George, Strasbourg's Interpretive Ethics: Lessons for the International Lawyer, *The European Journal of International Law*, Vol 21 no. 3, 2010, p 530

[43] Ibid. p. 531.

to identify uniform European standards of human rights. The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and the Contracting States and enables the Court to balance the sovereignty of States with their obligations under the Convention.[44] The Court has chosen to allow Contracting States a margin of appreciation to determine whether or not a particular limitation is proportionate to the legitimate aim pursued in the specific circumstances of a case, and thus whether or not a particular limitation amounts to a violation or not.[45] In a large number of cases, mainly under the qualified rights of the Convention (Articles 8-11 ECHR) the Court has granted a margin of appreciation on the ground that no consensus exists amongst contracting states on whether the applicant is entitled to the right she claims to have under the ECHR.[46] The margin of appreciation granted by the Court is not always equally extensive or wide. In the words of the Court: 'the scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background'.[47] The more extensive the margin of appreciation, the lower the level of scrutiny and thus the lower the actual protection offered by the ECtHR. The margin of appreciation has given rise to a lot of criticism, especially when determining compliance with Article 8 in the migration context. The proportionality assessment, that normally requires a balancing of the interference with the individuals rights and the States interest, is claimed to be distorted by the margin of appreciation in ECtHR case law and it does not reflect a clear proportionality standard due to the multi factor balancing approach.[48] As George Letsas puts it *"Properly analysed, the doctrine of the margin of appreciation is at best redundant and at worst a danger to the liberal-egalitarian values which underlie human rights."*[49] The margin of appreciation and the problematic use of the proportionality assessment will be dealt with in subchapter 3.1.2.1 and 3.1.2.2 of the thesis.

[44] FENWICK, Helen, *Civil Liberties and Human Rights,* Cavendish Publishing Limited, London, 2005, p. 34-37
[45] HENRARD, Kristin, A Critical Analysis of the Margin of Appreciation Doctrine of the ECtHR, with Special Attention to Rights of a Traditional Way of Life and a Healthy Environment: A Call for an Alternative Model of International Supervision, The Yearbook of Polar Law IV, 2012
[46] LETSAS, George, Strasbourg's Interpretative Ethic: Lessons for the International Lawyer, *The European Journal of International Law*, Vol. 21. 3, 2010, p. 531
[47] ECtHR *Rasmussen v. Denmark*, Judgement of 28 November 1984, Application No. 8777/79 para. 40
[48] See COSTELLO, Cathryn, *The Human Rights of Migrants and Refugees in European Law* (Oxford Studies in European Law, Oxford, UK, 2016, p. 169
[49] LETSAS, George, Strasbourg's Interpretative Ethic: Lessons for the International Lawyer, *The European Journal of International Law*, Vol. 21. 3, 2010, p. 531

2.1.1.3 Theory of autonomous concepts

It is accepted in jurisprudence that the plain meaning of treaty provisions has to be considered as their autonomous meaning, that is their meaning as part of the relevant treaty arrangement and not, for instance, the same meaning as the relevant word would possess under the national law of the State-party. Broadly speaking, the concept of autonomous meaning could be the implication of the need to understand words in the light of the context or the object and purpose of the treaty. This means that the meaning attached to a word or phrase is the one serving the rationale of the treaty. Autonomous meaning signifies the meaning of a phrase or provision treaty which is independent of what the same phrase or provision may mean in another context, and in this respect it is an expression of the plain meaning approach. The autonomous meaning with its independence from domestic law may be necessary to avoid auto-interpretation which can take place because the State can always change its law. The doctrine of autonomous meaning has been developed to an important extent to prevent treaty obligations from being influenced in their content by the legal position under the national law of the State. The ECtHR's case-law on autonomous concepts started with the case *Engel v. the Netherlands*.[50] In *Engel v. the Netherlands*, it was wrong to classify criminal offences as not covering military offences. The Court instead chose to understand its interpretive task as being more about whether respondent States have honoured the spirit of the obligations under the ECHR and less about the meaning of words found in the Convention. Ever since the *Engel* case, the Court has developed the theory of autonomous concepts to make it a significant doctrine of its jurisprudence. In its most recent decisions, almost 30 years after *Engel*, the Court qualified autonomous concepts as those the '*definition [of which] in national law has only relative value and constitutes no more than a starting point', and which 'must be interpreted as having an autonomous meaning in the context of the Convention and not on the basis of their meaning in domestic law'*.[51] Finally, the VCLT is now mainly invoked by the Court when it takes into account other treaties or instruments of international law, or general principles of international law, citing Article 31(3) VCLT. The Court's position here is that the interpretation of the ECHR does not take place 'in a vacuum' and that the ECHR must be

[50] ECtHR *Engel and Others v. the Netherlands*, Judgement of 23 November 1976, Application No. 5100/71-5102/71, 5354/72, 5370/72

[51] LETSAS, George, Strasbourg's Interpretative Ethic: Lessons for the International Lawyer, *The European Journal of International Law*, Vol. 21. 3, 2010, p. 525

interpreted 'according to other parts of international law of which it forms part'.[52] Therefore, EU law as well as the CRC have to be considered when interpreting the ECHR.

2.1.2 The ECHR in the field of immigration law

The ECHR is silent when it comes to the right to enter a foreign country or the right not to be expelled under certain circumstances. There is also no textual indication that the drafters considered the applicability of ECHR provisions in the field of immigration law. Thym has noted that the silence on immigration reflects the original choice of the Contracting States to regulate migration flows without a supranational human rights structure.[53] The absence of reference to immigration appears to be a deliberate choice according to the travaux préparatoires.[54] However, the States' activity has to conform to the principles of the Convention which itself contains entrenched safeguards for the sovereign rights of States. It is important to note that Article 1 of the ECHR requires States to guarantee the rights enshrined in the Convention not only to their own citizens, but to everyone within their jurisdiction. In principle, that means that even unlawfully present migrants are protected by the Convention and thus, entitled to respect for their family life which is the focus of this thesis. Article 8 of the ECHR encompasses the right to respect for private, family life, home and correspondence and is a qualified right which means that it is not absolute and an interference of the right can under certain circumstances be justified.

2.1.3 Article 8 of the ECHR and the ECtHR's determination of States' obligations

Even though the ECHR lacks reference to immigration, numerous applications brought before the ECtHR have claimed a right under Article 8 of the ECHR for a national or a lawfully established migrant in the host country to be joined by non-national family members, as well as the right for a migrant not to be expelled from the territory of the host state in defence to the family links they have established.

[52] Ibid. p. 521
[53] THYM, Daniel, Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay? 57 *International and Comparative Law Quarterly*, 2008
[54] THYM, Daniel, Residence as De Facto Citizenship? Protection of Long-term Residence under Article 8 ECHR in R Rubio-Marin (ed), *Human Rights and Immigration*, Oxford, Oxford University Press, 2014, p. 108.

In order to invoke Article 8, an applicant must show that the complaint falls within at least one of the four interests identified in the Article: private life, family life, home and correspondence.[55] The Court usually follows a certain order to find out whether a State has violated Article 8. This order applied by the ECtHR has two phases. The first one concerns Article 8 (1) and the second one, the justifications of Article 8 (2). Under Article 8 (1), the Court examines whether the applicant enjoys 'family life' and whether the situation of the case requires respect from the State. Under Article 8 (2), the Court examines whether there has been an interference and if so, whether the interference is justified.

The primary purpose of Article 8 is to protect against arbitrary interference with family life by public authority. This obligation is of the classic negative kind, described by the Court as the essential object of Article 8.[56] Where the case concerns a negative obligation, the Court must assess whether the interference was consistent with the requirements of Article 8 paragraph 2, namely in accordance with the law, in pursuit of a legitimate aim, and necessary in a democratic society. This assessment is being used in cases where the Court has to decide whether the State is under a negative obligation not to expel a settled foreign national with a right to residence based on the family ties, the so called 'expulsion cases'.[57] The assessment for these cases will be explained in more detail below.

In addition to the negative obligation, States may also have a positive obligation to ensure that Article 8 rights are respected. In the case of a positive obligation, the Court considers whether the importance of the interest at stake, i.e., the right to respect for family life which is in focus in this thesis, requires the imposition of the positive obligation sought by the applicant.[58] Situations where a State might have a positive obligation can be in cases where a foreign national is seeking an entry to join the family. The current case-law shows that in these cases the State will only have a positive obligation to admit a foreign national based on family ties if the applicant can show that

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[55] As explained in the Introduction chapter this paper only focuses on the interest of family life.
[56] ECtHR *Kroon and Others v. The Netherlands*, Judgement of 27 October 1994, Application No. 18535/91, para 31
[57] See ECtHR *Boultif v. Switzerland*, Judgement of 2 August 2001, Application No. 54273/00 and ECtHR *Üner v. the Netherlands,* Judgement of 18 October 2006, Application No. 46410/99, para. 58
[58] Council of Europe, Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence, Updated on 31 August 2020, para 6

there are insurmountable obstacles to continue family life elsewhere.[59] This assessment will be explained more in detail below.

In some cases, when the applicable principles are similar, the Court does not find it necessary to determine whether the impugned domestic decision constitutes an 'interference' with the exercise of the right to respect for family life or is to be seen as one involving a failure on the part of the respondent State to comply with a positive obligation.[60] In the migration context this concern cases where foreign nationals are remaining in the host country without a right to residence.[61] According to the current case law, 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 and whether there are factors of immigration control. This assessment will also be explained more in detail below.

However, the Court's case-law states that the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are, nonetheless, similar and in both contexts the State enjoys a certain margin of appreciation.[62] Moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. 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.

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[59] ECtHR *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, para 68. This approach has been confirmed in the subsequent case law , see among others ECtHR *Gül v. Switzerland*, , Judgement of 29 February 1996, Application No. 23218/94, para 38; ECtHR *Ahmut v. The Netherlands*, Judgement of 28 November 1996, Application No. 21702/93, para 67

[60] See for instance ECtHR *Nunez v. Norway*, Judgement of 28 June 2011, Application No. 55597/09, para. 69; ECtHR *Osman v. Denmark*, Judgement of 14 June 2011, Application No. 38058/09, para. 53 and ECtHR *Konstantinov v. The Netherlands*, Judgement of 26 April 2007, Application No. 16351/03, para 47.

[61] These type of cases are labelled as 'hybrid obligation cases' by Klaassen, in Klaassen, Mark, Between facts and norms: Testing compliance with Article 8 ECHR in immigration cases, 37 (2) *Netherlands Quarterly of Human Rights* (2019) p. 164, because they cannot be considered purely positive obligation cases as the applicant has already entered and lives in the host state.

[62] ECtHR *Gül v. Switzerland*, , Judgement of 29 February 1996, Application No. 23218/94, para 38

2.1.3.1 Expulsion cases: Determination of negative obligations

The case-law of the expulsion of settled immigrants contains rather clear guidelines on how to determine whether the termination of lawful residence would lead to a violation of Article 8 of the ECHR. The test to determine whether the expulsion violates Article 8 is laid down in Article 8 (2) of the ECHR. The case law of Article 8 provides for a detailed test with individual steps to be followed. The first step is to determine whether there is in fact family life.[63] The second step determines whether there is an interference with the right to respect for family life.[64] The third step focuses on whether the interference with the right to respect for family life is in accordance with the law.[65] The fourth step states that for an interference to be justified, it must have a legitimate aim. Within the text of Article 8 (2), five legitimate aims are listed. The interference should be 'in the interests of national security, public safety or the economic wellbeing of the country', made 'for the prevention of disorder or crime' must be necessary for 'the protection of health or morals' or should be necessary 'for the protection of the rights and freedoms of others.' This list is exhaustive and in most cases, finding a legitimate aim for the interference is not difficult.[66] The fifth step states that the interference should be necessary in a democratic society. The Court accepts that an interference is necessary when the measure is proportionate to the legitimate aim pursued.

Instead of making this assessment of the individual steps in all individual cases, the Court has developed certain guidelines in its own case-law. In one of the landmark cases concerning expulsion based on a criminal conviction, the *Boultif* v. *Switzerland* case, the Court held that the following elements should be considered:

- 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;

[63] See for instance ECtHR *Al-Nashif v. Bulgaria,* Judgement of 20 June 2002, Application No. 50963/99, para 112
[64] See for instance ECtHR *Boultif* v. *Switzerland*, Judgement of 2 August 2011, Application No. 54273/00, para 37
[65] See ECtHR *Madah and others v. Bulgaria*, Judgement of 10 May 2012, Application No. 45237/08, para 95-105
[66] See for instance ECtHR *Omoregi and Others v. Norway*, Judgement of 31 July 2008, Application No. 265/07, where migration control prerogatives outweighed family life.

- the nationalities of the various persons concerned, the applicant's family situation, such as 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.[67]

In the *Üner* v. *The Netherlands* case the Court added two more elements that should be considered.

- the best interests of the 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.[68]

The Court should for instance weigh the relocation difficulties for the deportee's partner or children against the intervention for other criteria such as public safety concerns. This might tip the balance in favour of the State as in the *Üner v. The Netherlands* case where a Turkish national was expelled after being convicted of manslaughter and assault.[69] In this case the Court found that public safety outweighed the right to family life. In *Boultif v. Switzerland*, where an Algerian national was facing expulsion after being convicted of armed robbery, the Court found that the Swiss wife of the Algerian national would not have been able to follow him to Algeria since she would encounter difficulties there. The Court found that, since he only presented a limited danger to public order, the interference with his Article 8 rights was disproportionate to the aim pursued.[70]

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[67] ECtHR *Boultif v. Switzerland*, Judgement of 2 August 2011, Application No. 54273/00, para 40
[68] ECtHR *Üner v. The Netherlands*, Judgement of 18 October 2006, Application No. 46410/99, para 58
[69] Ibid.
[70] ECtHR *Boultif v. Switzerland*, Judgement of 2 August 2011, Application No. 54273/00, para 53

2.1.3.2 Admission cases: Determination of positive obligations

In cases concerning the entry of foreign nationals the Court assumes no interference with the right to respect for family life, therefore the justification test of Article 8(2) is not triggered.[71] This is based on the assertion that by refusing entry, a State is not interfering in established family life. The Court bases this distinction on the sovereign right of States to control immigration. It holds that the refusal of entry does not constitute an interference with the right to respect for family life, but that instead it must be ascertained whether the State is under a positive obligation to allow for the entry and residence of a foreign national based on the right to respect for family life. In *Gül v. Switzerland* the Court held that "*However, the boundaries between the State's positive and negative obligations under this provision (art. 8) 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 the community as a whole; and in both contexts the State enjoys a certain margin of appreciation."*[72]
The central criterion used to determine whether the State is under a positive obligation to allow entry is whether family life is possible to be exercised in the country of origin of the foreign national. This is called the 'elsewhere test'.[73] Only in a few cases the Court has found the State to have positive obligations.[74] The case-law reveals that refusal of entry is usually regarded as the acceptable default position under the elsewhere approach. However, a fair balance has to be struck between the State's and the individual's interests in admission cases as well.

2.1.3.3 Hybrid cases: Determination when there is a mix of positive and negative obligations

In cases concerning foreign nationals who are remaining in the host country without a right to residence and are aware of the uncertain residence right while developing family ties, there is a mix of positive and negative obligations.[75] In these cases where the applicant's immigration status

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[71] CONNELLY, AM., Problems of Interpretation of Article 8 of the European Convention on Human Rights, 35:3 *International and Comparative Law Quarterly* (1986) p 572
[72] ECtHR *Gül* v. *Switzerland*, Judgement of 29 February 1996, Application No. 23218/94, ECtHR, para 38
[73] The term 'elsewhere test' is borrowed from G, Milios, The Immigrants' and Refugees' Right to 'Family Life': How Relevant are the Principles Applied by the European Court of Human Rights? *International Journal on Minority and Group Rights* (2018) p. 13
[74] ECtHR *Sen v. Netherlands*, Judgement of 21 December 2001, Application No. 31465/96 and ECtHR *Tuqabo-Tekle v. The Netherlands*, Judgement of 1 December 2005, Application No. 60665/00
[75] These type of cases are labelled as 'hybrid obligation cases' by Klaassen, in Klaassen, Mark, Between facts and norms: Testing compliance with Article 8 ECHR in immigration cases, 37 (2) *Netherlands Quarterly of Human*

was precarious at the time of family formation, the Court does not find it necessary to determine whether the impugned domestic decision constitutes an 'interference' with the exercise of the right to respect for family life or is to be seen as one involving a failure on the part of the respondent State to comply with a positive obligation.[76] The Court has stated that only in the most exceptional circumstances will the applicant's expulsion constitute a violation of Article 8 ECHR.[77] In addition to the elsewhere test the Court uses a number of criteria to determine whether there are exceptional circumstances in the case.

In *Rodrigues da Silva & Hoogkamer*[78] the Dutch authorities refused to allow a Brazilian national to remain in the country. She had entered the Netherlands and remained unlawful without applying for a residence permit. During her illegal stay she developed family life with a Dutch national who she had a daughter with. The applicant separated from the father who gained custody over the child. Although, the child was jointly raised by the mother and the paternal grandparents while the father played a less prominent role. In this case the Court developed a test to determine whether a foreign national, who remained in the host State without a right of residence for some time, should be allowed to remain there based on Article 8. The premise underpinning this test is that where the persons involved were aware of the fact that the right of residence was precarious while developing family ties, a violation of Article 8 ECHR is only found 'in the most exceptional circumstances'. Factors used to determine whether this is the case are:

1. the extent to which family life is effectively ruptured;
2. the extent of the family ties in the host state;
3. whether there are insurmountable obstacles to the family living in the country of origin of one or more of them;
4. whether there are factors of immigration control, such as a history of breaches of immigration law;
5. whether considerations of public order are applicable; and

Rights (2019) p. 164, because they cannot be considered purely positive obligation cases as the applicant has already entered and lives in the host state.

[76] See for instance ECtHR *Nunez v. Norway*, Judgement of 28 June 2011, Application No. 55597/09, para. 69; ECtHR *Osman v. Denmark*, Judgement of 14 June 2011, Application No. 38058/09, para. 53 and ECtHR *Konstantinov v. The Netherlands*, Judgement of 26 April 2007, Application No. 16351/03, para 47

[77] See ECtHR *Rodriges da Silva and Hoogkamer v the Netherlands*, Judgement of 31 January 2006, Application No. 50435/99

[78] Ibid.

6. whether family life was created at a time when the persons involved were aware of the fact that the immigration status of one of them was precarious[79]

In *Rodrigues da Silva & Hoogkamer* the Court found it is clearly in the child's best interests for the applicant to stay in the Netherlands. It justified its conclusion based on the far-reaching consequences which an expulsion would have on the responsibilities which the applicant had as a mother, as well as on her family life with her young daughter. The Court considered that in the particular circumstances of the case the economic well-being of the country did not outweigh the applicants' rights under Article 8, despite the fact that she was residing illegally in the Netherlands at the time of the child's birth.[80]

In *Nunes v. Norway*[81] the Court used a different test to the exceptional circumstances test to determine whether there has been a violation of Article 8. In this case a Dominican woman entered Norway under false identity and was granted a work permit and later a settlement permit. After splitting up with her husband she started living with a Dominican national and they had two children together. When the authorities found out about the false identity, they revoked her permit and decided she should be expelled with a two-year re-entry ban. Around this time, she had separated from the father who gained custody over the children. The Court concluded that if Ms Nunez were expelled and prohibited from entering the country for two years, it would have an excessively negative impact on her children. The Court found the following circumstances exceptional. The children's long-lasting and strong bond to their mother, the decision granting their custody to their father, the stress they had experienced and the long time it had taken the authorities to decide to expel Ms Nunez and ban her from re-entry into the country. Therefore, the authorities had not struck a fair balance between the public interest in ensuring effective immigration control and Ms Nunez's need to remain in Norway in order to continue to have contact with her children, in violation of Article 8. In this case the Court deviates from the criteria applied in the *Hoogkamer* case and puts the best interest of the children in a special position in comparison to other considerations. You can say that the best interest of the child overrides all other criteria.

[79] Ibid, para 39
[80] Ibid, para 44
[81] ECtHR *Nunez v. Norway*, Judgement of 28 June 2011, Application No. 55597/09

This point was acknowledged by the dissenting judges Mijovic and De Gaetano who were concerned that the case would send the wrong signals, namely that persons who are illegally in a country can somehow contrive to have their residence legitimised through the expedience of marriage and of having children.[82] However, there have to be certain situations where the rights of children outweigh the public interest in ensuring the effective implementation of immigration control as was done in this case.

Antwi v. Norway[83] concerned a Ghana national who entered Norway with a false identity and established and strengthened family life while he was aware that his immigration status was based on fraud. The facts of the case are very similar to the facts in the *Nunez* case but the Court however comes to the opposite conclusion. As in *Nunez* the Court found that the breaches of immigration law weighed heavy in the balance when assessing the proportionality of the expulsion of the applicant. After that the Court assessed whether, based on the best interests of the child, an expulsion would violate Article 8. The Court held that the child in the *Antwi* case was not in a situation similar to the children in the *Nunez* case. The Court concluded that even though the child would undergo a certain amount of hardship if she were to join the father in his country of origin, admitting that this would not be beneficial to her, she did not undergo as much stress due to the disruptions of her family life as the children in the *Nunez* case. Therefore, the Court found that the expulsion of the applicant would not lead to a violation of Article 8. Even though the circumstances in the *Antwi* case and the *Nunez* case are very similar there is one striking difference. In the *Nunez* case the parents were separated which makes it difficult to expect the former partner to join the family in the country of origin, whereas in the *Antwi* case the parents were still together.

In the *Omoregie case*[84] a Nigerian asylum seeker was rejected and stayed in Norway without residence status. He got married to a Norwegian woman with whom he had a child who had Norwegian nationality. Mr Omoregie had not committed any crimes but merely breached immigration law. For the dissenting Judge Malinverni this act was purely administrative and in no sense criminal.[85] However, the Court accepted the government's argument that they should not

[82] Ibid, Dissenting opinion of Judges Milovic and De Haetano, para 1.
[83] ECtHR *Antwi v. Norway*, Judgement of 14 February 2012, Application No. 26940/10
[84] ECtHR *Omoregi and Others v. Norway*, Judgement of 31 July 2008, Application No. 265/07
[85] Ibid, dissenting opinion of judge Malinverni joined by judge Kolver, para 12.

be presented with family life as a fait accompli that overrides migration control prerogatives.[86] Further the Court did not find that the national authorities of the respondent state acted arbitrarily or otherwise transgressed their margin of appreciation when deciding to expel the applicant and to prohibit his re-entry for five years.[87] Also, in view of the applicants' immigration status the Court did not find any exceptional circumstances in the case requiring Norway to grant him a right of residence.[88]

In another hybrid case, *Jeunesse* v. *The Netherlands*,[89] the Court used four different elements compared to the criteria in *Rodrigues da Silva & Hoogkamer* and made an 'all things considered' assessment and found a violation of Article 8. The case concerned a Surinam national who remained illegal in the Netherlands after her short term visa expired 1997. She made many attempts to regularize her migration status. She married a Dutch national and they had three children who all had Dutch nationality. The family had lived together in the Netherlands for 16 years and the children had never been to Surinam. In assessing whether a fair balance had been struck between the right to family life, the Court took into account nationality, best interests of the child and the impact on family life of moving to Surinam. The Court emphasised the fact that the children and husband were of Dutch nationality. The Court further noted that the applicant held Netherlands nationality at birth. She subsequently lost her nationality when Surinam became independent. She then became a Surinamese national, not by her own choice. The Court stated that as a result her position was not on a par with that of other potential immigrants who have never held Dutch nationality.[90] It was also noted that the applicant was the care giver and that the Netherlands tolerated her presence for a long time. The Court made an all things considered assessment and found a violation of Article 8.

To sum up, the current case-law on hybrid cases, 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 and whether family

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[86] Ibid, para 64.
[87] Ibid, para 68.
[88] Ibid, para 68.
[89] ECtHR *Jeunesse* v. *The Netherlands*, Judgement of 3 October 2014, Application No. 12738/10
[90] Ibid, para 115

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. And where children are involved, their best interests must be taken into account.[91]

In conclusion, the Court does not apply a consistent approach when determining whether contracting parties have complied with Article 8. Different immigration cases are determined differently. However, one aspect is similar in all immigration cases, in each and every case the Court starts its reasoning by emphasising that as a matter of international law, States are free to determine which foreign nationals are allowed to enter and reside, but are limited in this sovereign competence by the Convention.[92] The case-law also states that in all cases a fair balance has to be struck between the State's and the individual's interests.

2.2 EU Law and Family Migration

TCNs' right to enter and reside on the territory of the EU Member States has been developed through different EU regulations. In order to know under what regulation the TCN falls, the insiders status has to be clarified. Various EU instruments create different rights for TCN to unite with family within the EU depending on what resident permit or nationality the insider has acquired.[93] As already explained in the Introduction chapter, this thesis will focus on TCN family members of EU Citizens.[94] TCN family members of EU citizens are provided with greater protection under EU law compared to TCN family members to EU citizens under the ECHR. Therefore, cases where TCN family members of EU citizens can bring their case within the scope

[91] See ECtHR *Jeunesse v. the Netherlands,* Judgement of 3 October 2014, Application No. 12738/10, para 107-109.
[92] There are some few exceptions to this principle. See for instance ECtHR *Berrehab v. The Netherlands*, Judgement of 21 June 1988, Application No. 138; ECtHR *Sen v. Netherlands*, Judgement of 21 December 2001, Application No. 31465/96 and ECtHR *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, 12 Oct 2006.
[93] For instance, the status of EU citizenship becomes a valuable recourse for families with migrant background. Family members of EU Blue Card holders are more privileged than family members to Students under the Students Directive and to Seasonal Workers under the Seasonal Workers Directive. Also, third country nationals who lawfully reside in one of the member States of the EU have a right to family reunification based on Directive 2003/86/EC on the right to family reunification (FRD) subject to the requirements laid down in this Directive.
[94] Treaty on the Functioning of the European Union (TFEU) Article 20, 21 and 45, Directive 2004/38/EC of the European Parliament and of the Council 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.

of EU law in comparison with cases where TCN family members can't bring their case within the scope of EU law are very interesting and relevant for the research question.

2.2.1 Free movement of persons

In order for EU Citizens to bring their situation within the scope of EU law it requires a transnational element to activate the free movement provisions,[95] or according to the *Zambrano* case,[96] "establishing an interference with the genuine enjoyment of the substance of the rights of EU Citizenship".[97] Family reunification for migrant EU Citizens is a *right* and in *Carpenter*[98], *Baumbast*[99] and *Chen*[100] the CJEU recognized various TCN family members of EU Citizens an EU right to reside. The residence rights were rationalized as necessary to avoid barriers to free movement for the EU Citizens, which required that the EU Citizen be able to live a 'normal family life'.

Carpenter was one of the first cases where CJEU concluded that the right to family life was violated. In this case, where the deportation of the applicant, who had a family life in the UK and cared for her husband's children from a previous marriage, could not be regarded as proportionate to the objective pursued by this measure. Article 8 ECHR was used as an argument to support the right of residence. The Court held that the decision to deport Mrs Carpenter does not strike a fair balance between the competing interests. Even though Mrs Carpenter has infringed the immigration laws of the UK by not leaving the country prior to the expiry of her leave to remain as a visitor, her conduct 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. Moreover, the CJEU finds it clear that Mr and Mrs Carpenters marriage is genuine and that Mrs Carpenter continues to lead a true family life in the UK, in particular by looking after her husband's children. Due to those circumstances, the decision to deport Mrs Carpenter constitutes an infringement

[95] Directive 2004/38/EC of the European Parliament and of the Council 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 state[…] (Citizenship Directive) [2004] OJ L158/77.
[96] Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi* (ONEM) [2011] ECR I-1177. See chapter 2.2.2.
[97] Ibid, para 45.
[98] Case C-60/00 *Carpenter* [2002] ECR I-6279.
[99] Case C-413/99 *Baumbast* [2002] ECR I-7091.
[100] Case C-200/02 *Chen* [2004] ECR I-9925.

which is not proportionate to the objective pursued. The Court held that Article 49 (of the EC-Directive 73/148/EEC) was to be read in light of the fundamental right to respect to family life.[101]

In the *Metock* case[102] the CJEU held that there is a right for citizens of the Union who are exercising their free movement rights in a host state to be joined or accompanied by TCN family members irrespective of where they are coming from (i.e. inside or outside the EU) and of the legality of their residence in another Member State. The spouses' statuses as failed asylum seekers was irrelevant to their EU rights as TCN spouses of EU Citizens. In the *Akrich* case[103] a British-Moroccan couple tried to legalize the residence status of the Moroccan spouse. To achieve this, the couple moved to Ireland where the British spouse took up a temporary job, entitling the Moroccan partner to a residence right. When they wanted to return to the UK, they admitted that the only reason they moved to Ireland was to acquire a residence right for the Moroccan spouse on the basis of EU law. This case states that the use of free movement law to acquire the rights that are attached to it cannot be qualified as abuse, as long as the use of these rights is effective and genuine. This criterion is derived from the case-law on free movement of workers, which is laid down in Art. 45 Treaty on the Functioning of the European Union (TFEU).

In subsequent judgments of the Grand Chamber of the CJEU, the Court has further clarified the extent to which TCN who are family members of EU citizens can establish a right of residence in their EU family member's home Member State.

The *Mr. O and Mr. B* case[104] is a joint case which concerned a refusal by the Netherlands to grant a right of residence to Mr O, a Nigerian national and Mr M, a Moroccan national. They were both family members of Dutch citizens who had spent short periods with their family members in other Member States at weekends and during holidays. The Court held that Article 21 TFEU and Directive 2004/38/EC (Free Movement Directive) does not confer on TCN a derived right of residence in the home Member State of their EU citizen family member.[105] However, it also held that a refusal to allow such a derived right of residence may interfere with the EU citizen's freedom

[101] Case C-60/00 *Carpenter* [2002] ECR I-6279, para 41-45
[102] Case C-127/08 *Metock* [2008] ECR I-6241
[103] Case C-109/01 *Secretary of State for the Home Department v. Hacene Akrich* [2003] ECR I-03375
[104] Case C 456/12 *O. and B. v. Minister voor Immigratie, Integratie en Asiel*
[105] Ibid, para 36. See also Case C-40/11 *Iida* [2012] ECR, para 66, and Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* [2013] ECR, para 34

of movement under Article 21 TFEU if the period of residence in another Member State has been 'genuine', i.e. in accordance with Article 7 of the Free Movement Directive and subject to family life having been created or strengthened during that period.[106] Three months of residence in the host Member State in accordance with the conditions in Article 7 of the Free Movement Directive could then be used as a presumption of having created or strengthened family life, rather than as a precondition.[107] This interpretation is in line with the Court's wording in *O. and B.*, in which it considered that *"[r]esidence in the host Member State pursuant to and in conformity with the conditions set out in Article 7(1) of that directive [...] goes hand in hand with creating and strengthening family life in that Member State"*.[108] The Court found that short periods of residence, such as at weekends or on holidays, do not satisfy the condition set out in Article 7 (1) and (2) of the Free Movement Directive, i.e. for a period of more than three months.[109]

The *Ms. S and Ms. G* case[110] concerned a refusal by the Netherlands of TCN family members of Dutch citizens where the family had never resided in another Member State, but where the EU national travelled from the Netherlands to other Member States for work. Again the Court confirms that family members of such citizens have no derived right of residence in the home Member State under the Free Movement Directive.[111] The Court refers to *Carpenter*[112] and admits that such a right of residence should be granted where it is necessary to guarantee the EU citizen's effective exercise of free movement rights under Article 45 TFEU.[113] A circumstance in the case that may be a relevant factor to be taken into account by the referring court is that the TCN takes care of the EU citizens' children.[114]

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[106] Case C-456/12, *O. and B. v. Minister voor Immigratie, Integratie en Asiel,* para 54
[107] KROEZE, Hester, Distinguishing between use and abuse of EU free movement law: Evaluating use of the "Europe-route" for family reunification to overcome reverse discrimination, *European Papers*, vol. 3, 2018, p 1238.
[108] Case C-456/12, *O. and B. v. Minister voor Immigratie, Integratie en Asiel,* para 53
[109] Ibid. para 59
[110] Case C-457/12, *S. and G. v. Minister voor Immigratie, Integratie en Asiel*
[111] Ibid. para 34
[112] Case C-60/00 *Carpenter* [2002] ECR I-6279
[113] Case C-457/12, *S. and G. v. Minister voor Immigratie, Integratie en Asiel,* para 40.
[114] Ibid. para 43.

2.2.2 The Zambrano case-law

The cross boarder requirement in order to bring a case within the scope of EU law made the legal position of static EU citizens troublesome and was criticized among scholars.[115] The Grand Chamber ruling in *Zambrano* was a response to this criticism. The Zambrano family fled Columbia and sought asylum in Belgium. Their asylum application was refused but they were granted a precarious resident permit bases on a non-refoulement clause. They remained in Belgium and had two more children who gained Belgian nationality. In order to establish a right of residence for the father Ruiz, the children sought to assert their right as EU citizens. The CJEU held that deprivation of the father's right to reside and right to work was such as to deprive the EU Citizen children 'of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.[116] The reason for this motivation was the Court's assumption that denying the father a right to reside and work would lead to a situation where the children would have to leave the territory of the union in order to accompanying their parents.[117] In other words, the assumption seems to be that without the support of the TCN family member, the EU Citizen would be forced to leave for practical reasons, but not necessarily legal once.[118]

This was also the assumption in *Dereci*,[119] which is a joined case concerning five different TCN with family relationship with Austrian nationals resident in Austria who didn't exercise their right to freedom of movement within the EU. In this case the Court notes that '*the situation of a Union citizen...who has not made use of right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation*'.[120] The Court leaves the issue of whether the current situation falls within the scope of EU law to be determined by the referring court, in line with their evaluation of whether or not the family members of the applicants were deprived of the genuine enjoyment of the substance of the rights by the decision of the Bundesministerium.[121] *Dereci*

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[115] See SHUIBNE, N Nic, Free Movement of Persons and the Wholly Internal Rule: Time to Move On? 39 (4) *Common Market Law Review*, 2002 and SPAVENTA, E, Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects 45 (1) *Common Market Law Review*, 2008
[116] Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi* (ONEM) [2011] ECR I-1177, para 42, citing Case C-135/08 *Rottmann* [2010] ECR-I-1449, para 42.
[117] Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi* (ONEM) [2011] ECR I-1177, para 44.
[118] COSTELLO, Cathryn, The Human Rights of Migrants and Refugees in European Law, Oxford Studies in European Law, Oxford University Press, 2016, p. 136
[119] Case C-256/11 *Murat Dereci and Others v. Bundesministerium für Inneres* [2011] ECR I-11315.
[120] Ibid, para 61
[121] Ibid, para 70-72

emphasizes the 'exceptional' nature of the *Zambrano* residence right[122] and that the 'genuine enjoyment' test will be met only when the EU Citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.[123] However, *Dereci* confirms that breadth of *Zambrano* as a residual protection for residence rights and doesn't support the view in *McCarthy*[124], suggesting that the *Zambrano* ruling would only come to the assistance of minors.[125]

In order to assess whether an EU Citizen would be obliged to leave the EU territory, the CJEU introduced the concept of dependency regarding the relationships between the EU citizen and the TCN family member. In the joined *O.S and L* case[126] the Court concluded that Article 20 TFEU (Citizenship) did not preclude a Member State from refusing the TCN step-parent of a Union citizen a residence permit, provided that the refusal did not entail the denial of the genuine enjoyment of the Union citizen's enjoyment of rights. States must determine the level of dependency between the family members and this assessment needs to take into account any legal, financial or emotional ties. According to the Court, it is for the applicants to claim that such ties practically exist; however, it is the Member States' responsibility to make such inquiries in order to make a proper assessment.

In the case of *Rendón Marín*, the CJEU held that the existence of a criminal record alone is not enough to refuse a residence permit to a TCN who is the sole carer of a minor EU citizen.[127] The case concerned a Columbian national with sole custody of two minor EU citizen children born in Malaga. According to the Court, the mere fact that Mr Marin possessed a criminal record was not enough in order to be automatically refused the right to abode in Spain, as this could compel his children to leave the country and endanger their right as EU citizens to reside in the EU territory.[128] In *Chavez-Vilchez and Others* the Court made a change from its earlier judgement and highlighted Article 7 and 24 (2) and (3) of the CFR when determining the dependency between the EU Citizen

[122] Ibid, para 40
[123] Ibid, para 66
[124] Case C-434/09 *Mc Carty v. Secretary of State for the Home Department* [2011] ECR I-03375.
[125] COSTELLO, Cathryn, The Human Rights of Migrants and Refugees in European Law, Oxford Studies in European Law, Oxford University Press, 2016, p. 137.
[126] Cases C-356/11, C-357/11 *O, S v Maahanmuuttovirasto, Maahanmuuttovirasto v L* [2012] EU:C:2012:776
[127] Case C-165/14 *Alfredo Rendón Marín v Administración del Estado* [2016] EU:C:2016:675
[128] Ibid, paras 88,89

children and their TCN mothers.[129] Consequently, any assessment of whether an EU citizen has a relationship of dependency with a TCN and whether the former is in fact under risk of being deprived of his or her EU citizenship rights has to be made in accordance with Articles 7 and 24 (2) and (3) of the CFR, and in line with the corresponding provisions of the ECHR.

To conclude, there are two ways to bring a case within the scope of EU law. The first and more legally straight forward one is to move to another Member State to trigger the application of the Citizenship Directive, or otherwise come within the protection of the free movement rules. The second way of bringing a case withing the scope of EU law is meeting the rather high threshold of *Zambrano*. In order to meet the current interpretation of the 'genuine enjoyment test', this requires that the applicant can demonstrate that one would have to leave the EU territory if the family members' residence is not permitted. In order to assess whether the denial of a residence permit is depriving an EU Citizen of the genuine enjoyment of the rights conferred by virtue of the EU Citizenship status, the dependency between the TCN and the EU Citizen has to be determined. This assessment has to be made in accordance with the CFR and corresponding provisions of the ECHR. According to the CJEU case-law various TCN family members of EU Citizens have been recognized an EU right to reside. The residence rights are rationalized as necessary to avoid barriers to free movement for the EU Citizens, which require that the EU Citizen be able to live a 'normal family life'. The EU case law on family reunification shows that it is reflected by the principle of effectiveness and the increasing role of fundamental rights protection.[130]

2.2.3 The Charter of Fundamental Rights of the EU (CFR)

The CFR is an important source for the interpretation of EU family migration law. The provisions in EU regulations must be read in accordance with the relevant CFR provisions. In *Dereci* the CJEU stated that the CFR is applicable when the refusal of residence of a particular person is covered by EU law.[131] However, in cases where there are no factors linking them to EU law, the CFR is not applicable. The CFR contains several provisions relevant for the right to family

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[129] Case C-133/15 *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and others* [2017] EU: C:2017:354, para 70

[130] KROEZE, Hester, Distinguishing between use and abuse of EU free movement law: Evaluating use of the "Europe-route" for family reunification to overcome reverse discrimination, *European Papers*, vol. 3, 2018, p 1232

[131] Case C-256/11 *Dereci* [2011] ECR I-11315, para 72

life. The most relevant of the right to respect for family life is Article 7 CFR which corresponds with Article 8 ECHR. According to CJEU the interpretation of Article 7 CFR is the same as the interpretation of Article 8 (1) ECHR.[132] Article 7 CFR does not provide for the possibilities of derogations to the right as Article 8 (2) does. This doesn't necessarily mean that Article 7 CFR has a wider scope than Article 8 ECHR since Article 52 (1) CFR provides for the possibilities that there are limitations to the rights protected in the CFR which should be in accordance with the proportionality principle. Also, Article 52 (3) CFR provides that in so far as the rights from the CFR correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same. Therefore, Article 7 CFR should be interpreted as a qualified right from which derogations are allowed. However, in the context of EU law, the general principle of effectiveness and proportionality is of great importance and must be respected in the interpretation of the rights.

2.2.4 Three-part test of proportionality

As already noted, the principle of proportionality should be respected in the interpretation of the right to family life. The CJEU's application of the proportionality principle has been developed to the three-part test of proportionality.[133] The test consists of three parts; suitability, necessity and proportionality in the strict sense.[134] The suitability and necessity requirements deal with the relationship between the aims of a measure and the means or instruments that have been chosen to achieve these aims. If an interference with a right proves to be unsuitable or superfluous, either because the aims pursued cannot be achieved by it in any case, or because less intrusive means were available, there is no good reason to sustain such an interference.[135] The third requirement, proportionality in the strict sense, concerns the relationship between the interests at stake. It requires that a reasonable balance should be achieved among the interests served by the measure and the interests that are harmed by introducing it.[136] If the conditions of suitability and necessity are shown fulfilled, only then the requirement of proportionality in the strict sense will be

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[132] Case C-400/10 *McB* [2010] ECR I-8965 para 53

[133] GERARDS, Janneke, How to improve the necessity test of the European Court of Human Rights, Oxford University Press and New York University School of Law, 2013, p. 469

[134] ROCHEL, Johan, Working in tandem: Proportionality and procedural guarantees in EU immigration law, *German Law Journal,* 2019, p. 92.

[135] RÉAUME G, Denise, Limitations on Constitutional Rights: The Logic of Proportionality, *University of Oxford Legal Research Paper Series*, Paper No. 26/2009, p 25.

[136] GERARDS, Janneke, How to improve the necessity test of the European Court of Human Rights, Oxford University Press and New York University School of Law, 2013, p. 469

applied.[137] The means-ends test allows the Court to examine the justification of the reasonableness of the choice of means or instruments which forms a separate and significant component of the reasonableness of an interference with fundamental rights. The means-ends test might also reduce the difficulties linked to the balancing assessment. There would be no need to assess whether the State did strike a fair balance if the means chosen were found inadequate or unnecessary. Only when the Court finds the chosen means to be adequate and necessary to achieve the ends pursued, would there be a need for the Court to do a balancing test.[138]

2.3 Convention on the Rights of the Child (CRC)

In 1989 the CRC was adopted by the General Assembly of the UN.[139] The CRC is ratified by 196 states[140] and has become the most widely ratified human rights treaty. The Convention is intended to protect the human rights of children and contains human rights that are also present in other human rights treaties. Since all ECHR contracting states are also parties to the CRC, an interpretation of the ECHR in light of the CRC is coherent with the reference in Article 31 (3) Vienna Convention on the Law of Treaties, 1969 (VCLT), to relevant rules of international law applicable in relations between parties' as auxiliary tools for interpretation.[141] The Committee on the Rights of the Child is in charge of monitoring the implementation of the CRC and issues General Comments (GC) on the interpretation of the content of the Convention. The documents of the Committee are not legally binding but are considered to be of high authority. The State parties of the Convention are obliged to submit a report every five years on the status of the implementation of the Convention.

[137] ROCHEL, Johan, Working in tandem: Proportionality and procedural guarantees in EU immigration law, *German Law Journal*, 2019, p. 92.
[138] Ibid, p 488.
[139] Convention on the Rights of the Child was adopted 20 November 1989 and entered into force 2 September 1990, 1577 UNTS 3 (CRC)
[140] As of 14 April 2021
[141] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing 2017, p. 374

2.3.1 The best interests of the child, Article 3 CRC

The principle of the best interests of the child derives in international law from Article 3 (1) of the CRC.[142] The CRC should be interpreted in the teleological manner usually employed when interpreting an international convention and by reference to the jurisprudence of the CRC's monitoring body, the Committee on the Rights of the Child.[143] The best interests of the child is one of four leading principles in the CRC which all interrelate with each other and other provisions in the Convention.[144] The other three leading principles are Article 2, the right to non-discrimination; Article 6, the right to life and development and Article 12, the right to be heard. The best interests principle is overarching in the way that even though all rights have equal validity, no right(s) is to be interpreted in a way compromising the child's best interests.[145] Thus, the best interests concept should be understood as an umbrella provision for the rights of the child laid down in the Convention.[146] When looking at the rights in the CRC, Article 16 (1)[147] corresponds with Article 8 in ECHR. However, Article 16 (1) CRC is only one of many rights relating to the concept of family unity.[148] Hence, family unity can be seen as an established norm in the CRC.

In May 2013, the Committee on the Rights of the Child published a comment on Article 3 (1) CRC intended to accommodate the lack of common understanding of the principle.[149] The Committee has stated that the notion of the best interests of the child generally describes the well-being of persons under the age of 18 years.[150] The primary aim of this concept is to ensure the effective enjoyment by the child of all the rights enshrined in the CRC and protect the physical, mental,

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[142] CRC Art 3(1) "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*"
[143] See, Article 31 Vienna Convention on the Law of Treaties, 1969
[144] KLAVERBOER et al. The Best interests of the Child in Cases of Migration – Assessing and Determining the Best Interests of the Child in Migration Procedures, *The international Journal of Children's Rights,* 2017, Vol. 25, p 117
[145] STRØMLAND et al., In Your Best Interest – A Discussion of How Capability Approach Could be Used as a Guideline to Strengthen and Supplement the Principle of the Child's Best Interests, *The international Journal of Children's Rights*, 2019, Vol. 27, p 518
[146] KLAASSEN, Mark and RODRIGUES, Peter, The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter, *European Journal of Migration and Law*, 2017, Vol. 19, p 198
[147] *1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*
[148] See for instance CRC Articles 7(1), 8(1), 9, 10(1), 18(1) and 22(2).
[149] Committee on the Rights of the Child, 'General Comment No. 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration' UN Doc CRC/C/GC/14 (29 May 2013).
[150] Ibid, para 21

moral, psychological and social development of the child.[151] The best interests of the child should be the primary consideration in every decision concerning children when different interests are at stake; they should be utilised in favour of the child, when a legal provision is open to more than one interpretation; and they should be incorporated in every step of the policy-making and its implementation.[152]

Part V of the Committee on the Rights of the Child, 'General Comment No. 14 (GC No. 14), *Implementation: assessing and determining the child's best interests*, outlines seven elements that should be considered when a decision about the child's best interests is to be made (pp. 7ff.): (a) the child's views; (b) the child's identity; (c) preservation of the family environment and maintaining relations; (d) care, protection, and safety of the child; (e) situation of vulnerability; (f) the child's right to health, and (g) the child's right to education. However, because this principle covers all areas of a child's life, the comment also underlines that the principle remains ambiguous, and states that; *'Not all the elements will be relevant to every case, and different elements can be used in different ways in different cases. The content of each element will necessarily vary from child to child and from case to case, depending on the type of decision and the concrete circumstances, as will the importance of each element in the overall assessment*'.[153] The child's right to express its views and have them taken into account is vital in any decision-making and the child's views should be an essential element in the best interests assessment, making it less paternalistic.[154] The right of the child to be heard is laid down in Article 12 CRC. According to the Committee on the Rights of the Child, there is an intimate connection between the best interests of the child and the views of the child.[155] The Committee has also clarified that the best interests of the child should be integrated and constantly applied.[156] Consequently, the best interests of the child should also be applied in migration cases where children are effected. The term 'concerning children' should according to the Committee be given a broad application where actions which are

[151] Ibid, paras 4, 5
[152] Ibid, para 6
[153] Ibid para 80
[154] SANDBERG, Kirsten, Children's Right to Protection under the CRC. In FALCH-ERIKSEN, Asgeir, BACKE-HANSEN, Elisabeth (ed) *Human Rights in Child Protection, Implication for professional Practice and Policy*, Springer, 2018, p 32
[155] According to the General Comment No. 12 (2009), *The right of the child to be heard,* UN Doc. CRC/C/Gc/12, para 74, there can be no correct application of article 3 if the components of article 12 are not respected.
[156] See Committee on the Rights of the Child 'Consideration of reports submitted by States parties under article 44 of the Convention. Concluding Observations: Finland' (2011) CRC/C/FIN/CO/4, para 28

not only directly aimed at the child, but affect the child indirectly, for instance through the parents or legal guardians.[157]

2.4 Conclusions

This chapter is meant to be explanatory and give an understanding on how the ECHR, EU law and the CRC currently are applied by the ECtHR and CJEU for the protection of the right to family life in the migration context. The chapter shows that depending on which legal framework, the ECHR or EU law, the protection of the right to family life is dealt with differently. The way the ECtHR tests whether the State has complied with its obligations under Article 8 of the ECHR depends on the type of immigration case. In admission cases the Court holds that the refusal of entry does not constitute an interference with the right to respect for family life, but that instead it must be ascertained whether the State is under a positive obligation to allow for the entry and residence of a foreign national based on the right to respect for family life. In these cases the applicant has to show that there are obstacles to establish or continue family life in the country of origin. In some cases it is difficult to make a sharp distinction between negative and positive obligations, the so called hybrid cases. In such cases, only in the most exceptional circumstances will the applicant's expulsion constitute a violation of Article 8 of the ECHR. In the so called expulsion cases, the Court tests whether a State has a negative obligation not to expel a foreign national who is a settled migrant with a right of residence. The outlined criteria in the case-law form a solid test to determine whether the interference in the right to respect for family life of a settled foreign national is justified under Article 8 (2). In all cases a fair balance has to be struck between the competing interests of the individual and the community as a whole. This application of the right to respect for family life differs from how the cases are treated under the scope of EU law. In order for EU Citizens to bring their situation within the scope of EU law it requires a transnational element to activate the free movement provisions,[158] or according to the *Zambrano* case law,[159] "establishing an interference with the genuine enjoyment of the substance of the rights

[157] Committee on the Rights of the Children 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (2013) CRC/C/GC/14, paras 19, 20
[158] Directive 2004/38/EC of the European Parliament and of the Council 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 state[…] (Citizenship Directive) [2004] OJ L158/77
[159] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* (ONEM) [2011] ECR I-1177

of EU Citizenship".[160] Family reunification for migrant EU Citizens is a *right* and in *Carpenter*,[161] *Baumbast*[162] and *Chen*[163] the CJEU recognized various TCN family members of EU Citizens an EU right to reside. The residence rights were rationalized as necessary to avoid barriers to free movement for the EU Citizens, which required that the EU Citizen be able to live a 'normal family life'. In most cases the CJEU refers to both Article 7 of the CFR and Article 8 of the ECHR and its interpretation by the ECtHR. In the context of EU law, the general principle of effectiveness and proportionality, as it has been developed by the CJEU,[164] is of great importance and must be respected in the interpretation of the rights. Since all Council of Europe member States and EU member States have ratified the CRC and are bound by international law, the application of the best interests of the child, should be a primary consideration in all cases concerning children.

[160] Ibid, para 45
[161] Case C-60/00 *Carpenter* [2002] ECR I-6279
[162] Case C-413/99 *Baumbast* [2002] ECR I-7091
[163] Case C-200/02 *Chen* [2004] ECR I-9925
[164] GERARDS, Janneke, How to improve the necessity test of the European Court of Human Rights, Oxford University Press and New York University School of Law, 2013, p. 469.

3 CONSEQUENCES AND CAUSES FOR THE ECTHR'S INCONSISTENT AND UNFAIR CASE-LAW

Even though Article 8 ECHR has permeated the area of immigration policy, the case-law has shown a number of extremely problematic developments.[165] Some academic observers argue its application remains very much State-biased, with a marginal impact on sovereign discretion.[166] Cases often turn on distinguishing facts rather than principles and the multi-factor approach produces much uncertainty.[167] Other academics find that this uncertainty reflects a wider uncertainty about the role of the ECtHR vis-a-vis the national jurisdictions of the Contracting States.[168] The inconsistent case law and unequal protection leads to a legal uncertainty for the contracting parties and individuals which generates widely diverging practices by the States which minimises the precedent value of the Court's judgements. This chapter investigates and presents the consequences and possible causes for the assumptions made in the introduction chapter.[169] Firstly, this chapter is examining the consequences and possible causes for the assumption that the case law of the ECtHR on the right to respect for family life is inconsistent. It also scrutinizes the possible reasons for and effects of the second assumption of the thesis, that the unequal level of protection between settled migrants and migrants seeking an entry or requesting to regularise their irregular migration status is unfair and in contrast with the ECtHR's own case law. Lastly, the chapter is examining the problems and consequences related to the third assumption of the thesis, that the Court doesn't examine the full range of relevant rights in the CRC and not giving sufficient weight to the best interest of the child in the balancing exercise.

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[165] DRAGHICI, Carmen, The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty? Hart Publishing, Oxford and Portland, Oregon, 2017, p. 387

[166] *Ibid*, p. 387

[167] COSTELLO, Cathryn, *The Human Rights of Migrants and Refugees in European Law*, Oxford Studies in European Law, Oxford, UK, 2016, p. 128

[168] THYM, Daniel, Respect for private and family life under Article 8 ECHR in Immigration cases: Human Right to regularize illegal stay? 57 *International and Comparative Law Quarterly*, 2008, pp. 87-112

[169] See chapter 1.1.

3.1 The inconsistency

As can be seen in chapter 2, different legal tests are used by the Court to determine State compliance with Article 8 of the ECHR. Depending on whether the case concern a settled migrant facing expulsion, a foreign national seeking an entry or a foreign national requesting to regularise an irregular migration status, the Court uses different tests and guidelines to determine State compliance. This inconsistent application of Article 8 leads to legal uncertainty for the contracting parties and individuals which generates widely diverging practices by the States which minimises the precedent value of the Court's judgements. This subchapter points out the inconsistency that is especially shown in cases concerning admission and regularisation of irregular migration status. The chapter also explores possible causes for the Court's inconsistent application of Article 8.

3.1.1 The inconsistent case-law

The inconsistency is mostly seen in the Court's assessment of admission and hybrid cases.[170] In admission cases this is especially obvious when comparing cases where parents left their children behind in the country of origin and the children later are seeking entry to be able to exercise family life. It seems that in similar cases the Court comes to contrary decisions. In *Gül*[171] and *Ahmut*[172] the Court found no violation of Article 8 of the ECHR while in two similar cases, *Sen*[173] and *Tuquabo-Tekle,*[174] the Court came to the opposite conclusion. In some cases the Court considers the voluntary or involuntary separation between parent and children decisive and in other cases not to be decisive. In *Gül v. Switzerland* the Court held that the parent's departure was voluntary and that the father caused the separation from his son by leaving Turkey. The Court stated that the father was unable to prove to the Swiss authorities – who refused to grant him political refugee status – that he personally had been a victim of persecution in his home country. While in *Tuquabo-Tekle v. The Netherlands* where the denial of asylum to Mrs. Tuquabo-Tekle did not imply that she had no good reason to flee. In some cases the Court considers the children

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[170] See chapter 2. In cases concerning the expulsion of settled immigrants the case law of the Court contains rather clear guidelines on whether a State has a negative obligation not to expel a foreign national. Therefore, the focus is put on admission and hybrid cases.
[171] ECtHR *Gül v. Switzerland*, Judgement of 29 February 1996, Application No. 23218/94, para 38.
[172] ECtHR *Ahmut v. the Netherlands*, Judgement of 28 November 1996, Application No. 21702/93
[173] ECtHR *Sen v. Netherlands*, Judgement of 21 December 2001, Application No. 31465/96
[174] ECtHR *Tuqabo-Tekle v. the Netherlands*, Judgement of 1 December 2005, Application No. 60665/00

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born and residing in the host country and in some cases it is not even mentioned or considered.[175] Similar or comparable factors can be used in favour or not in favour of the applicant which makes the case law inconsistent. The Court doesn't draw a distinction between positive and negative obligations[176] which saves the Court from having to articulate clear principles. The Court's non-formalised attitude, where it assess the facts of each case separately, decrease the precedent value of its judgement.

In cases where foreign nationals remain in the host state without a right to residence and are aware of the uncertain residence right while developing family ties, the distinction between negative and positive obligations is unclear. In these cases the Court follows different tests and it is unclear why it does so. The case law states that only in the most exceptional circumstances will the applicant's expulsion constitute a violation of Article 8 of the ECHR.[177] However, in *Nunez v. Norway* the Court deviates from this criterion and puts the best interest of the children in a special position in comparison to other considerations. You can say that the best interest of the child overrides all other criteria. Still, in *Antwi v. Norway*, where the factors were very similar to the facts in the *Nunez* case, the Court comes to the opposite conclusion and didn't find a violation of Article 8. Here the child's best interests did not override all other criteria. When comparing the *Hoogkamer* case with the *Antwi* case one can wonder why the Court found no exceptional circumstances in the *Antwi* case when it clearly was in the best interest of the child in the *Hoogkamer* case for the mother to stay in the Netherlands. Especially since the father who was the applicant in the *Antwi* case stayed at home and assumed an important role in the daughters daily care and up-bringing while the mother was occupied with her work. Further, in *Jeunesse v. The Netherlands*,[178] the Court used four different elements compared to the criteria in *Rodrigues da Silva & Hoogkamer* and made an "all things considered" assessment and found a violation of Article 8. As can be seen the Court is not consistent in the test it uses to determine whether there is a violation of Article 8

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[175] See ECtHR *Gül v. Switzerland*, Judgement of 29 February 1996, Application No. 23218/94, where the fact that a sibling is legally residing in Switzerland is not mentioned, while in ECtHR *Sen v. Netherlands*, Judgement of 21 December 2001, Application No. 31465/96 and ECtHR *Tuqabo-Tekle v. the Netherlands*, Judgement of 1 December 2005, Application No. 60665/00, this weighs heavily in favour of the applicant.
[176] See for instance ECtHR *Gül v. Switzerland*, Judgement of 29 February 1996, Application No. 23218/94
[177] See ECtHR *Rodriges da Silva and Hoogkamer v. the Netherlands*, Judgement of 31 January 2006, Application No. 50435/99
[178] ECtHR *Jeunesse* v. *The Netherlands*, Judgement of 4 December 2012, Application No. 12738/10

in cases in which the applicant is already residing in the host State, developing family life there, but not in possession of a valid right of residence. In both admission cases and hybrid cases the proportionality assessment, that normally requires a balancing of the interference with the individuals rights and the States interest, does not reflect a clear proportionality standard due to the multi factor balancing approach.[179] Spijkerboer concludes that the case law is inconsistent on this point and argues that "*Identical or comparable factors may turn up on each side of the scale, facts are reframed so as to fits the Court's arguments*".[180]

3.1.2 Causes for the inconsistency

The analysis of the case-law shows that the Court is not consistent in how it tests compliance with Article 8 of the ECHR. In order to answer the research question of the thesis, whether and how the case law of the ECtHR on the right to respect for family life in the immigration context can be more consistent and fair among all applicants, which will be dealt with in chapter 4, this chapter analyse the possible causes for the inconsistency.

3.1.2.1 Margin of appreciation

The margin of appreciation has given rise to a lot of criticism. The margin of appreciation doctrine as developed by the Court refers to a level of discretion that it leaves to states in determining whether or not a particular limitation of a human right amounts to a violation.[181] The core of the doctrine, and the way it was traditionally used and predominantly is understood and currently used, is that the margin of appreciation is about the demarcation of the bottom line, i.e. about whether a particular limitation or interference with the enjoyment of a right amounts to a legitimate limitation or to a violation of the human right concerned.[182] It might be argued that the doctrine of the margin of appreciation is based on the assumption that States want and actually do

[179] COSTELLO, Cathryn, The Human Rights of Migrants and Refugees in European Law, Oxford Studies in European Law, Oxford University Press, 2016, p. 130.
[180] SPIJKERBOER, Thomas, Structural Instability: Strasbourg Case Law on Children's Family Reunion, European Journal of Migration and Law 11, 2009
[181] SCHOKKENBROEK, Jeroen, "The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case Law of the ECHR," *Human Rights Law Journal* 19 (1998): 31; WALDOCK, Humphrey, "The Effectiveness of the System Set Up by the European Convention on Human Rights," *Human Rights Law Journal* 1 (1980): 9
[182] HENRARD, Kristin, A Critical Analysis of the Margin of Appreciation Doctrine of the ECtHR, with Special Attention to Rights of a Traditional Way of Life and a Healthy environment: A Call for an Alternative Model of International Supervision, The Yearbook of Polar Law IV, 2012, 365-413, p 367

respect fundamental rights at all times. This is however daily challenged by information on human rights violations, also by member States of the Council of Europe, notwithstanding the fact that they are all contracting parties to the ECHR.[183] Additionally, it is not determined where to draw the line and when a State has overstepped its margin of appreciation.[184] By allowing States a margin of appreciation regarding the way in which they implement the human rights, there is a risk that the need for uniformity and that legal certainty will suffer.[185] Therefore it is essential that there is a system of international supervision that kicks in and assesses 'objectively' whether or not the national authorities have respected the 'bottom line'. The most central requirement for legitimate limitations in terms of international law, and particularly in terms of the ECHR, is the proportionality principle. The margin of appreciation doctrine is developed by the Court most prominently in relation to that principle.[186] As can be seen from the case law, the multifactor balancing approach in family migration cases does not reflect a sharply outlined proportionality standard. The proportionality assessment, that normally requires a balancing of the interference with the individuals rights and the States interest, is distorted by the margin of appreciation in the ECtHR case-law. It does not reflect a clear proportionality standard due to the multi factor balancing approach.[187] As George Letsas puts it, *"Properly analysed, the doctrine of the margin of appreciation is at best redundant and at worst a danger to the liberal-egalitarian values which underlie human rights."*[188]

3.1.2.2 The proportionality test

According to the case-law of the ECtHR there must always be a proportionate relationship between the aim pursued by the interference and the Convention right at stake.[189] However, when

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[183] Ibid p. 271

[184] SPIJKERBOER, Thomas, Structural Instability: Strasbourg Case Law on Children's Family Reunion, European Journal of Migration and Law 11, 2009

[185] HENRARD, Kristin, A Critical Analysis of the Margin of Appreciation Doctrine of the ECtHR, with Special Attention to Rights of a Traditional Way of Life and a Healthy environment: A Call for an Alternative Model of International Supervision, The Yearbook of Polar Law IV (2012): 365-413, p 37

[186] Ibid. p 368

[187] See COSTELLO, Cathryn, The Human Rights of Migrants and Refugees in European Law, Oxford Studies in European Law, Oxford University Press, 2016, p. 169

[188] LETSAS, George, Strasbourg's Interpretative Ethic: Lessons for the International Lawyer, The European Journal of International Law Vol. 21. 3, 2010, p. 531.

[189] HENRARD, Kristin, A Critical Analysis of the Margin of Appreciation Doctrine of the ECtHR, with Special Attention to Rights of a Traditional Way of Life and a Healthy Environment: A Call for an Alternative Model of International Supervision, The Yearbook of Polar Law IV, 2012, p. 365–413.

analysing the application of the test of "necessity in a democratic society" by the ECtHR, a non-transparent use of terminology is revealed and there is a tendency to confuse and mix distinct elements of judicial review.[190] It's been criticized that the Court's use of the necessary test is too vague and general and that the balancing test which is often used by the Court is complex, subjective and not transparent.[191] By making an "all things considered" assessment of the situation, which is often used, the Court avoids to clearly analysing the interference with the right and the State's justification for such an interference under Article 8 (2). This is a problem since the national authorities may only want to mirror the Court's interpretative approach if the Court's reasoning is clear and consistent. Another problem with the Court's use of the proportionality test is that the Court seems to consider migration control as a social pressing need in itself and doesn't require the States to articulate the aim of its actions clearly which weakens the proportionality assessment.[192] The State's interest in migration control infuses the Court's approach and it is assumed that refusal of entry and removal in themselves pursue legitimate aims which makes the case law unstable.[193]

3.1.2.3 The tension between human rights and immigration control

One reason for the inconsistency in the case-law could be the fact that the Court is struggling to deal with the role of the human right to respect for family life in the context of immigration control, which is part of State sovereignty.[194] The Court is dealing with the tension between a cosmopolitan and a communitarian position.[195] This can for instance be seen in the different formulations of the judgements in *Gül* and *Ahmut* on the one side and *Sen* and *Tuquable-Tekle* on the other. In the *Gül* case, the issue was whether admitting the son to Switzerland was the only way of developing family life. In *Ahmut*, the issue was whether the refusal prevented Ahmut from

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[190] GERARDS, Janneke, Judicial Deliberations in the European Court of Human Rights, in the Legitimacy of Highest Courts' rulings, N. Huls, M. Adams, J. Bomhoff, eds., The Hague: T.M.C. Asser Institute, 2008
[191] GERARDS, Janneke, How to improve the necessity test of the European Court of Human Rights, Oxford University Press and New York University School of Law, 2013, p. 471, 482
[192] COSTELLO, Cathryn, The Human Rights of Migrants and Refugees in European Law, Oxford University Press, 2016, p. 127.
[193] An example where the migration control approach has been used see ECtHR *Omoregie and others v. Norway*, Judgement of 312 July 2008, Application No. 265/07
[194] KLAASSEN, Mark, Between facts and norms: Testing compliance with Article 8 ECHR in immigration cases, 37:2 *Netherlands Quarterly of Human Rights*, 2019, p 164
[195] To read more about this argument see SPIJKERBOER, Thomas, Structural Instability: Strasbourg Case Law on Children's Family Reunion, European Journal of Migration and Law 11, 2009

having the family life with his son in the form it had when they were living in different countries. In both cases the Court comprehends State sovereignty as the starting point and looks for limitations of State sovereignty in the Convention's codification of human rights. Contrarily, in *Sen* and *Tuquablo-Tekle*, the Court enquired whether the child's move to the Netherlands was the most adequate way of developing family life and whether there was a major obstacle to move the family to Turkey and Eritrea respectively. In these cases the Court takes the rights of the family as the starting point, and looks at the Convention to find out whether the State can legitimately limit this right.[196] Spijkerboer argues that the Court is confronted with two tensions: communitarian versus cosmopolitan views on the regulation of migration, and ascending versus descending perspectives on international law and that each extreme represents a legitimate position which can be criticised from the other side. This makes the Court's case law structurally unstable.[197]

3.2 Different compliance tests for different immigration cases

In each and every case concerning migration control the ECtHR emphasises that as a matter of international law, States are free to determine which foreign nationals are allowed to enter and reside, but are limited in this sovereign competence by the ECHR.[198] The Court's principle of State sovereignty regarding migration control has become the starting point instead of one element amongst others when determining compliance with Article 8 of the ECHR. This is especially shown in cases concerning migrants who are seeking an entry to a State, the so called admission cases, or in cases where a migrant requesting to regularise their irregular migration status in order to enjoy family life, the so called hybrid cases. In admission cases the Court holds that the refusal of entry does not constitute an interference with the right to respect for family life, but that instead it must be ascertained whether the State is under a positive obligation to allow for the entry and residence of a foreign national based on the right to respect for family life. This differs from how the Court tests whether a State has a negative obligation not to expel a foreign national who is a

[196] Ibid, p. 287
[197] Ibid. p. 271
[198] See among many other authorities, ECtHR *Abdulaziz, Cabales and Balkandali v. the United Kin*gdom, judgment of 28 May 1985, Application No. *9214/80; 9473/81;9474/81* and ECtHR *Boujlifa v. France*, Judgment of 21 October 1997, 122/1996/741/940, para. 42. There are some few exceptions to this principle. See for instance ECtHR *Berrehab v. The Netherlands*, Judgement of 21 June 1988, Application No. 138; ECtHR *Sen v. Netherlands*, Judgement of 21 December 2001, Application No. 31465/96 and ECtHR *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, 12 Oct 2006.

settled migrant with a right of residence, the so called expulsion cases. Settled migrants with a right of residence enjoy a higher level of protection than foreign nationals seeking an entry or requesting to regularise their irregular migration status. The gap and differentiation in the level of protection between immigration cases have been criticized among scholars claiming it is unfair.[199] This subchapter points out why this unequal treatment is unfair and can be sees as conflicting with the Court's own case-law.

3.2.1 Conflicting with its own case-law

The Court's different approach when determining positive and negative obligations can be seen as conflicting with its own case-law, which establishes that similar considerations should be applied regarding positive and negative obligations that are derived from Article 8.[200] Even though States have been afforded a wide margin of appreciation when it comes to positive obligations, they still have to remain within its margin and respect the proportionality principle. The Court has stated that regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole in both admission cases and expulsion cases and that in both contexts the State enjoys a certain margin of appreciation.[201]

The Court has also indicated that, not only with regards to continued residence but with regards to a first entry as well, this margin of appreciation finds its limits in the core obligations implied by Article 8 of the Convention. These obligations require that a State allows for and even facilitate the development of normal family ties between settled members within the defending State's community and their foreign family members.[202] In *Sen v. Netherlands* the Court takes an explicit stand on what, in effect, family life entails. By doing so it sketches the contours of the core obligations that must be met by a State, regardless of how broad its margin of appreciation may be

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[199] See among others COSTELLO, Cathryn, The Human Rights of Migrants and Refugees in European Law, Oxford University Press, 2016; and THYM, Daniel, Respect for private and family life under Article 8 ECHR in Immigration cases: A human right to regularize illegal stay? *International and Comparative Law Quarterly*, 57, 2008

[200] MILIOS, Georgios, The Immigrants' and Refugees' Right to 'Family Life': How Relevant are the Principles Applied by the European Court of Human Rights? *International Journal on Minority and Group Rights*, 2018, p. 30

[201] ECtHR *Gül v Switzerland*, Judgement of 29 February 1996, Application No. 23218/94, para 38

[202] VAN WALSUM, Sarah, Comment on the *Sen* Case. How Wide is the Margin of Appreciation Regarding the Admission of Children for Purposes of Family Reunification? *European Journal of Migration and Law*, 4, 2003, p 520

where immigration policies are concerned.[203] Even though the *Sen* judgement remains a rather isolated and fact-specific decision[204] and the post *Sen* case law leave the parent with the option of continuing the level of contact after leaving the country of origin or continuing family life in the country of origin,[205] the Court has repeatedly stressed that the boundaries between positive and negative obligations do not lend themselves to precise definition.[206]

The *Gül v. Switzerland* case is well highlighting the difficulty in distinguishing between cases. The dissenting judge Martin's view is that the refusal of the Swiss authorities to let the son Ersin and his parents be reunited may be considered as an action from which they should have refrained, whereas it could arguably also be viewed as failing to take an action which they were required to take, namely making a reunion possible by granting the authorisation. In his opinion this illustrates that the approach of the ECtHR should be exactly the same in both a positive and negative case. Also since the case law holds that similar considerations should be applied regarding positive and negative obligations that are derived from Article 8 and in both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community, it can be assumed that it makes no material difference whether a positive or a negative obligation is at stake.[207]

The difficulty in distinguishing between cases is also shown in *I.A.A. and Others v. United Kingdom.*[208] The case concerned five Somali nationals, 4 biological siblings and an adopted sibling. Their mother left Somalia to join her second husband in 2004 in the UK, where he had been granted refugee status, leaving the applicants in the care of her sister in Somalia. In 2006 the applicants moved with their aunt from Somalia to Ethiopia. After their mother's sister returned to Somalia, leaving the applicants in the care of their older sibling, aged 16, the applicants applied for entry clearance to the UK. In this case the Court notes that in order to establish the scope of

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[203] Ibid p. 519

[204] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing, 2017, p. 349. Another isolated and fact-specific case similar to the Sen case is ECtHR *Tuqabo-Tekle* v. *The Netherlands*, Judgement of 1 December 2005, Application No. 60665/00.

[205] ECtHR *Chandra and Others v. The Netherlands*, Decision of 13 May 2003, Application No. 53102/99, ECtHR *Ramos Andrade v. The Netherlands*, Decision of 6 July 2004, Application No. 53675/00

[206] See for instance, Keegan v. Ireland, judgment of 26 May 1994, App. No. 290, para. 49

[207] See dissenting opinion of judge Martin, para 9, in ECtHR *Gül v. Switzerland*, Judgement of 29 February 1996, Application No. 23218/94

[208] ECtHR *I.A.A. and Others v. United Kingdom*, Judgement of 8 March 2016, Application No. 25960/13

the State's obligations, it has to examine the facts of the case in light of the applicable principles set out in previous case law.[209] The cases the Court is refereeing to are all cases where the State's positive obligations have been examined.[210] Therefore, it is interesting to note that the Court recognized that an interference of the right to family life had taken place for all applicants but found that the Government had struck a fair balance between the applicants' interest in developing family life in the respondent State on the one hand and the Stat's own interest in controlling immigration on the other.[211] This is contradicting since the Court confirms an interference with the right to family life but doesn't justify the refusal according to Article 8 (2). In other words, even though there has been an interference with the right the Court doesn't assess whether the interference was consistent with the requirements of Article 8 paragraph 2, namely in accordance with the law, in pursuit of a legitimate aim, and necessary in a democratic society.

Consequently, it can be argued that the widely different approach towards admission and expulsion cases made by the Court is conflicting with its own case-law.

3.2.2 The lack of justifying refusals

When determining compliance with Article 8 in admission cases the applicant has to show that there are obstacles to establish or continue family life in the country of origin. In this regard the present doctrine notably implies that the distinction between positive and negative obligation has no bearing on either the burden of proof or the standards for assessing whether a fair balance has been struck.[212] However, when putting the burden of proof on the applicant the State doesn't need to justify the exclusion of an applicant. This has resulted in a very high threshold for admission cases to comply with Article 8. The case law reveals that refusal of entry is usually regarded as the acceptable default position under the elsewhere approach and only in a few cases have the Court found the State to have positive obligations.[213]

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[209] Ibid. para 39

[210] See Ibid. para 39 where the Court is refereeing to the principles set out *in* ECtHR *Gül v. Switzerland*, Judgement of 29 February 1996, Application No. 23218/94 para 38; ECtHR *Ahmut v. the Netherlands*, Judgement of 28 November 1996, Application No. 21702/93 para 67 and ECtHR *Berisha v. Switzerland,* Judgement of 30 July 2013, Application No. 948/12, para 48

[211] Ibid. para 42

[212] See dissenting opinion of judge Martin para 9 in ECtHR *Gül v. Switzerland*, Judgement of 29 February 1996, Application No. 23218/94

[213] ECtHR *Sen v. Netherlands*, Judgement of 21 December 2001, Application No. 31465/96

Schotel argues that the problem with the refusal of admission cases is not sovereignty per se. The problem is the belief that sovereignty can account for a State's power to exclude migrants without justification.[214] He observes that in a rule-of-law perspective State powers are not conceived as unlimited; they are purpose-constrained and this principle should also apply in the immigration field. Therefore, in order for exclusion to be legitimate, the authorities must show that the exclusion is necessary to obtain the objectives of the immigration policy and that exclusion was the only and the least burdensome measure available.[215] Draghici also suggests that "*the burden of proof should thus not be on the citizen to demonstrate that they have exhausted all other jurisdictions where they could possibly relocate with their non-national partner or child, but rather on the State to put forward a cogent motivation as to why the citizen needs to leave the country in order to enjoy family life*".[216]

This said, State sovereignty should not be a problem when determining compliance with Article 8 in admission cases since according to the case-law, the margin of appreciation finds it limits in the States obligations to allow for and even facilitate the development of normal family ties. The problem is rather the lack of justifying the refusal. If there is no justification ground to why an admission case is refused the balance that has to be struck between the individual and the community is distorted. In order to make a fair balancing exercise as stated by the Court in *Gül v. Switzerland*[217] the State should explain the reasons which justify any decision to deny admission under Article 8. If there is no justification ground it is hard to prove that a fair balance has been struck between two competing interests.

3.2.3 The marginalization of insider's interests

The case-law on admission and hybrid cases shows that the Court's consideration to insiders interests in the balancing exercise is lacking. Cases concerning family migration are first

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and ECtHR *Tuqabo-Tekle v. the Netherlands*, Judgement of 1 December 2005, Application No. 60665/00

[214] SCHOTEL, Bas, *On the Right of Exclusion: Law, Ethics and Immigration Policy,* Abingdon: Routledge, 2012, 1 p 38

[215] See Schotel's argumentation in ibid

[216] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing, 2017, p. 388

[217] ECtHR *Gül v. Switzerland*, Judgement of 29 February 1996, Application No. 23218/94, para 38

and most seen as immigration cases and when balancing the individual rights against the State's interests the focus is on the migrant/outsider.[218] In *Useinov v. the Netherlands* the ECtHR stated that when States tolerate the presence of aliens in their territory while awaiting a decision on an application for a residence permit, it enables the persons concerned to take part in the host country's society and to form relationships and to create a family there. But, this does not mean that the State, as a result, is under an obligation pursuant to Article 8 of the Convention to allow the alien concerned to settle in their country. In this context the Court also drew a parallel with the situation where a person who, without complying with the regulations in force, confronts the authorities of a State with his or her presence in the country as a fait accompli. This statement is only acknowledging that immigrants develop relationships with insiders but not that insiders may develop relationships with asylum seekers.

Moreover, the Court equates being in an asylum procedure with illegal stay, and relationships developed during asylum procedures as an evasion of immigration policies.[219] In the *Useinov* case there were also no considerations or details about why there were no obstacles for the mother of the children, who was a Netherland national, to go to Macedonia. This was similar in the *Omoregie* case where a Nigerian asylum seeker was rejected and stayed in Norway without residence status. In this case it was up to the wife, who was a Norwegian national, to choose between home and family to maintain family life by following the husband to Nigeria or stay in Norway without the husband and father to the child.[220]

The *Omoregie* and *Useinov* cases are in stark contrast to the expulsion case *Boultif v. Switzerland*. The *Boultif* case concerned an Algerian national with a residence permit who was facing expulsion after being convicted for armed robbery. The Court found that the Swiss wife of the Algerian national would not have been able to follow him to Algeria since she would encounter difficulties there. The Court found that, since he only presented a limited danger to public order, the interference with his Article 8 rights was disproportionate to the aim pursued.[221] Mrs Boultif was

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[218] See ECtHR *Useinov v. Netherlands*, Judgement of 11 April 2006, Application No. 61292/00 and ECtHR *Omoregie and others v. Norway*, Judgement of 312 July 2008, Application No. 265/07

[219] HART, Betty de, Love Thy Neighbour: Family Reunification and the Rights of Insiders, *European Journal of Migration and law* 11, 2009, p. 251.

[220] ECtHR *Omoregie and others v. Norway*, Judgement of 312 July 2008, Application No. 265/07, para 66

[221] ECtHR *Boultif v. Switzerland*, Judgement of 2 August 2011, Application No. 54273/00, para 53

in a similar situation to the women in the *Omoregie* case and the *Useinov* case, although the outcome was very different. One difference was that Mr Boultif had been lawfully admitted. Although, in *Omeregie* and *Useimov*, citizen children were involved, and the husbands had not committed any crimes. Mr Omoregie had merely breached immigration law. For the dissenting Judge Malinverni in the *Omoregie* case this act was purely administrative and in no sense criminal.[222] Even though the State is allowed a wider margin of appreciation in admission cases[223] the different outcomes are not defendable.

It is also questionable whether the public interest in ensuring an effective implementation of immigration control, as stated in the *Omoregie* case, is more important to protect than the prevention of disorder or crime as referred to in the *Boultif* case. It is also interesting to note that in the *Omoregie* case the Court finds that the interference was 'necessary' within the meaning of Article 8 (2) of the Convention.[224] However, the mentioned legitimate aim, 'ensuring an effective implementation of immigration control', is not one of the legitimate aims listed under Article 8 (2). This shows the Court's inconsistency when distinguishing between positive and negative obligations in hybrid cases.

As stated above one explanation to why insiders interests are not given due consideration is that family reunification cases are first and most seen as immigration cases and when balancing the individual rights against the State's interests the focus is on the migrant/outsider. Other explanations to this development in the case law could be that the insider partners are not always one of the applicants before the Court. The applicants also tend to go on the Courts line and focus more on convincing the Court about the ties to the country of origin instead of the ties to the country of residence or citizenship.[225] Citizenship and permanent residence tend to lose some of

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[222] ECtHR *Omoregie and others v. Norway*, Judgement of 312 July 2008, Application No. 265/07, dissenting opinion of judge Malinverni joined by judge Kolver, para 12.
[223] ECtHR *Abdulaziz, Cabales and Balkandali v. the United Kin*gdom, judgment of 28 May 1985, Application No. *9214/80; 9473/81;9474/81*, para. 67.
[224] ECtHR *Omoregie and others v. Norway*, Judgement of 312 July 2008, Application No. 265/07, para 68
[225] HART, Betty de, Love Thy Neighbour: Family Reunification and the Rights of Insiders, European Journal of Migration and law 11 (2009) p. 252

their meaning if they don't include the right to establish a family life in the country in which one is living.[226]

3.3 The uncertain place of the best interests of the child

It has been highlighted that in the area of immigration law the protection offered by the ECHR to children and family life is arguably at its weakest.[227] The ECtHR's immigration case-law on Article 8 of the ECHR has shown an uneven and uncertain application of the child's best interests.[228] Little significance is attached to the child's respect for family life when determining whether the immigration measure is compatible with the ECHR.[229] Even though there is an increased attention towards the principle of the best interests of the child in immigration case-law, the ruling frequently goes very little beyond paying lip-service to the principle and often State's migration control takes priority over the child's respect for family life. This chapter examines the ECtHR's application of the principle of the best interests of the child when determining compliance with Article 8 of the ECHR in immigration cases. It explores how the Court is identifying the best interests of the child and which elements the Court takes into account. This chapter also analyses the question concerning what weight the Court apportions to the best interests of the child when balancing the State's and the applicant's interests. The assumption is that the Court does not examine the full range of relevant rights in the CRC which means it is not applying a complete, rights based approach to interpreting and applying the principle of the best interests of the child, and not giving sufficient weight to the child's best interests when balancing the State's and applicants interests.

3.3.1 ECtHR's application of the best interests of the child

The best interests of the child does not appear in the text of the ECHR. Still, the ECtHR is adopting the best interests of the child principle within its decisions with respect to Article 8 of the

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[226] WALTER, A Reverse Discrimination and Family Reunification, Nijmegen: Wolf Legal Publishers, 2008, p. 21 as referred to by HART, Betty de, Love Thy Neighbour: Family Reunification and the Rights of Insiders, European Journal of Migration and law 11, 2009, p. 251.
[227] VAN BUREN, Geraldine, *Child Rights in Europe: Convergence and Divergence in Judicial Protection*, Strasbourg Council of Europe Publishing, 2007 p. 123.
[228] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing 2017, p. 379.
[229] KILKELY, Ursula, *The Child and the European Convention of Human Rights,* Aldershot, Ashgate/Dartmouth,*1999*

ECHR in the immigration context. The jurisprudence shows that the principle is considered as part of the balancing exercise in Article 8 of the ECHR. It is interesting to note that the jurisprudence of the ECtHR with respect to the best interests of the child is based on Article 3 (1) CRC which according to the Court in *Nunez v. Norway*[230] is incorporated in Article 8 of the ECHR.[231]

However, the indirect application of the best interests of the child is problematic. The ECHR only invoke Article 3 of the CRC without any reference to the other provisions of the CRC. This shows that the way the CRC is implemented in the ECHR is incomplete from the perspective of the CRC. As explained in chapter 2, in order for the ECtHR to apply a complete, rights-based approach to interpreting and applying the principle of the best interests of the child, the full range of relevant rights in the CRC have to be examined for the situation in question. In part V of the Committee on the Rights of the Child, General Comment No. 14 (GC No. 14) the Committee outlines seven elements that should be considered when a decision about a child's best interests is to be made. Even though all the elements might not be relevant to every case the ECtHR still has to examine the full range of rights relevant for the specific case.

When determining whether it is in the best interests for the child to remain or reunite with the family in the host country or in the country of origin, the Court takes certain elements into account relevant to the situation in question.[232] In the current ECtHR's case law the Court is in general taking the child's adaptability to the country of origin or the issue of country ties and the existence of an effective family bond into consideration when determining the child's best interests.[233] Depending on the context, the age of the child has different impact on the Court's reasoning. The age is linked to the questions whether the child is adaptable or not of moving to the country of

[230] ECtHR *Nunes v. Norway*, Judgement of 28 June 2011, Application No. 55597/09

[231] KLAASSEN, Mark and RODRIGUES, Peter, The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter, *European Journal of Migration and Law*, 2017, Vol. 19, p 217.

[232] See ECtHR *El Ghatet v. Switzerland*, Judgement of 8 November 2016, Application No. 56971/10, paras 45, 46, where the Court states that in order to decide upon the best interests of the child and the most adequate means for them to develop their family life, States should take into account the children's age, their situation in their country of origin and the extent to which they are dependent on their parents.

[233] See SMYTH, Ciara, 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? *European Journal of Migration and Law*, 2015, Vol. 17, p 75 and LELOUP, Mathieu, The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency, *Netherlands Quarterly of Human Rights*, 2019, Vol. 37(1), p 54.

origin with the expelled parent to enjoy family life there. Generally young children between the age of 1 and 6 years old are considered adaptable and, therefore, able to move to the country of origin.[234] But this reasoning is not consistent since the Court has in other cases found children at the age from 9 to 14 to be at an adaptable age.[235] This indicates that the assessment of adaptability and country ties is arbitrary and any age can be seen as adaptable without evidence to support the position.[236]

Another element scrutinised by the Court when determining the child's best interests is the effective family bond. The Court assesses the extent to which there are genuine bonds of attachments. It is hard to draw any clear conclusions about what impact the child's ties and dependency on the parents has on the Court's decisions. However, in cases where parents have left children behind in the country of origin and the children later are seeking an entry to exercise family life, the Court tends to find the parent is to blame for leaving the child behind when emigrating.[237] Even though the Court's strict approach seemed to be abandoned with the Sen case[238] this judgement remains a rather isolated and fact-specific decision.[239] In the post Sen case law the parent is left with the option of continuing the level of contact after leaving the country of origin or continuing family life in the country of origin.[240] Although, a comparable exceptional scenario to the Sen case can also be found in the Tuquabo-Tekle case[241] where the Court stated that 'parents who leave children behind while settle abroad cannot be assumed to have irrevocably

[234] See for instance ECtHR *Sorabjee v. The United Kingdom*, Decision of 23 October 1995, Application No. 23938/94; ECtHR *Amara v. The Netherlands*, Decision of October 2004, Application No. 6914/02, ECtHR *Üner v. The Netherlands*, Judgement of 18 October 2006, Application No. 46410/99, and ECtHR *Omoregi v. Norway*, Judgement of 15 November 2012, Application No. 265/07

[235] See ECtHR *Antwi and Others v. Norway*, Judgement of 14 February 2012, Application No. 26940/10; ECtHR *Palanci v. Switzerland*, Judgement of 25 March 2014, Application No. 2607/08; *Papashvillo v. Belgium,* Judgement of 17 April 2014, Application No. 41738/10; and ECtHR *Kaplan v. Norway*, Judgement of 24 July 2014, Application No. 32504/10

[236] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing, 2017, p. 377

[237] See ECtHR *Gül v. Switzerland*, Judgement of 29 February 1996, Application No. 23218/94; ECtHR *Ahmut v. Netherlands*, Judgement of 28 November 1996, Application No. 21702/93

[238] ECtHR *Sen v. the Netherlands*, Judgement of 21 December 2001, Application No. 31465/96

[239] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing 2017, p. 349

[240] ECtHR *Chandra and Others v. The Netherlands*, Decision of 13 May 2003, Application No. 53102/99; ECtHR *Ramos Andrade v. The Netherlands*, Decision of 6 July 2004, Application No. 53675/00

[241] ECtHR *Tuquabo-Tekle v. The Netherlands*, Judgement of 1 December 2005, Application No. 60665/00

decided that those children are to remain in the country of origin permanently and to have abandoned any idea of a future reunion'.[242]

According to the Committee on the Rights of the Child, there is an intimate connection between the best interests of the child and the views of the child.[243] In the current case-law the Court is not assessing or giving due considerations to the views of the child in the immigration context of Article 8 of the ECHR. One reason for the lack of consideration of the child's views in these cases could be that children involved are often not party of the proceedings. This has in some cases lead the Court to refuse to consider the interests of the child who is not considered party of the proceedings.[244] Although, in other cases the Court does consider the best interests of the child involved even where he or she is not party of the proceedings.[245]

Other relevant elements to be considered when determining the best interests of the child in the immigration context could be certain socio-economic rights. One socio-economic right relevant in the immigration context is the right to an adequate standard of living. This right is defined in the CRC as the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.[246] Other relevant socio-economic rights are the right of the child to health and to education. In general the Court is not considering the relative qualities of the host and home country in light of relevant socioeconomic rights of the child but in some cases it has been considered. In *Palanci v. Switzerland*[247] the Court used the fact that there was a good education system in Ankara as an argument in favour of the family relocating to Turkey with their expelled father. In *Josef v. Belgium*[248] the Court refused to countenance the argument that the children would receive a better education in Belgium than Nigeria, reiterating its established line that Article 8 does not impose a general obligation on the State to respect the choice by immigrants of their country of residence.

[242] Ibid para 45
[243]According to the General Comment No. 12 (2009), *The right of the child to be heard,* UN Doc. crc/c/Gc/12, para 74, there can be no correct application of article 3 if the components of article 12 are not respected.
[244] See ECtHR *I.M. v. The Netherlands*, Decision of 25 March 2003, Application No. 41226/98
[245] See ECtHR *Nunez v. Norway*, Judgement of 28 June 2011, Application No. 55597/09
[246] See Article 27 CRC.
[247] ECtHR *Palanci v. Switzerland*, Judgement of 25 March 2014, Application No. 2607/08
[248] ECtHR *Josef v. Belgium*, Decision of 27 February 2014, Application No. 70055/10

In conclusion, as can be seen from the case law, the Court is not adopting a complete, rights based approach when interpreting and applying the principle of the best interests of the child and therefore not examining the full range of relevant rights in the CRC.

3.3.2 Inconsistency when weighing the child's interests against other interests

When determining if Article 8 of the ECHR and the right to family life has been violated in a case, the Court has to determine whether the contracting State has struck a fair balance between the personal interests of the immigrant, on one hand, and the public interest on the other. The best interests of the child among other interests have to be considered. The question is what weight the Court apportions to the best interests of the child when balancing the State's and the applicant's interests. The case law of the expulsion of settled immigrants contains rather clear guidelines on how to determine whether the termination of lawful residence would lead to a violation of Article 8 of the ECHR. Therefore the focus in this thesis lays on admission cases and hybrid cases where the Courts case law is more unpredictable and uncertain. Although, there are some cases worth mentioning when it comes to expulsion cases.

3.3.2.1 Weight apportioned to the child's best interests in expulsion cases

In 2001, the Court tried to improve the somewhat unpredictable expulsion case-law by developing the *Boultif*-criteria[249] which national courts should use when performing the proportionality assessment of the expulsion measure. In the *Üner* case, the Grand Chamber confirmed these criteria and added two additional ones. More specifically it stated that regard should also be had to:

- 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.[250]

[249] ECtHR *Boultif v. Switzerland*, Judgement of 2 August 2001, Application No. 54273/00, para 48
[250] ECtHR *Üner v. Netherlands*, Judgement of 18 October 2006, Application No. 46410/99

In the *Üner* judgment, the Court thus expressly established the best interests of the child as a criterion to take into account when one of the parents is confronted with an expulsion measure. More specifically, regard should be had to the difficulties these children will encounter if they were to follow the expelled parent. It should be noted that these *Üner*-criteria only apply in cases where an adult is being expelled because of criminal offences he or she committed.[251] In *M.P.E.V. and Others v. Switzerland*[252] the ECtHR found that Switzerland's intended expulsion of an Ecuadorian man who had unsuccessfully claimed asylum would violate his, his second daughter's and his wife's right to a family life, despite the man's previous criminal convictions and his separation from his wife. The Court criticised the failure by the Federal Administrative Court to explicitly refer to the best interests of the child in reaching its decision. The Court was not convinced that sufficient weight had been attached to the interests of the youngest daughter, whose contact with the father would be "drastically diminished" if he was forced to return to Ecuador.

It is interesting to note that the principle of the best interests of the child have been more successful in cases where the deportee is a criminal offender who was a minor at the time when he or she committed the offence prompting the removal measure.[253] In *Jakupovic v. Austria* the Court held that very weighty reasons have to be put forward to expel a minor.[254] Similarly, in *Yildiz v. Austria*,[255] and *Emre v. Switzerland*[256] the Court attached significant importance to the fact that the offences were committed while the applicants were still minors. This, however, does not mean that it is impossible to expel minors. In the *Maslov v. Austria* case the Court explicitly held that the obligation to have regard to the best interests of the child also applies if the person to be expelled is himself or herself a minor, or if-as in the present case-the reason for the expulsion lies in offences committed when a minor.[257] Although, the Court stated that very serious violent offences can justify expulsion even if they were committed by a minor.[258]

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[251] LELOUP, Mathieu, The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency, *Netherlands Quarterly of Human Rights*, 2019, Vol. 37(1), p. 53 f.
[252] ECtHR *M.P.E.V. and Others v. Switzerland*, Judgement of 8 July 2014, Application No. 3910/13
[253] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing 2017, p. 378
[254] ECtHR *Jakupovic v. Austria*, Judgement of 6 February 2003, Application No. 36757/97, paras 28-33.
[255] ECtHR *Yildiz v. Austria*, Judgement of 31 October 2002, Application No. 37295/97, para 45
[256] ECtHR *Emre v. Switzerland*, Judgement of 22 May 2008, Application No. 42034/04, para 74.
[257] ECtHR *Maslov v. Austria*, Judgement of 13 June 2008, Application No. 1638/03 ECtHR, para 82.
[258] Ibid, para 85.

3.3.2.2 Weight apportioned to the child's best interests in admission and hybrid cases

In admission cases, concerning foreign nationals seeking an entry, Article 8 of the ECHR will be violated if there are insurmountable obstacles to establishing family life in the country of origin. Only then will the State be held to have exceeded its margin of appreciation.[259] In hybrid cases where the applicant's immigration status was precarious at the time of family formation, the Court has stated that only in the most exceptional circumstances will the applicant's expulsion constitute a violation of Article 8 ECHR.[260] When looking at the current case-law on admission cases and hybrid cases it is hard to understand what weight the Court has given the best interests of the child within the insurmountable obstacle and exceptional circumstances tests.

In the *I.A.A. and others v. the United Kingdom* case[261] the Court did not find the refusal of admission conflicted with the children's best interests. The case concerned the admission of 5 Somali siblings who wanted to join their mother in the UK. Their mother left Somalia to join her second husband in 2004 in the UK, where he had been granted refugee status, leaving the applicants in the care of her sister in Somalia. In 2006 the applicants moved with their aunt from Somalia to Ethiopia. After their mother's sister returned to Somalia, leaving the applicants in the care of their older sibling, aged 16, the applicants applied for entry clearance to the UK 2008. When considering the children's best interests the Court held that while the best interests of the child is a paramount consideration it cannot be a trump card which requires the admission of all children who would be better off living in a Contracting State. The Court referred to the *Berisha v. Switzerland* case[262] and concluded that even though the applicants' current situation is certainly unenviable, they are no longer young children (they are currently 21, 20, 19, 14 and 13 years old) and the Court has previously rejected cases involving failed applications for family reunification and complaints under Article 8 where the children concerned have in the meantime reached an age where they were presumably not as much in need of care as young children and are increasingly able to fend for themselves.[263] Other interests taken into account was that there were no evidence

[259] See ECtHR *Gül v. Switzerland*, Judgement of 29 February 1996, Application No. 23218/94; and ECtHR *Ahmut v. the Netherlands*, Judgement of 28 November 1996, Application No. 21702/93

[260] See ECtHR *Rodriges da Silva and Hoogkamer v. the Netherlands*, Judgement of 31 January 2006, Application No. 50435/99

[261] ECtHR *I.A.A. and others v. the United Kingdom*, Judgement of 8 March 2016, Application No. 25960/13

[262] ECtHR *Berisha v. Switzerland*, Judgement of 30 July 2013, Application No. 948/12

[263] Ibid. para 46

in the case suggesting that the mother intended for the children to join her in the UK.[264] Also, the Court considered that while it would undoubtedly be difficult for the applicants' mother to relocate to Ethiopia, there were no evidence before it to suggest that there would be any "insurmountable obstacles" or "major impediments" to her doing so. Although, she has three children in the United Kingdom, two were adults and her youngest child twelve years old. The Court did not find that it would be unduly difficult for the twelve year old son to relocate to Ethiopia since he had lived his first six years in Somalia.[265] In conclusion the Court didn't find the domestic authorities having failed to strike a fair balance between the interests of the applicants and the best interest of the State in controlling migration, or as having exceeded the margin of appreciation.[266]

In *Josef v. Belgium*[267] the Court did not accord with the best interests of the child. In this case the expulsion of a Nigerian single mother of three children, who was HIV positive and in need of high level of medical and psycho-social support did not violate Article 8 of the ECHR. The children, who the Court found would be able to adapt to family life in Nigeria, were at the age of six, four and one and a half by the time of the Courts decision. They were all born in Belgium and had lived there their whole life. The Court even appeared to accept the existence of a risk that, if returning to Nigeria, the mother would die a premature death.[268]

This case is in stark contrast with *Jeunesse v. the Netherlands*[269] where the Court considered the best interests of the child as one of four factors making the case exceptional. The other factors given account were: that the applicant's husband and children were all Netherland nationals and that the applicant held Netherland's nationality at birth but lost it when Surinam became independent; that the authorities in the Netherland had been tolerating the applicant's irregular presence for 16 years and that the family would experience a degree of hardship if required to relocate to Surinam. When assessing the best interests of the child, the Court held that since the applicant was the mother and homemaker, it was obvious that it would not be in the children's best interests for their mother to be forcibly relocated to Surinam and for them to remain in the

[264] Ibid. 43
[265] Ibid. 44
[266] Ibid. para 47
[267] ECtHR *Josef v. Belgium*, Judgement of 27 February 2014, Application No. 70055/10
[268] Ibid, para 145.
[269] ECtHR *Jeunesse v. the Netherlands*, Judgement of 3 October 2014, Application No. 12738/10

Netherlands and, thus, rupture their relationship with her, or relocate to Surinam themselves, a country to which they had never been.[270] In this case the Court also commented on the proper weight to be accorded to the principle of the best interests of the child. The Court held that while the best interests of the child alone could not be decisive, 'such interests certainly must be afforded significant weight'.[271] The national decision-making bodies should therefore '*advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal order in order to give effective protection and sufficient weight to the best interests of the child'*.[272]

In *El Ghatet v. Switzerland*[273] the Court found a violation of Article 8. The case concerned a 15-year-old boy from Egypt who applied for admission to reunite with his father in Switzerland. The father left his son behind when he left Egypt to seek asylum in Switzerland. His application for asylum was rejected but he acquired a residence permit 1999 after marrying a Swiss national. The son relocated to Switzerland 2003 for purpose of family reunification but was sent back to Egypt 2005 in light of conflicts between him and the father's spouse. After the father separated from the wife the son lodged another request for family reunification. The Court underlined that the task to assess the best interests of the child in each individual case is primarily one for the domestic authorities and that they enjoy a certain margin of appreciation. The Court's task is to ascertain whether the domestic courts secured the guarantees set forth in Article 8, particularly taking into account the child's best interests, which must be sufficiently reflected in the reasoning of the domestic courts. It further stated that the domestic court must put forward specific reasons in light of the circumstances of the case, not least to enable the Court to carry out the European supervision entrusted to it. Where the reasoning of domestic decisions is insufficient, with any real balancing of the interests in issue being absent, this would be contrary to the requirements of Article 8 of the Convention.[274]

When applying the principles in the case-law and with regards to the circumstances in the case, the Court considered that no clear conclusion can be drawn whether or not the applicants' interest in a family reunification outweighed the public interest of the respondent State in controlling the

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[270] Ibid, para 119
[271] Ibid, para 109
[272] Ibid, para 120
[273] ECtHR *El Ghatet v. Switzerland*, Judgement of 8 November 2016, Application No. 56971/10
[274] Ibid. para 47

entry of foreigners into its territory.[275] The Court found that the national court did not place the child's best interests sufficiently in the centre of its balancing exercise and its reasoning contrary to the requirements under the Convention and the CRC. Therefore the Court found a violation of Article 8.

Even though the Court underlines that the national courts must put forward specific reasons in light of the circumstances of the case, it doesn't give any specific guidance in relation to what circumstances would weigh heavily in favour for the child.

The case-law on admission and hybrid cases shows that the weight the Court attaches to the best interests of the child when determining the obstacle or exceptional circumstances tests varies depending on other factors in the balancing test. However, in most cases where the parents are divorced or separated and custody has been awarded to the parent with the right to remain, but there is an access arrangement in place in respect of the parent who is trying to regularise the stay or seeking an entry, the best interests of the child is given significant weight.[276] In these cases a negative decision would automatically result in the forced separation of the child from one of the parents. Therefore, the Court rightfully gives significant weight to the best interests of the child. Although, in other cases where the parents are still together the Court is showing an inconsistent attitude.[277] In these cases, a negative decision will not necessarily result in a forced separation. The question for the Court is therefore whether it is in the best interests of the child to continue family life in the host country or in the country of origin. In these kinds of cases the Court is inconsistent. The Court doesn't seem to take any certain elements into account relevant to the situation in question as long as the family is together. All other elements, such as the country ties, the child's views or socio-economic rights seem to lose its relevance. As Ciara Smyth puts it *"In such cases, the Court is inconsistent on the amount of weight it gives to the best interests of the child, as if the principle of the best interests of the child loses its inherent significance once the family are together."*[278] This also suggest that the ECtHR legitimise a difference in treatment between

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[275] Ibid. para 52

[276] See ECtHR *Rodriges da Silva and Hoogkamer v. the Netherlands*, Judgement of 31 January 2006, Application No. 50435/99 and ECtHR *Nunez v. Norway,* Judgement of 28 June 2011, Application No. 55597/09

[277] See ECtHR *Antwi and Others v. Norway*, Judgement of 14 February 2012, Application No. 26940/10

[278] SMYTH, Ciara, 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? *European Journal of Migration and Law*, 2015, Vol. 17, p. 99.

children of harmonious families and single parents to whom the obstacle and exceptional circumstances tests applies. Children in harmonious families face a greater risk of having to leave their home country than children of separated parents. One can say, supporting a different stance would be to accept that domestic decision makers can justifiable penalise children for the unpleasant decisions of the adults responsible for them.[279]

Even though there is no agreement on the precise weight apportioned on the child's best interests, it is generally accepted that the interests of the child should receive some hierarchical primacy.[280] The Court has repeatedly affirmed that all decisions concerning children should 'place the best interests of the child at the heart of their considerations and attach crucial weight to it.'[281] It can be questioned whether the child's best interests receives such weight in the balancing exercise when it has to be demonstrated that it would be insurmountable to relocate to another country. This test implies that a child may have to leave their own country in order to enjoy family life with a law-abiding non-national parent. The insurmountable obstacle criterion can be legitimate in situations where the non-national poses a threat to the community but it is difficult to defend it where the case is based on immigration policy alone. A fair balance has not been struck between two options, namely voluntary exile or termination of family life.[282]

3.3.3 Migration control often overriding the child's best interests

Another issue that arises in cases involving children and immigration is the order of priority of child proceedings and immigration proceedings. In the *Rodrigues* case[283] the family proceeding courts had chosen the father as the custodial parent mostly because the mother would be expelled from the jurisdiction even though the father did not play a significant role in the daughters care and upbringing.[284] In cases where both family matters and immigration matters are involved, the

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[279] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing, 2017, p. 374

[280] POBJOY, J. M., The best interests of the child principle as an independent source of protection, *International Comparative Law Quarterly*, 2015, 327, p 37 f. , ECtHR *Neulinger and Shuruk v. Switzerland*, Judgment of 6 July 2010, Application No. 41615/07, para 135

[281] ECtHR *El Ghatet v. Switzerland*, Judgement of 8 November 2016, Application No. 56971/10, para. 46

[282] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing, 2017, p. 388

[283] ECtHR *Rodriges da Silva and Hoogkamer v. the Netherlands*, Judgement of 31 January 2006, Application No. 50435/99

[284] Ibid, para 33

question is which issues should be determined first, the most suitable caregiver or the immigration status of the parent? In many cases the Court will prioritize migration proceedings. The immigration proceedings take priority and child proceedings need to be resolved in accordance with the immigration decision.

This seems to be the case in *Berisha v. Switzerland*.[285] The case regarded the expulsion of three children to Kosovo, who illegally had entered Switzerland to join their lawfully settled parents. In this case the Court's analysis of the factual circumstances contradicts the paramountcy of the child's best interests affirmed in *Neulinger and Schuruk v. Switzerland*.[286] Instead of paying particular attention to the circumstances of the minor children concerned, especially their age, their situation in their country of origin and the extent to which they are dependent on their parents, as the Court stated in the case,[287] the Court applied the traditional insurmountable obstacle test and attached particular weight to the illegal conduct of the parents. This is troublesome since the State can penalise behaviour in breach of immigration rules which the children can't be held responsible for.[288] Regarding the youngest child, 7 years old by the time of the application, the Court found that the parents are not prevented from travelling – or even staying – with her in Kosovo in order to ensure that she is provided with the necessary care and education.[289] The Court is clearly not taking the position that family unity can be seen as an established norm in the CRC and that family unity should be the Court's default position in family reunification cases concerning children.[290] Instead the State's interest prima facie trumps the welfare of the child.

Another case which exemplifies the migration control approach is the *Omoregie v. Norway* case.[291] In this case a Nigerian asylum seeker was rejected and stayed in Norway without residence status. He got married to a Norwegian woman with whom he had a child who had Norwegian nationality. Mr Omoregie had not committed any crimes but merely breached immigration law. When assessing the best interests of the child the Court found that the child, who was two years old, was

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[285] ECtHR *Berisha v. Switzerland,* Judgement of 30 July 2013, Application No. 948/12
[286] ECtHR *Neulinger and Shuruk v. Switzerland*, Judgment (GC) of 6 July 2010, Application No. 41615/07, para 135
[287] ECtHR *Berisha v. Switzerland*, Judgement of 30 July 2013, Application No. 948/12, para 51
[288] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing, 2017, p. 378
[289] ECtHR *Berisha v. Switzerland,* Judgement of 30 July 2013, Application No. 948/12, para 60
[290] Committee on the Rights of the Child, 'General Comment No. 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration' UN Doc CRC/C/GC/14 (29 May 2013) Supra note 61, para 66
[291] ECtHR *Omoregi and Others v. Norway*, Judgement of 31 July 2008, Application No. 265/07

still of an adaptable age at the time when the disputed measures were decided and implemented and nothing should prevent the wife and child from coming to visit the first applicant for periods in Nigeria.[292] Migration control is clearly overriding the child's best interests and right to family life in this case since the Court held that Article 8 of the ECHR did not afford any protection to the family life in Norway, as the couple could have had no expectations of the asylum seeker's continued residence there. Likewise, the *Antwi* case[293] evidently shows the problematic development that the best interest of the child exercise in immigration cases will only prevail the State's interests when extreme hardship can be demonstrated.

This suggest that the whole spectrum of options available are not always considered.[294] In *Antwi* the Court found that the breaches of immigration law weighed heavy in the balance when assessing the proportionality of the expulsion of the applicant. It noted that the 10 year old daughter is a Norwegian national who spent her whole life in Norway, is fully integrated into Norwegian society and speaks Norwegian at home. She has only visited Ghana three times and has limited links to the country and little knowledge of the language. The Court stated that it most probably would be difficult for the daughter to adapt to life in Ghana and that the implementation of the expulsion order would not be beneficial to her.[295] Despite admitting it would be difficult for the daughter to adapt to life in Ghana and that the implementation of the expulsion order would not be beneficial for her the Court found no exceptional circumstances in the present case and that sufficient weight was attached to the best interest of the child.

3.4 Conclusions

This chapter investigates and presents the consequences and possible causes for the inconsistent case-law and the unequal treatment of different immigration cases as well as the uncertain application of the best interests of the child. By allowing States a margin of appreciation regarding the way in which they implement the human rights, there is a risk that the need for

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[292] Ibid para 66.
[293] ECtHR *Antwi and Others v. Norway*, Judgement of 14 February 2012, Application No. 26940/10
[294] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing, 2017, p. 378.
[295] ECtHR *Antwi and Others v. Norway*, Judgement of 14 February 2012, Application No. 26940/10, para 94-97

uniformity and that legal certainty will suffer and make the case law inconsistent.[296] The most central requirement for legitimate limitations in terms of international law, and particularly in terms of the ECHR, is the proportionality principle and the margin of appreciation doctrine developed by the Court most prominently in relation to that principle.[297] As can be seen from the case law the proportionality assessment, that normally requires a balancing of the interference with the individual's rights and the States interests, is distorted by the margin of appreciation in ECtHR case law. It does not reflect a clear proportionality standard due to the multi factor balancing approach.[298] Another problem with the Court's use of the proportionality test is that the Court seems to consider migration control as a social pressing need in itself and doesn't require the States to articulate the aim of its actions clearly which weakens the proportionality assessment.[299] The State's interest in migration control infuses the Court's approach and it is assumed that refusal of entry and removal in themselves pursue legitimate aims which makes the case law unstable.[300] Another reason for the inconsistent case law seems to be caused by the Court 's struggle to deal with the role of the human right to respect for family life in the context of immigration control, which is part of State sovereignty.[301] The Court doesn't use the same perspective or position in all immigration cases. In some cases, the Court sees State sovereignty as the starting point and look for limitations of State sovereignty in the Convention's codification of human rights. In other cases it takes the rights of the family as the starting point, and look at the Convention to find out whether the state can legitimately limit this right. This makes the Court's case law structurally unstable.

The unequal protection between different migration cases seems to be caused by the different tests applied by the Court. When putting the burden of proof on the applicant in admission cases the State doesn't need to justify the refusal of an applicant. This has resulted in a very high threshold for admission cases to comply with Article 8. If there is no justification ground to why an

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[296] HENRARD, Kristin, A Critical Analysis of the Margin of Appreciation Doctrine of the ECtHR, with Special Attention to Rights of a Traditional Way of Life and a Healthy environment: A Call for an Alternative Model of International Supervision, The Yearbook of Polar Law IV, 2012, 365-413, p 37
[297] Ibid. p 368
[298] See COSTELLO, Cathryn (2016) *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press, 2016, p. 169
[299] Ibid. p. 127
[300] An example where the migration control approach has been used see ECtHR *Omoregie and others v. Norway*, Judgement of 312 July 2008, Application No. 265/07
[301] KLAASSEN, Mark Between facts and norms: Testing compliance with Article 8 ECHR in immigration cases, 37:2 *Netherlands Quarterly of Human Rights*, 2019, p 164.

admission case is refused the balance that has to be struck between the individual and the community is distorted. The Court's case-law holds that similar considerations should be applied regarding positive and negative obligations that are derived from Article 8 and in both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community. It can be assumed that it makes no material difference whether a positive or a negative obligation is at stake.[302] Therefore, it can be argued that the widely different approach towards admission and expulsion cases made by the Court is conflicting with its own case-law. Additionally, the case law is also unequal because insiders' interests are not given due consideration in admission and hybrid cases. These kind of cases are first and most seen as immigration cases and when balancing the individual rights against the State's interests the focus is on the migrant/outsider. Other explanations to this development in the case law could be that the insider partners are not always one of the applicants before the Court. The applicants also tend to go on the Courts line and focus more on convincing the Court about the ties to the country of origin instead of the ties to the country of residence or citizenship.[303] Citizenship and permanent residence tend to lose some of their meaning if they don't include the right to establish a family life in the country in which one is living.[304]

Lastly, the chapter is examining the problems and consequences related to the third assumption of the thesis, that the Court doesn't examine the full range of relevant rights in the CRC when applying the principle of the best interests of the child and is inconsistent when applying the principle. The ECtHR's immigration case-law on Article 8 of the ECHR has shown an uneven and uncertain application of the child's best interests.[305] Little significance is attached to the child's respect for family life when determining whether the immigration measure is compatible with the ECHR.[306] In the current ECtHR's case-law the Court is in general taking the child's adaptability, country ties and effective family bond into consideration when determining the child's best

[302] See dissenting opinion of judge Martin, para 9, in ECtHR *Gül v. Switzerland*, Judgement of 29 February 1996, Application No. 23218/94

[303] HART, Betty de, Love Thy Neighbour: Family Reunification and the Rights of Insiders, *European Journal of Migration and law* 11, 2009, p. 252.

[304] WALTER, A., Reverse Discrimination and Family Reunification, Nijmegen: Wolf Legal Publishers, 2008, p. 21 as referred to by HARTR, Betty de, Love Thy Neighbour: Family Reunification and the Rights of Insiders, European Journal of Migration and law 11, 2009, p. 251

[305] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing, 2017, p. 379

[306] *KILKELY, U, The Child and the European Convention of Human Rights, Aldershot, Ashgate/Dartmouth, 1999.*

interests[307] and leaving out other important elements such as the child's views and socio-economics rights. This means the Court is not adopting a complete, rights based approach when interpreting and applying the principle of the best interests of the child and, therefore, not examining the full range of relevant rights in the CRC. It can be questioned whether the child's best interests receives sufficient weight in the balancing exercise when it has to be demonstrated that it would be insurmountable to relocate to another country. A fair balance has not been struck between two options, namely voluntary exile or termination of family life.[308] The immigration proceedings often take priority and child proceedings need to be resolved in accordance with the immigration decision. Due to the fact that the principle of the best interests of the child is not expressly enshrined in the ECHR the way the principle has been applied by the Court makes it difficult to determine when the principle will be applied as the overriding principle.

[307] SMYTH, Ciara, 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? *European Journal of Migration and Law*, 2015, Vol. 17, p 75

[308] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing, 2017, p.388

4. Possible solutions for the ECtHR's case-law to become consistent and fair

In this thesis the main research question is whether and how the case-law of the ECtHR on the right to respect for family life in the immigration context can be more consistent and fair among all applicants in order to give Contracting Parties and individuals more certainty and generate a more convergent practice by the States and increase the precedent value of the Court's judgements. Three assumptions or statements have been made in order to answer the research questions; the case law of the ECtHR on the right to respect for family life is inconsistent and unpredictable; the unequal level of protection between settled migrants and migrants seeking an entry or requesting to regularise their irregular migration status is not defendable and is in contrast with the ECtHR's own case-law and the Court doesn't examine the full range of relevant rights in the CRC when applying the principle of the best interests of the child. It is also uncertain what weight the child's best interests is given in the balancing exercise. The aim of the thesis is to determine whether the inconsistent case law can be helped by the influence of EU regulations and the CJEU case-law, whether the unfair unequal level of protection in different migration cases can be reduced by determining all cases under the same test and distinguishing cases based on family matters instead of migration status and lastly, whether the application of the best interests of the child can be more certain and predictable by examining the full range of relevant rights in the CRC and by providing guidance on which factors it would weigh more heavily in the balancing exercise. Thus, in this chapter of the thesis possible solutions for these three assumptions, i.e., the three problematic developments in focus of this study, are being suggested and examined.

4.1 Can the inconsistent case-law be improved by the influence of EU law and CJEU case-law?

As mentioned in chapter 3, the ECtHR's proportionality assessment is distorted by the statist assumption.[309] The multifactor balancing approach in family migration cases does not reflect a sharply outlined proportionality standard. Even though the ECtHR's case-law allows the State an

[309] See COSTELLO, Cathryn, *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press, 2016, p. 168

area of discretion the Court is not determined where to draw the line and when a State has overstepped its margin of appreciation.[310] The ECtHR's use of unsound reasoning and multi-factor approach is in a contrast to the EU law's clearer rights and more rigorous proportionality assessments.[311] Scholars have argued that the EU citizenship concept under the CJEU case law offers more extensive protection compared to Article 8 of the ECHR under the ECtHR case-law.[312] EU Citizenship entails a stable right of residence for the sponsor with family reunification as a right as illustrated by the case law on EU Citizens' TCN family members. The Omoregie case[313] makes it very obvious how different TCN under the ECHR are treated in comparison to TCN under EU law. Especially when comparing it to the Metock case.[314] In the Metock case the CJEU found that the spouses' status as unsuccessful asylum seekers was irrelevant to their EU rights as TCN spouses of EU Citizens, while in Omoregie the ECtHR held that Article 8 of the ECHR did not afford any protection to the family life in Norway, as the couple could have had no expectation of the asylum seeker's continued residence there. Lock states that *"EU law is relevant not only in the determination of the scope of Convention rights, but it is also invoked in the ECtHR's proportionality analysis."*[315] This said, referring to and drawing inspiration from EU law when determining compliance with Article 8 of the ECHR in immigration case-law, would be an understandable step.

4.1.1 Using the three-part test of proportionality

An improvement of the ECtHR's application of the justification test could be reached if the Court would make more systematic use of the three-part test of proportionality as it has been developed by for instance the CJEU.[316] As already mentioned in chapter 2.2.4. the three parts of

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[310] See SPIJKERBOER, Thomas, Structural Instability: Strasbourg Case Law on Children's Family Reunion, *European Journal of Migration and Law*, 11, 2009

[311] See COSTELLO, Cathryn, *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press, 2016, p. 169.

[312] See BERNERI, Chiara, 'Protection of Families Composed by EU Citizens and Third-country Nationals: Some Suggestions to Tackle Reverse Discrimination', 2014, 16 *European Journal of Migration and Law*, 249-275; VAN ELSUWEGE, Peter and KOCHENOV, Dimitry, 'On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights', 2011, 13 *European Journal of Migration and Law*, 443–466

[313] ECtHR *Omoregie and others v. Norway*, Judgement of 312 July 2008, Application No. 265/07

[314] Case C-127/08 *Metock* [2008] ECR I-6241.

[315] LOCK, Tobias, The Influence of EU Law on Strasbourg Doctrines, *European Law Review*, Research Paper Series No 2017/03, p. 5

[316] GERARDS, Janneke, How to improve the necessity test of the European Court of Human Rights, Oxford University Press and New York University School of Law, 2013, p. 469

the proportionality test in EU law are; suitability, necessity and proportionality in the strict sense.[317] The suitability and necessity requirement deal with the relationship between the aims of a measure and the means or instruments that have been chosen to achieve these aims. If an interference with a right proves to be unsuitable or superfluous, either because the aims pursued cannot be achieved by it in any case, or because less intrusive means were available, there is no good reason to sustain such an interference.[318] The third requirement, proportionality in the strict sense, concerns the relationship between the interests at stake. It requires that a reasonable balance should be achieved among the interests served by the measure and the interests that are harmed by introducing it.[319] If the conditions of suitability and necessity are shown fulfilled, only then will the requirement of proportionality in the strict sense be applied.[320] In the current ECtHR case-law the Court is in most cases applying a fair balance test without preceding it with a means-ends test.[321]

One reason why the Court systematically and clearly should apply a test more similar to the three-part test of proportionality is that the means-ends test would allow the Court to examine the justification of the reasonableness of the choice of means or instruments which forms a separate and significant component of the reasonableness of an interference with fundamental rights. Another reason for the Court to apply the three-part proportionality test is that the means-ends test might reduce the difficulties linked to the balancing assessment. There would be no need to assess whether the State did strike a fair balance if the means chosen were found inadequate or unnecessary. Only when the Court finds the chosen means to be adequate and necessary to achieve the ends pursued, would there be a need for the Court to do a balancing test.[322] The measure or

[317] ROCHEL, Johan, Working in tandem: Proportionality and procedural guarantees in EU immigration law, *German Law Journal*, 2019, p. 92
[318] RÉAUME, Denise G., Limitations on Constitutional Rights: The Logic of Proportionality, University of Oxford Legal Research Paper Series, Paper No. 26/2009, p 25
[319] GERARDS, Janneke, How to improve the necessity test of the European Court of Human Rights, Oxford University Press and New York University School of Law, 2013, p. 469
[320] ROCHEL, Johan, Working in tandem: Proportionality and procedural guarantees in EU immigration law, *German Law Journal*, 2019, p. 92
[321] GERARDS, Janneke, How to improve the necessity test of the European Court of Human Rights, Oxford University Press and New York University School of Law, 2013, p. 488
[322] Ibid, p 488

instrument has to be effective to further the aim pursued. This requires the Court to make an assessment of the casual link between means and ends which can be very difficult.[323]

The ECtHR is usually dealing with this problem by accepting very general and abstract aims, such as protection of national security as the basis of the justifiability of interference with fundamental rights. It is hard to apply any sound proportionality test on basis of such broad aims as 'the general interest'.[324] To solve the problem by finding the 'right' level of effectiveness according to the circumstances of the case the Court may instead use a superficial or deferential test of effectiveness when the States have been given a wide margin of appreciation. In these kind of circumstances the Court may accept that the measure is only partly effective or not entirely ineffective. By contrast, in cases where the interference with the interest is more serious the judicial test should be less superficial or deferential and greater demand may be placed on the casual relation between means and ends.[325] In order to determine the appropriate level of intensity of review the Court might use the margin of appreciation doctrine.[326] When a wide margin of appreciation is left to the states a deferential review could be chosen which means that the Court should merely examine whether the measure at hand is not manifestly ineffective to achieving the ends pursued. In contrary, if a narrow margin of appreciation is left to the states the Court has to conduct an intensive, strict review.[327] How to determine and use the margin of appreciation will be dealt with more under subchapter 4.2.2.

If the Court would use the means-ends test thoroughly it could be an important complement to the balancing test. The means-ends test would require the Court to determine explicitly the interests involved in the case and to give the reasons why the measures were used to achieve the goals, which is often left out in the balancing test.

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[323] Ibid, p 474.
[324] HIRSCHBER, L. Der Grundsatz der Verhältnismässigkeit (The principal of proportionality),1981, as quoted in GERARDS, Janneke, How to improve the necessity test of the European Court of Human Rights, Oxford University Press and New York University School of Law, (2013), p. 480
[325] GERARDS, Janneke, How to improve the necessity test of the European Court of Human Rights, Oxford University Press and New York University School of Law, 2013, p 475 ff
[326] GERARDS, Janneke, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17 *European Law Journal*, 2011
[327] GERARDS, Janneke, How to improve the necessity test of the European Court of Human Rights, Oxford University Press and New York University School of Law, 2013, p. 489

4.1.2 Put more focus on the individual

The ECtHR's case-law shows that the Court is struggling to deal with the role of the human right to respect for family life in the context of immigration control, which is part of State sovereignty.[328] The Court is dealing with the tension between a cosmopolitan and a communitarian position.[329] In some cases the Court is seeing State sovereignty as the basis and looks for limitations of State sovereignty in the Convention's codification of human rights. In other cases the Court takes the rights of the family as the basis, and looks at the Convention to find out whether the State can legitimately limit this right.[330] Therefore the perspective or position the Court decides to take in each case is of great importance for the outcome. When a case is seen as a migration case State sovereignty is the primary consideration while the rights of individuals will get more consideration when a case is seen as a family matter.[331] The Court's case law is not perceived as being primarily about family life, rather about migration control and whether the foreign national should be admitted or allowed to remain in the country. In most of its cases the Court starts its reasoning by emphasising the following statements, which show that the immigration aspect of the cases has a primary position;

"the extent of a State's obligations to admit to its territory relatives of settled migrants will vary according to the particular circumstances of the persons involved and the general interest";

"as a matter of well-established law and subject to its treaty obligations, a State has the right to control the entry of non-nationals to its territory";

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[328] KLAASSEN, Mark, Between facts and norms: Testing compliance with Article 8 ECHR in immigration cases, *Netherlands Quarterly of Human Rights*, 2019, p 164

[329] To read more about this argument see SPIJKERBOER Thomas, Structural Instability: Strasbourg Case Law on Children's Family Reunion, *European Journal of Migration and Law*, 11, 2009, 271–293

[330] This can for instance be seen in the different formulations of the judgements in Gül and Ahmut (ECtHR *Gül v. Switzerland*, Judgement of 29 February 1996, Application No. 23218/94 and ECtHR *Ahmut v. the Netherlands* Judgement of 28 November 1996, Application No. 21702/93) on one side and Sen and Tuquable-Tekle (ECtHR *Sen v. the Netherlands*, Judgement of 21 December 2001, Application No. 31465/96 and ECtHR *Tuqabo-Tekle v. the Netherlands*, Judgement of 1 December 2005, Application No. 60665/00) on the other.

[331] SPIJKERBOER Thomas, Structural Instability: Strasbourg Case Law on Children's Family Reunion, *European Journal of Migration and Law*, 11, 2009, 271–293p. 285 ff

"where immigration is concerned, Article 8 does not impose on a State a general obligation to respect the by married couples' choice of country of their matrimonial residence, and to authorise family reunion in its territory"[332]

In order to limit the inconsistency and move towards a similar protection as EU law provides TCN family members to EU Citizens, the Court should take the right to family life as the basis and also see the case as a family matter. The impact of EU law on migration within the EU can illustrate how human rights law can reverse the immigration laws, which traditionally are focusing on the public interest, and instead put a focus on the individual. EU rules on the free movement of EU citizens and their interpretation by the CJEU have systematically forced the Member States to justify their restrictive laws and practices, gradually extending the rights of Union citizens and for some TCN in the EU.[333] The ECtHR interprets the Convention in the awareness that the CJEU refers to the ECHR and the ECtHR's case law as the principal sources of its human rights jurisprudence.[334] In the *Pupino* judgement the CJEU for the first time required EU law to respect "the Convention , as interpreted by the ECtHR". Knowing that its case law will serve as the EU's constitutional human rights standard in immigration cases could therefore motivate the ECtHR to tighten its control intensity and pay less attention to the Contracting Parties' margin of appreciation.[335] Another reason for the Court to pay less attention to the margin of appreciation given to the Contracting States is the risk of negating the need for uniformity and the related concerns of legal certainty, predictability and coherence when allowing states a margin of appreciation regarding the way in which they implement human rights.[336]

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[332] See among other cases ECtHR *Gül v. Switzerland*, Judgement of 29 February 1996, Application No. 23218/94 and ECtHR *Ahmut v. the Netherlands* Judgement of 28 November 1996, Application No. 21702/93, ECtHR *Tuqabo-Tekle v. the Netherlands*, Judgement of 1 December 2005, Application No. 60665/00, ECtHR *Berisha v. Switzerland*, Judgement of 30 July 2013, Application No. 948/12 and ECtHR *El Ghatet v. Switzerland*, Judgement of 8 November 2016, Application No. 56971/10

[333] See Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Family Reunification Directive (FRD) [2003] OJ L251/12

[334] See among many cases from the CJEU case law, ECJ, judgment of 16 June 2005, Case C–105/03, *Pupino* [2005] ECR I-5285, para 60

[335] See THYM, Daniel, Respect for private and family life under Article 8 ECHR in immigration cases: A human right to regularize illegal stay? International and Comparative Law Quarterly; 57, 2008, p. 111

[336] HENRARD, Kristin, A critical analysis of the margin of appreciation doctrine of the ECtHR, with special attention to rights of a traditional way of life and a healthy environment: A call for an alternative model of international supervision, The yearbook of Polar-Law IV, 2012, p 372

4.1.3 Interaction between ECtHR and CJEU

In the field of human rights law, it is common for decision-making bodies, domestic, regional or international, to draw inspiration from the law and practice of other legal orders. The ECtHR is no exception. Many decisions from the Court draw inspiration from relevant international law or comparative law. The Court's position here is that the interpretation of the ECHR does not take place 'in a vacuum' and that the ECHR must be interpreted 'according to other parts of international law of which it forms part'.[337] This does not exclude the influence of EU law in general on the ECHR. Research suggests that the Court cite the CJEU more frequently now than it did 15 years ago.[338] A creative engagement between ECtHR and CJEU may offer the best way to contest inconsistency under the right circumstances. In *Jeunesse v. Netherlands*[339] interveners explicitly argued that the ECHR protection should be interpreted to reach the same level as EU law.[340] The Court rejected this argument and maintained an 'all things considered' assessment. However, the *Zambrano* case[341] was cited and EU law was considered. As Cathryn Costello puts it "*Jeunesse v. Netherlands illustrates that while EU and ECHR protections are distinct, mutual reinforcement and cross-fertilization can be productive and progressive, under the right conditions*".[342] These dynamics of cross-fertilisation have not only led to a considerable enrichment of their respective means to protect human rights, but have also increased both courts' autonomy with regard to the EU and Council of Europe member states.[343]

It is interesting to note that in the *Chavez-Vilchez* case, the Court states that the assessment of whether an EU citizen has a relationship of dependency with a TCN and whether he or she is in fact under risk of being deprived of his or her citizenship rights, as these are enshrined in Article 20 of the TFEU, has to be made in the light of the right to family life and the best interests of the child, according to Articles 7 and 24 (2) and (3) of the CFR, and in line with the corresponding

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[337] LETSAS, George, Strasbourg's Interpretative Ethic: Lessons for the International Lawyer, *The European Journal of International Law* Vol. 21. 3, 2010, p. 521.
[338] LOCK, Tobias, The Influence of EU Law on Strasbourg Doctrines, European Law Review, Research Paper Series No 2017/03, p. 2.
[339] ECtHR *Jeunesse v. the Netherlands*, Judgement of 3 October 2014, Application No. 12738/10
[340] Ibid para 99
[341] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'empoli*, 2011, ECR I-1177. In Zambrano the CJEU has created a new rout to protect residence rights of EU citizens and their TCN families.
[342] Costello, Cathryn, *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press, 2016, p. 169
[343] See SCHEEK, Laurent, The relationship between the European Courts and Integration through Human Rights 65, Heidelberg Journal of International Law, 2005, p. 8

provisions of the ECHR and the respective case law of the ECtHR.[344] Therefore it would be logical and beneficial for the protection of the right to family life if the ECtHR would determine similar cases under the ECHR in line with the corresponding CJEU case law.

4.2 Can the same treatment of different immigration cases improve the fairness?

The reason to apply the elsewhere test in the framework of Article 8 (1) and for the wide margin of appreciation given to the States in admission cases is, as explained above, the assertion that a refusal of entry in admission cases does not constitute an interference with the right to respect for family life. Instead it must be ascertained whether the State is under a positive obligation to allow for the entry and residence of a foreign national based on the right to respect for family life. However, when assessing whether a fair balance has been struck under Article 8 (1), the paragraph does not impose any limitations on the interests of the community as can be seen under Article 8 (2). In Article 8 (2) the Court has to apply a proportionality test between the individual's right on the one hand, and the interests of the community explicitly referred to in the paragraph, on the other. There are no such restrictions under the first paragraph and the State can invoke any interest of the community, and in particular 'the control of immigration' that is not one of the legitimate aims under the second paragraph.[345] Hence, Article 8 (1) is more favourable for States since it doesn't impose any limitations on justification grounds that can be invoked for limitations of the right to family life.

4.2.1 Justify refusals and determine all cases under Article 8 (2) of the ECHR

In order to limit the unfair treatment admission cases should instead be determined under Article 8 (2).[346] When determining an admission case within the scope of Article 8 (2) the Court can consider the refusal of entry as an action from which the State should have refrained and

[344] Case C-133/15 *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and others* [2017] EU: C:2017:354, para 70
[345] MILIOS, Georgios, The Immigrants' and Refugees' Right to 'Family Life': How Relevant are the Principles Applied by the European Court of Human Rights?, *International Journal on Minority and Group Rights*, 2018, p. 17.
[346] See Ibid and KLAASSEN, Mark, Between facts and norms: Testing compliance with Article 8 ECHR in immigration cases, *Netherlands Quarterly of Human Rights Vol 37(2)*, 2019

therefore consider the refusal as an interference with the right to respect for family life.[347] After determining that an interference has taken place due to the States action which they should have refrained from, the Court must assess whether the interference was consistent with the requirements of Article 8 paragraph 2, namely in accordance with the law, in pursuit of a legitimate aim, and necessary in a democratic society. In other words, the State has to do the same test as for expulsion cases and apply a proportionality test and strike a fair balance between the interests of the community and in particular those mentioned in Article 8(2) and the interests of the individual that is the right to respect for his or her 'family life'.[348] This means that additional elements to the elsewhere test have to be considered in admission cases. Using the justification test in Article 8 (2) also means that the Court has to justify the refusal of entry in admission cases and not put the burden of proof on the applicant. Consequently, in cases concerning migrants seeking an entry or trying to regularise an irregular stay and no criminal conviction is involved, more demand would be put on the Court. 'The control of immigration' which is not one of the legitimate aims under paragraph 2, could not be applied and therefore more demand will be put on the Court to find a legitimate aim which would justify a refusal or expulsion.

4.2.2 Distinguish cases based on family matters and not migration status

It is clear from the current case-law that the Court seeks to make a differentiation in the level of protection that is afforded in different types of immigration cases. The Court tends to be more protective towards family life in a case concerning the expulsion of a settled migrant since this person has spent a longer time in the host State and enjoys a higher level of integration than a foreign national seeking entry.

In the *Berrehab v. The Netherlands* case[349] the Court stated that in determining whether an interference was 'necessary in a democratic society', the Court makes allowance for the margin of appreciation that is left to the Contracting States.[350] When balancing the legitimate aim pursued against the seriousness of the interference with the applicants' right to respect for their family life,

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[347] See dissenting opinion of judge Martin, para 9, in ECtHR *Gül v. Switzerland*, Judgement of 29 February 1996, Application No. 23218/94

[348] MILIOS, Georgios, The Immigrants' and Refugees' Right to 'Family Life': How Relevant are the Principles Applied by the European Court of Human Rights? International Journal on Minority and Group Rights, 2018, p. 21

[349] ECtHR *Berrehab v. The Netherlands*, Judgement of 21 June 1988, Application No. 138

[350] Ibid, para 28.

the Court emphasised that Mr Berrehab was not seeking to enter the Netherlands for the first time, but had already resided there lawfully for many years and had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, the Court stressed that Mr. Berrehab already had real family ties in the Netherlands.[351] This reasoning implies that a foreign national who is seeking entry can't have 'real' family ties just because he or she hasn't resided lawfully in the host country. However, this approach is not convincing as it takes elements into account that fall outside the scope of family life. Even though there might never have been a right of residence in the past, the refusal to live together in the host State can amount to a huge interference with the right for family life.

The differentiation between the cases should therefore not depend on whether the foreigner is seeking entry, trying to regulate an irregular stay or whether a settled foreigner is facing expulsion. Instead, when determining whether the right to respect for family life has been violated and whether the violation is justified, the differentiation should depend on the family circumstances of the case and how deep an impact a measure, i.e. the refusal of entry or expulsion, will have on the family life. Thus, when determining both positive and negative obligations under Article 8 (2) a difference in the 'right' level of effectiveness can still take place within the application of the margin of appreciation. The Court has listed the various factors that are relevant when determining the scope of the margin of appreciation in several judgements.[352] Factors which have most impact on the scope of the margin of appreciation are the existence or lack of a European consensus; the "better placed" argument; and the nature and importance of the affected right or interest, in relation to the seriousness of the interference.[353] According to the case law the margin will be narrower where the right at stake is crucial to the individual's enjoyment of intimate or key rights.[354] Hence, when a refusal of entry or the expulsion have a deep impact on family life it can be seen as crucial

[351] Ibid, para 29. It is worth noting that much of the ECtHR's case law on expulsion of settled migrants relates to settled migrants with a right to residence facing expulsion because of criminality. The *Berrehab* case therefore seems to be a somewhat exceptional case since Mr. Berrehab had not committed any crime.
[352] See for instance ECtHR *S. and Marper v. UK,* Judgement of 4 December 2008, Application Nos. 30562/04 and 30566/04 para. 102 and ECtHR *Connors v. UK*, Judgement of 27 May 2004, Application No. 66746/01 para 82
[353] For an explanation on determining the scope of the margin of appreciation see GERARDS, Janneke, The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination, in M. Balboni (ed), M. Balboni (ed.), The principle of discrimination and the European Convention of Human Rights, available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875230
[354] ECtHR *S. and Marper v. the United Kingdom,* Judgement of 4 December 2008, Application No. 30562/04 and 30566/04, para 102

to the individuals enjoyment of his or her right to respect for family life and the margin of appreciation should therefore be narrower. Thus, according to the circumstances of the case the Court may use a judicial test of effectiveness where less demand may be placed on the causal relationship between measure and aim when the States have been given a wide margin of appreciation, as in cases where the family ties can't be seen as very strong and the measure won't have a deep impact on family life. In these kinds of circumstances the Court may accept that the measure, i.e. the denied admission or the expulsion, is only partly effective or not entirely ineffective to the aim, for instance the economic wellbeing of the country. By contrast, in cases where the State has been given a narrow margin of appreciation, like in cases where the family ties can be seen as very strong and a separation or move to another country will have a deep impact on family life, the Court may use a judicial test where greater demand may be placed on the causal relationship between measure and aim.[355]

Certain factors or elements can be taken into consideration in order to determine whether the family ties can be seen as strong and whether a refusal of entry or an expulsion would have a deep impact on family life and consequently if a wide or narrow margin of appreciation should be applied. These factors or elements could be based on the individuals adaptability to the country of origin, ties to the host country, effective family bond between the family members and socio-economic rights available in the country of origin. These suggested elements are borrowed from the elements that should be applied when a decision about a child's best interests is to be made.[356] Since most migration cases concerning the right to family life involves children these elements would be relevant to apply. However, these elements can be of relevance even in cases where no children are involved. Thus, by evaluating the family ties with the help from the forementioned elements, the Court can determine the appropriate level of intensity of review by using the margin

[355] See GERARDS, Janneke, *How to improve the necessity test of the European Court of Human Rights*, Oxford University Press and New York University School of Law, 2013, p 475 ff.
[356] Additional elements that should be considered when a decision about the child's best interests is to be made, see Committee on the Rights of the Child, 'General Comment No. 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration' UN Doc CRC/C/GC/14 (29 May 2013). To read more about relevant elements to be considered when determining the best interests of the child see EDLUND, Jennie and STEHLÍK, Václav, The Uncertain Place of the Child's Best Interests in ECtHR's Immigration Case Law. *International and Comparative Law Review*, 2020, vol. 20, no. 2, pp. 93–112

of appreciation doctrine.[357] This way the Court can make a more fair distinction between migration cases not depending on the migration status but rather based on family ties.

4.2.3 Acknowledging the insiders' interests

In addition to the above explained solutions to improve the case-law, the Court in general needs to put more focus on the insiders interests. As explained under chapter 3.2.3, cases concerning family migration especially cases concerning admission or regulating an irregular migration status, are first and most seen as immigration cases and when balancing the individual rights against the State's interests the focus is on the migrant/outsider.[358] The Court tend to put more focus on the insiders interests in expulsion cases. One of the reasons for the breach of Article 8 in the *Yildiz v. Austria* case was that 'the authorities failed to establish whether the second applicant (the spouse) could be expected to follow him to Turkey, in particular whether she spoke Turkish and maintained any links, other than her nationality, with that country.[359] In *Boultif v. Switzerland*[360] the Court laid down several reasons why the spouse couldn't accompany her husband to Algeria. Even in the *ACB* case[361], which concerned whether the government had any positive obligations under Article 8 to admit onto its territory relatives of settled immigrants, the Court acknowledged that family reunification is about the interest of the insiders (citizens and permanent residents) to be joined by their migrant partners, and not outsiders (migrant partners) who want to be admitted.[362] Moreover, Carens claims that the state's obligation to admit outside family members is derived not so much from the claims of those seeking to enter as the claims of those they seek to join: citizens, residents, or others who have been admitted for an extended period.[363] Therefore, there is no reason why the interests of the insider spouse or child shouldn't

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[357] GERARDS, Janneke, Pluralism, Deference and the Margin of Appreciation Doctrine, *17 European Law Journal,* 2011

[358] See ECtHR *Useinov v. Netherlands*, Judgement of 11 April 2006, Application No. 61292/00 and ECtHR *Omoregie and Others v. Norway*, Judgement of 31 July 2008, Application No. 265/07

[359] ECtHR *Yildiz v. Austria*, Judgement 31 October 2002, Application No. 37295/97, para 43

[360] ECtHR *Boultif v. Switzerland*, Judgement of 2 August 2001, Application No. 54273/00

[361] ECtHR *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, Application Nos. 9214/80,9473/81, 9474/81

[362] See ECtHR *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, Application Nos. 9214/80,9473/81, 9474/81, para 60, *"The applicants are not the husbands but the wives, and they are complaining not of being refused leave to enter or remain in the United Kingdom but, as persons lawfully settled in that country, of being deprived (Mrs. Cabales), or threatened with deprivation (Mrs. Abdulaziz and Mrs. Balkandali), of the society of their spouses there."*

[363] CARENS, J.H., Who Should Get in? The Ethics of Immigration Admissions, 17 (1) *Ethics and International Affairs*, 2003 p. 96-97.

be an important element to consider when balancing the different interests involved in cases concerning admission or hybrid cases as well.

This said, the Courts current approach can be seen as incompatible with the freedom of residence of a lawful citizen which is guaranteed in several state constitutions as well as international conventions.[364] In order to change this development the applicants, the States and the Court need to put more focus on the insiders' interests when balancing rights. If the insiders interests are being marginalised and they don't have a right to establish a family life in the country in which they are living, their Citizenship or permanent residence tend to lose their meaning.[365]

4.3 Can the Court's application of the best interests of the child principle be less arbitrary?

As can be seen under chapter 3.3 the Court is not examining the full range of relevant rights in the CRC which means it is not applying a complete, rights based approach to interpreting and applying the principle of the best interests of the child, and not giving sufficient weight to the child's best interests when balancing the State's and applicants interests. This subchapter explore possible solutions in order to improve the Court's application of the best interests of the child principle.

4.3.1 Identifying the best interests of the child

When looking at the rights in the CRC, Article 16 (1) corresponds with Article 8 in ECHR. However, Article 16 (1) CRC is only one of many rights relating to the concept of family unity.[366] Hence, family unity can be seen as an established norm in the CRC. Family unity should, therefore, be the ECtHR's default position in family reunification cases concerning children.[367] The Court should be asking whether it is in the best interests of the child to remain or reunite with the family

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[364] MILIOS, Georgios, The Immigrants' and Refugees' Right to 'Family Life': How Relevant are the Principles Applied by the European Court of Human Rights?, *International Journal on Minority and Group Rights*, 2018, p. 17.
[365] WALTER, A., Reverse Discrimination and Family Reunification, Nijmegen: Wolf Legal Publishers, 2008, p. 21 as referred to by HART, Betty de, Love Thy Neighbour: Family Reunification and the Rights of Insiders, *European Journal of Migration and law 11*, 2009, p. 251.
[366] See for instance CRC Articles 7(1), 8(1), 9, 10(1), 18(1) and 22(2).
[367] Committee on the Rights of the Child, 'General Comment No. 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration' UN Doc CRC/C/GC/14 (29 May 2013) Supra note 61, para 66

in the host country or in the country of origin and not, as it occasionally does, ask whether it is in the best interests of the child to be with the family. Especially since Article 9 (1) CRC states that children should not be separated from their parents against their will. The task of identifying the interests of the child in Article 8 of the ECHR in the immigration context means identifying relevant rights of the child. The Court needs to see the best interests of the child in the light of all relevant rights of the child where the key right is the right of the child to family unity. As can be seen from the case law, the Court is not adopting a complete, rights based approach when interpreting and applying the principle of the best interests of the child and, therefore, not examining the full range of relevant rights in the CRC.

In the current ECtHR's case law the Court is in general taking the child's adaptability, country ties and effective family bond into consideration when determining the child's best interests[368] and leaving out other important elements such as the child's views and socio-economics rights.

All the elements in the GC No 14[369] might not be relevant to every case, and different elements can be used in different ways in different cases. However, when determining the best interests of the child in the immigration context the child's views and socio-economic rights are relevant elements to consider in addition to adaptability, country ties and effective family bond. Additionally, the Court has laid down that it is the competent national authorities task to determine the best interests of the child but in order for the Court to ascertain whether the domestic courts has taken into account the child's best interests, it must be sufficiently reflected in the reasoning of the domestic courts. The courts must put forward specific reasons in light of the circumstances of the case, especially in order to enable the Court to carry out the supervision.[370] The Court includes the best interests of the child in its balancing test and has repeatedly affirmed that all decisions concerning children should '*place the best interests of the child at the heart of their considerations and attach crucial weight to it'*.[371] This due consideration should also be reflected

[368] SMYTH, Ciara, 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? *European Journal of Migration and Law*, 2015, Vol. 17, p 75
[369] The seven elements are; (a) the child's views; (b) the child's identity; (c) preservation of the family environment and maintaining relations; (d) care, protection, and safety of the child; (e) situation of vulnerability; (f) the child's right to health, and (g) the child's right to education.
[370] ECtHR *El Ghatet v. Switzerland*, Judgement of 8 November 2016, Application No. 56971/10, para 47
[371] Ibid. para 46

in the reasoning of each decision, whereas the lack of a sufficient reasoning contradicts the requirements of Article 8 of the Convention.[372] When not examining all relevant elements in a case the protection under the best interests of the child's principal is weakened. Therefore, in order to adopt a complete, rights based approach when interpreting and applying the principle of the best interests of the child in the immigration context the child's views and socio-economic rights are relevant elements to consider in addition to adaptability, country ties and effective family bond.

4.3.2 Weighing the best interests of the child against migration control

When determining if Article 8 of the ECHR and the right to family life has been violated in a case, the Court has to determine whether the contracting state has struck a fair balance between the personal interests of the immigrant, on one hand, and the public interests on the other. The Court has to balance the State's and the applicant's interests. The best interests of the child among other interests have to be considered. The question is what weight the Court apportions to the best interests of the child when balancing the State's and the applicant's interests. Even though there is no agreement on the precise weight apportioned on the child's best interests, it is generally accepted that the interests of the child should receive some hierarchical primary.[373] It can be questioned whether the child's best interests receives such weight in the balancing exercise when it has to be demonstrated that it would be insurmountable to relocate to another country. This test implies that a child may have to leave their own country in order to enjoy family life with a law-abiding non-national parent. The insurmountable obstacle criterion can be legitimate in situations where the non-national poses a threat to the community but it is difficult to defend it where the case is based on immigration policy alone. A fair balance has not been struck between two options, namely voluntary exile or termination of family life.[374] Leloup suggests that; "*the best interests of the child – and the right to family life in general – would be better protected if this burden of proof were to be reversed and if the proportionality test started from a family-centred approach. In this approach, the family – rather than having to prove that there were insurmountable obstacles for their relocation – would have to demonstrate that they were enjoying family life in the host state*

[372] Ibid. para 47

[373] POBJOY, J. M., The best interests of the child principle as an independent source of protection, *International Comparative Law Quarterly*, 2015, 327, p 37 f. , ECtHR *Neulinger and Shuruk v. Switzerland*, Judgment (GC) of 6 July 2010, Application No. 41615/07, para 135

[374] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing, 2017, p. 388

and had sufficient social and economic ties there. It will then be up to the host state to give sufficient reasons – for example serious threats to the public order – to justify the expulsion."[375] Therefore, as suggested under subchapter 4.2.1, the application of the best interests of the child principle would also be better protected if family migration cases were determined under Article 8 (2) where the State has to justify the refusal or expulsion and clearly explain what weight it has apportioned to the different interests including the best interests of the child. Leloup's suggestion also indicates that by moving the focus away from the migration issue and focus more on the family matter the best interests of the child would be better protected.[376]

Due to the fact that the principle of the best interests of the child is not expressly enshrined in the ECHR the way the principle has been applied by the Court makes it difficult to determine when the principle will be applied as the overriding principle. Unfortunately the application of the principle of the best interests of the child has not added predictability to the Courts' case-law on family migration. This is not necessarily the Court's fault as the principle itself lacks certainty. Some may regard such a lack of certainty as flexibility and as a morality that is essential in the case-by-case approach, which the best interest standard requires. However, it would be in the interest of certainty and in the best interests of children if the Court were to provide guidance on which factors the court would weigh more heavily in the balance when applying the best interests principle.[377]

In the *El Ghatet v. Switzerland* case,[378] the Court found that the national court did not place the child's best interests sufficiently at the centre of its balancing exercise and its reasoning and that there accordingly had been a violation of Article 8. The Court underlined that the national courts must put forward specific reasons in light of the circumstances of the case. Had the domestic authorities engaged in a thorough balancing of the interests in issue, particularly taking into account the child's best interests, and put forward relevant and sufficient reasons for their decision,

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[375] LELOUP, Mathieu, The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency, *Netherlands Quarterly of Human Rights*, 2019, Vol. 37(1), p. 60

[376] See more about this argumentation under chapter 4.2.2.

[377] VAN BUREN, G, *Child Rights in Europe: Convergence and Divergence in Judicial Protection*, Strasbourg Council of Europe Publishing, 2007, p. 36

[378] ECtHR *El Ghatet v. Switzerland*, Judgement of 8 November 2016, Application No. 56971/10. The circumstances of the case are also discussed and analysed in chapter 3.3.2.2

the Court would, in line with the principle of subsidiarity, consider that the domestic authorities neither failed to strike a fair balance between the interests of the applicants and the interest of the State, nor to have exceeded the margin of appreciation available to them under the Convention in the domain of immigration.[379] The Court states that in order to decide upon the best interests of the child and the most adequate means for them to develop their family life, States should take into account the children's age, their situation in their country of origin and the extent to which they are dependent on their parents.[380] However, this guidance is not sufficient. In order for the domestic authorities to put forward relevant and sufficient reasons for their decision and particularly taking the child's best interests into account, the decision should be based on the seven elements the Committee on the Rights of the Child outlines in its GC No. 14.[381] If the Court would make clear that all elements listed in the GC No. 14 could be important elements that domestic authorities should take into account and put forward for their decisions it would make the application of the balancing test and margin of appreciation more predictable.

4.4 Conclusions

This chapter examines possible solutions on how the case-law of the ECtHR on the right to respect for family life in the immigration context can be more consistent and fair among all applicants. Based on the assumptions laid down in chapter 3, this chapter explores how the case-law can be more consistent; how the level of protection for different migration cases can be more equal and fair and lastly, how the Court's application of the principle of the best interests of the child can be more certain and give sufficient weight for the best interest of the child in the balancing exercise.

EU law and CJEU case-law is provided with clearer rights and more rigorous proportionality assessments compared to the ECtHR's use of unsound reasoning and multi-factor approach. Therefore, it would be an understandable step to refer and draw inspiration from EU law when

[379] Ibid. para 52
[380] Ibid paras 45, 46
[381] See part V of the Committee on the Rights of the Child, 'General Comment No. 14 (GC No. 14), *Implementation: assessing and determining the child's best interests*, outlines seven elements that should be considered when a decision about the child's best interests is to be made (pp. 7ff.): (a) the child's views; (b) the child's identity; (c) preservation of the family environment and maintaining relations; (d) care, protection, and safety of the child; (e) situation of vulnerability; (f) the child's right to health, and (g) the child's right to education

determining compliance with Article 8 of the ECHR in immigration case law.[382] If the ECtHR would use the means-ends test thoroughly, it could be an important complement to the balancing test. The means-ends test would require the Court to determine explicitly the interests involved in the case and to give the reasons why the measures were used to achieve the goals, which is often left out in the ECtHR's balancing test. In order to limit the inconsistency and move towards a similar protection as found in EU law the Court should take the rights of the family as the basis, and look at the Convention to find out whether the State can legitimately limit this right and not seeing State sovereignty as the basis and look for limitations of State sovereignty in the Convention's codification of human rights. Thus, paying less attention to the margin of appreciation given to the Contracting States which risk negating the need for uniformity and the related concerns of legal certainty, predictability and coherence.[383] Additionally, a creative engagement between ECtHR and CJEU may offer the best way to contest inconsistency under the right circumstances. As Laurent Scheek explained it: *"Just as in cooperative binary puzzles where two players must solve the game together and where both lose as someone tries to win over the other, solving Europe's binary human rights puzzle has required of European judges a new way of thinking where it's not the institutions, but their linkage that matters"*.[384] Therefore, drawing inspiration from EU law will lead to greater legal certainty for contracting parties and individuals and limit the widely diverging practices by the States and the ECtHR.

The different tests the Court use in different migration cases to determine States' compliance with Article 8 have resulted in that foreign nationals seeking entry or requesting to regularise their irregular migration status enjoy an unjust lower level of protection than settled migrants with a right of residence. This different approach by the Court can be seen as conflicting with its own case law, which establishes that similar considerations should be applied regarding positive and negative obligations that are derived from Article 8.[385] Even though States have been afforded a wide margin of appreciation when it comes to admission cases, they still have to remain within

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[382] COSTELLO, Cathryn (2016) The Human Rights of Migrants and Refugees in European Law, 2016, Oxford University Press, p. 130

[383] HENRARD, Kristin, A critical analysis of the margin of appreciation doctrine of the ECtHR, with special attention to rights of a traditional way of life and a healthy environment: A call for an alternative model of international supervision, The yearbook of Polar-Law IV, 2012, p. 372.

[384] SCHEEK, Laurent, 'The Relationship between the European Courts and Integration through Human Rights' 65 *Heidelberg Journal of International Law* 837, 2005, p. 885

[385] MILIOS, Georgios, The Immigrants' and Refugees' Right to 'Family Life': How Relevant are the Principles Applied by the European Court of Human Rights? *International Journal on Minority and Group Rights*, 2018, p. 30

its margin and respect the proportionality principle. The Court has also indicated that, not only with regards to continued residence but with regards to a first entry as well, this margin of appreciation finds its limits in the core obligations implied by Article 8 of the Convention. These obligations require that a State allow for and even facilitate the development of normal family ties between settled members within the defending State's community and their foreign family members.[386]

Furthermore, the Court has repeatedly stressed that the boundaries between positive and negative obligations do not lend themselves to a precise definition.[387] Hence, the approach of the ECtHR should be exactly the same in both a positive and negative case and see both a refusal of entry and expulsion as an interference of the right to respect for family life. Since the case law holds that similar considerations should be applied regarding positive and negative obligations that are derived from Article 8 and in both contexts regard must be given to the fair balance that has to be struck between the competing interests of the individual and the community, it can be assumed that it makes no material difference whether a positive or a negative obligation is at stake.[388]

Consequently, all cases should therefore be determined under Article 8 (2) where States have to justify the interference and apply a proportionality test and strike a fair balance between the interests of the community and in particular those mentioned in Article 8(2) and the interests of the individual that is the right to respect for his or her 'family life'.[389] In order to make a more fair distinction between different migration cases and determine the appropriate level of intensity of review the Court can make use of the margin of appreciation doctrine.[390] The differentiation should depend on the family circumstances of the case and not the migration circumstances of the case. Certain factors or elements based on the family ties can be taken into consideration in order to decide if a wide or narrow margin of appreciation should be applied.

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[386] VAN WALSUM, Sarah, Comment on the *Sen* Case. How Wide is the Margin of Appreciation Regarding the Admission of Children for Purposes of Family Reunification? *European Journal of Migration and Law 4*, 2003, p 520

[387] See for instance, ECtHR *Keegan v. Ireland*, Judgment of 26 May 1994, Application No. 290, para. 49

[388] See dissenting opinion of judge Martin, para 9, in ECtHR *Gül v. Switzerland*, Judgement of 29 February 1996, Application No. 23218/94

[389] MILIOS, Georgios, The Immigrants' and Refugees' Right to 'Family Life': How Relevant are the Principles Applied by the European Court of Human Rights? *International Journal on Minority and Group Rights*, 2018, p. 21.

[390] GERARDS, Janneke, Pluralism, Deference and the Margin of Appreciation Doctrine, *17 European Law Journal,* 2011

In addition to these suggestions the Court needs to give more consideration to the insiders' interests in admission and hybrid cases. Even though the Court has acknowledged that family reunification is about insiders, it doesn't show it in the current case law. Family reunification cases are first and most seen as immigration cases and when balancing the individual rights against the State's interests the focus is on the migrant/outsider.[391] This approach can be seen as incompatible with the freedom of residence of a lawful citizen which is guaranteed in several state constitutions as well as international conventions.[392] In order to change this development the applicants, the States and the Court need to put more focus on the insiders' interests when balancing rights. If the insiders interests are being marginalised and they don't have a right to establish a family life in the country in which they are living, their Citizenship or permanent residence tend to lose their meaning.[393]

In order to improve the application of the best interests of the child the Court needs to adopt a complete, rights based approach when interpreting and applying the principle of the best interests of the child in the immigration context. The child's views and socio-economic rights are relevant elements to consider in addition to adaptability, country ties and effective family bond. The application of the best interests of the child principle would also be better protected if family migration cases were determined under Article 8 (2) where the State has to justify the refusal or expulsion and clearly explain what weight it has apportioned to the different interests including the best interests of the child. By moving the focus away from the migration issue and focus more on the family matter the best interests of the child would be better protected. It would be in the interests of certainty and in the best interests of children if the Court were to provide guidance on which factors the court would weigh more heavily in the balance when applying the best interests principle.[394] If the Court would make clear that all elements listed in the GC No 14 could be important elements that domestic authorities should take into account and put forward for their

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[391] See ECtHR *Useinov v. Netherlands*, Judgement of 11 April 2006, Application No. 61292/00 and ECtHR *Omoregie and Others v. Norway*, Judgement of 31 July 2008, Application No. 265/07

[392] MILIOS, Georgios, The Immigrants' and Refugees' Right to 'Family Life': How Relevant are the Principles Applied by the European Court of Human Rights?, *International Journal on Minority and Group Rights*, 2018, p. 17

[393] WALTER, A. Walter, Reverse Discrimination and Family Reunification, Nijmegen: Wolf Legal Publishers, 2008, p. 21 as referred to by Hart, Betty de, Love Thy Neighbour: Family Reunification and the Rights of Insiders, *European Journal of Migration and law 11*, 2009, p. 251

[394] VAN BUREN, G, *Child Rights in Europe: Convergence and Divergence in Judicial Protection*, Strasbourg Council of Europe Publishing, 2007, p. 36.

decisions it would make the application of the balancing test and margin of appreciation more predictable.

5. CONCLUSIONS AND OUTCOME

As long as refugees and migrants settle in European States, the human right to family life will continue to play a crucial role for national and supranational judicial examination in cases concerning family migration. Family decisions about where to live and when and whether to reunite are often dictated by migration status and migration control. Since family migration is one of the main legal migration routes to European States, it is crucial for both migrants and destination countries to have clear and predictable legalisation concerning family migration in place that is safeguarding human rights while controlling migration. The member States have the primary responsibility to protect the rights and freedoms laid down in the Convention[395] and the ECtHR plays a subsidiary role in protecting the rights. To uphold the Human Rights commitments under the ECHR the Contracting States have to provide for family unification subject to a margin of discretion to the State.

The ECtHR's case-law on the right to family life in the immigration context has shown a problematic development. The case-law lacks consistency in terms of procedural and substantive protection. The application of Article 8 of the ECHR remains very much State-biased, with marginal impact on sovereign discretion.[396] Cases often turn on distinguishing facts rather than principles and the multi-factor approach produces much uncertainty.[397] Different types of immigration cases are determined differently which results in unequal level of protection under Article 8 and the case-law has shown an uneven and uncertain application of the child's best interests. The inconsistent case law makes is difficult for national authorities to apply Article 8 which leads to widely diverging practices by the Contracting Parties and the precedent value of the Court's judgements is minimised. This widely diverging practice can also push migrants into unauthorised channels to find host States where the regulations on family migration are less strict and subsequently unintentionally lead to an increase in illegal immigration flows.

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[395] See for example ECtHR *Markovic and others v Italy,* Judgement of 14 December 2006, Application No. 1398/03
[396] DRAHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Modern Studies in European Law, Hart Publishing, UK, 2017, p. 387
[397] COSTELLO, Cathryn, *The Human Rights of Migrants and Refugees in European Law*, Oxford Studies in European Law, Oxford, UK, 2016, p. 128

In this thesis the object of the inquiry is whether and how the case-law of the ECtHR on the right to respect for family life in the immigration context can be more consistent and fair among all applicants in order to give Contracting Parties and individuals more certainty and generate a more convergent practice by the States and increase the precedent value of the Court's judgements. Three assumptions are made in order to answer the research question.

The first assumption is that the case-law of the ECtHR on the right to respect for family life is inconsistent and unpredictable and the aim is to find out whether it can be helped by the influence of EU law and CJEU case law.

In each and every case concerning migration control the ECtHR emphasises that as a matter of international law, states are free to determine which foreign nationals are allowed to enter and reside, but are limited in this sovereign competence by the ECHR.[398] The Court's principle of state sovereignty regarding migration control has become the starting point instead of one element amongst others when determining compliance with Article 8 of the ECHR.[399] This is especially shown in cases concerning migrants who are seeking entry to a state or in cases where a migrant requesting to regularise their irregular migration status in order to enjoy family life.

The contrast between the ECtHR's and CJEU's approach on the right to family life is remarkable. The ECtHR's proportionality assessment, that normally requires a balancing of the interference with the individuals rights and the States interest, does not reflect a clear proportionality standard due to the multi factor balancing approach. The Court's use of the necessary test is too vague and general and the balancing test which is often used by the Court is complex, subjective and not transparent.[400] Further, the State's interest in migration control infuses the Court's approach and it is assumed that refusal of entry and removal in themselves pursue legitimate aims which makes the case-law unstable. Even though the ECtHR's case-law allows the State an area of discretion,

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[398] See, among many other authorities, ECtHR *Abdulaziz, Cabales and Balkandali v. the United Kin*gdom, Judgment of 28 May 1985, Application No. *9214/80; 9473/81;9474/81* para. 67; ECtHR *Boujlifa v. France*, Judgment of 21 October 1997, 122/1996/741/940, para. 42

[399] There are some exceptions to this principle. See for instance ECtHR *Berrehab v. The Netherlands*, Judgement of 21 June 1988, Application No. 138; ECtHR *Sen v. Netherlands*, Judgement of 21 December 2001, Application No. 31465/96 and ECtHR *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Judgement of 12 Oct 2006, Application No. 13178/03

[400] GERARDS, Janneke, How to improve the necessity test of the European Court of Human Rights, Oxford University Press and New York University School of Law, 2013, p. 482, 471

the Court is not determined where to draw the line and when a State has overstepped its margin of appreciation.[401]

This case-law is in stark contrast to the CJEU case law on family reunification where clearer rights and more rigorous proportionality assessment is being used and TCN who are family members of EU Citizens have a stronger protection. Therefore, it is of interest for the ECtHR to draw inspiration from EU law.[402] If the ECtHR would use the means-ends test thoroughly, it could be an important complement to the balancing test. The means-ends test would require the Court to determine explicitly the interests involved in the case and to give the reasons why the measures were used to achieve the goals, which is often left out in the ECtHR's balancing test.

In order to limit the inconsistency and move towards a similar protection as EU law the Court should take the rights of the family as the basis, and look at the Convention to find out whether the State can legitimately limit this right and not seeing State sovereignty as the basis and look for limitations of State sovereignty in the Convention's codification of human rights. Thus, paying less attention to the margin of appreciation given to the Contracting States which risk negating the need for uniformity and the related concerns of legal certainty, predictability and coherence.[403]

Lastly, a creative engagement between ECtHR and CJEU may offer the best way to contest inconsistency under the right circumstances. Therefore, drawing inspiration from EU law will lead to greater legal certainty for contracting parties and individuals and limit the widely diverging practices by the States and the ECtHR.

The second assumption is that the differentiation in the level of protection between settled migrants and migrants seeking an entry or requesting to regularise their irregular migration status is not defendable and is in contrast with the ECtHR's own case-law, which establishes that similar considerations should be applied regarding positive and negative obligations that derive from

[401] See SPIJKERBOER, Thomas, Structual Instability: Strasbourg Case Law on Children's Family Reunion, *European Journal of Migration and Law* 11, 2009
[402] COSTELLO, Cathryn, *The Human Rights of Migrants and Refugees in European Law*, Oxford Studies in European Law, Oxford University Press, 2016, p. 130.
[403] HENRARD, Kristin, A critical analysis of the margin of appreciation doctrine of the ECtHR, with special attention to rights of a traditional way of life and a healthy environment: A call for an alternative model of international supervision, The yearbook of Polar-Law IV, 2012, p. 372.

Article 8.[404] The aim is to find out whether the unequal level of protection in different migration cases can be reduced by determining all cases under the same test and distinguishing cases based on family matters instead of migration status.

The way the Court tests whether the state has complied with its obligations under Article 8 depends on the type of immigration case. In admission cases the Court holds that the refusal of entry does not constitute an interference with the right to respect for family life, but that instead it must be ascertained whether the state is under a positive obligation to allow for the entry and residence of a foreign national based on the right to respect for family life. In these cases the applicant has to show that there are obstacles to establish or continue family life in the country of origin. In some cases it is difficult to make a sharp distinction between negative and positive obligations. In such cases, only in the most exceptional circumstances will the applicant's expulsion constitute a violation of Article 8 of the ECHR. In expulsion cases, the Court tests whether a state has a negative obligation not to expel a foreign national who is a settled migrant with a right of residence. The outlined criteria in the case-law form a solid test to determine whether the interference in the right to respect for family life of a settled foreign national is justified under Article 8 (2).

The assessments concerning foreign nationals seeking entry or requesting to regularise their irregular migration status are not as thorough and just as the assessment for settled migrants with a residence right facing expulsion. The different tests have therefore resulted in that foreign nationals seeking entry or requesting to regularise their irregular migration status enjoy an unjust assessment compared to settled migrants with a right of residence. This different approach by the Court can be seen as conflicting with its own case-law, which establishes that similar considerations should be applied regarding positive and negative obligations that are derived from Article 8. Even though States have been afforded a wide margin of appreciation when it comes to admission cases, they still have to remain within its margin and respect the proportionality principle. The Court has also indicated that, not only with regards to continued residence but with regards to a first entry as well, this margin of appreciation finds its limits in the core obligations implied by Article 8 of the Convention. Due to these obligations and the fact that the Court repeatedly has stressed that the boundaries between positive and negative obligations do not lend

[404] GEORGIOS, Milios, The Immigrants' and Refugees' Right to 'Family Life': How Relevant are the Principles Applied by the European Court of Human Rights? *International Journal on Minority and Group Rights*, 2018, p. 30

themselves to a precise definition, the approach of the ECtHR should be exactly the same in both a positive and negative case. Hence, it should see both refusal of entry and expulsion as an interference of the right to respect for family life.

Consequently, all cases should therefore be determined under Article 8 (2) where States have to justify the interference and apply a proportionality test and strike a fair balance between the interests of the community and in particular those mentioned in Article 8(2) and the interests of the individual that is the right to respect for his or her 'family life'. In order to make a more fair distinction between different migration cases and determine the appropriate level of intensity of review the Court can make use of the margin of appreciation doctrine. The thesis suggests that the differentiation should depend on the family circumstances of the case and not the migration circumstances of the case. When the family ties are strong and a refusal of entry or the expulsion would have a deep impact on the family life it can be seen as crucial to the individuals enjoyment of his or her right to respect for family life and the margin of appreciation should be narrower. Certain factors or elements can be taken into consideration in order to determine whether the family ties can be seen as strong and whether a refusal of entry or an expulsion would have a deep impact on family life and consequently if a wide or narrow margin of appreciation should be applied. The thesis suggests that these factors or elements could be influenced from the elements that should be applied when a decision about a child's best interests is to be made. These elements could for instance be; the individuals adaptability to the country of origin, ties to the host country, effective family bond between the family members and socio-economic rights available in the country of origin. In addition to putting more focus on the impact a refusal of entry or an expulsion would have on the family life, the Court needs to put more focus on the insiders interests. This would make the assessment of the family circumstances more thorough and just as well as the balancing test when balancing the individual rights against the State's interests.

The third assumption in this thesis is that the Court doesn't examine the full range of relevant rights in the CRC when applying the principle of the best interests of the child. It is also uncertain what weight the child's best interests is given in the balancing exercise which generates unpredictability. The aim is to clarify whether the application of the best interests of the child can be more certain and predictable by examining the full range of relevant rights in the CRC and by providing guidance on which factors it would weigh more heavily in the balancing exercise.

The ECtHR's immigration case-law on Article 8 of the ECHR has shown an uneven and uncertain application of the child's best interests.[405] Little significance is attached to the child's respect for family life when determining whether the immigration measure is compatible with the ECHR.[406] The Grand Chamber of the Court affirmed the paramountcy of the child's best interests in *Neulinger and Schuruk v. Switzerland*,[407] which implies that the principle of the best interests of the child has acquired the status of a general principle of international law. However, State practice shows a resistance to the concept of best interests in the immigration context, since the child may not have a right to what is in his/her best interests.

The task of identifying the interests of the child in Article 8 of the ECHR in the migration context means identifying relevant rights of the child. The Court needs to see the best interests of the child in the light of all relevant rights of the child where the key right is the right of the child to family unity. As can be seen from the case law, the Court is not adopting a complete, rights based approach when interpreting and applying the principle of the best interests of the child and, therefore, not examining the full range of relevant rights in the CRC. In the current ECtHR's case law the Court is in general taking the child's adaptability, country ties and effective family bond into consideration when determining the child's best interests[408] and leaving out other important elements such as the child's views and socio-economics rights. The ECtHR should therefore examine the full range of relevant rights in the CRC in order to adopt a complete, rights based approach when interpreting and applying the principle of the best interests of the child.

When looking at the current case-law on admission cases and hybrid cases it is hard to understand what weight the Court has given the best interests of the child when balancing the States and the applicant's interests against each other. The weight the Court attaches to the best interests of the child when determining the insurmountable obstacle or exceptional circumstances tests varies

[405] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing, 2017, p. 379.
[406] KILKELY, Ursula, *The Child and the European Convention of Human Rights,* Aldershot, Ashgate/Dartmouth, 1999.
[407] *Neulinger and Shuruk v Switzerland*, Application No. 41615/07, Judgment (GC) of 6 July 2010, para 135
[408] SMYTH, Ciara, 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? *European Journal of Migration and Law*, 2015, Vol. 17, p 75

depending on other factors in the balancing test. In most cases where the parents are divorced or separated and custody has been awarded to the parent with the right to remain, but there is an access arrangement in place in respect of the parent who is trying to regularise the stay or seeking an entry, the best interests of the child is given significant weight.[409] Although, in other cases where the parents are still together the Court is showing an inconsistent attitude.[410] The Court doesn't seem to take any certain elements into account relevant to the situation in question as long as the family is together. It also suggests that the ECtHR legitimises a difference in treatment between children of harmonious families and single parents to whom the obstacle and exceptional circumstances tests applies.

It can be questioned whether the child's best interests receives sufficient weight in the balancing exercise when it has to be demonstrated that it would be insurmountable to relocate to another country. A fair balance has not been struck between two options, namely voluntary exile or termination of family life.[411] In order to better protect the best interests of the child the burden of proof should not be on the citizen to demonstrate that they have exhausted all other jurisdictions where they could possibly relocate with their non-national partner or child, but rather on the State to put forward a cogent motivation as to why the citizen needs to leave the country in order to enjoy family life.[412]

In many cases where both family matters and immigration matters are involved the Court will prioritize migration proceedings. The immigration proceedings take priority and child proceedings need to be resolved in accordance with the immigration decision. Due to the fact that the principle of the best interests of the child is not expressly enshrined in the ECHR the way the principle has been applied by the Court makes it difficult to determine when the principle will be applied as the overriding principle. Even though there is an increased attention towards the principle of the best interests of the child in immigration case-law, the ruling very often goes very little beyond paying

[409] See ECtHR *Rodriges da Silva and Hoogkamer v. the Netherlands*, Judgement of 31 January 2006, Application No. 50435/99 and ECtHR *Nunez v. Norway*, Judgement of 28 June 2011, Application No. 55597/09

[410] See ECtHR *Antwi v. Norway*, Judgement of 14 February 2012, Application No. 26940/10

[411] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing, 2017, p.388

[412] LELOUP, Mathieu, The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency, *Netherlands Quarterly of Human Rights*, 2019, Vol. 37(1), p. 60

lip-service to the principle.[413] As Vandenhole and Ryngaert put it *"Notwithstanding recent efforts of the Court to clarify how the best interests of the child may be operationalised in migration cases, it remains a very vague and open-ended concept that is often invoked as a trump card without clarification of its meaning. Given the fundamental uncertainty about the notion's meaning due to the absence of solid criteria to substantiate it, the notion of best interests of the child may be invoked to justify basically whatever decision is reached."*[414]

It would be in the interests of certainty and in the best interests of children if the Court were to provide guidance on which factors it would weigh more heavily in the balance when applying the best interests principle.[415] The thesis suggests that the Court should make clear that all elements listed in the Committee on the Rights of the Child, GC No 14, could be important elements that domestic authorities should take into account and put forward for their decisions. This would make the application of the balancing test and margin of appreciation more predictable and make the Court's application of the principle of the child's best interests less arbitrary.

In sum, the outcome of the dissertation suggests that when determining whether States have complied with Article 8 of the ECHR, in cases concerning family migration, the Court's inconsistent case-law can be improved by the influence of EU law and regulations and CJEU case-law. The use of the three part test of proportionality could make the case-law more consistent as well as putting more focus on the individual and more engagement between the ECtHR and the CJEU.

In order to improve the unfair treatment between different types of immigration cases the Court should determine all cases under the same test and distinguishing cases based on family matters instead of migration status and paying more attention to insiders interests. In order to make a more fair distinction between different migration cases and determine the appropriate level of intensity of review the Court can make use of the margin of appreciation doctrine. Certain factors or

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[413] DRAGHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Hart Publishing, 2017, p. 379.
[414] WANDENHOLE, W, RYNGAERT J, *Mainstreaming Children's Rights in Migration Litigation: Muskahadzhiyeva and Others v Belgium,* 2012, Cambridge University Press, p 69
[415] VAN BUREN, Geraldine, *Child Rights in Europe: Convergence and Divergence in Judicial Protection*, Strasbourg Council of Europe Publishing, 2007, p. 36.

elements based on the family ties can be taken into consideration in order to decide if a wide or narrow margin of appreciation should be applied.

Lastly, examining the full range of relevant rights in the CRC and provide guidance on which factors the domestic authorities should put forward and weigh more heavily in the balancing exercise when applying the child's best interests principle would make the application of the best interests of the child's principle less arbitrary.

These adjustments would lead to a more consistent and fair case-law, give Contracting Parties and individuals more certainty and generate a more convergent practice by the States. Given the influence of the Court's decisions in these matters on interpretation and application of the Convention at the domestic level, this will increase the precedent value of the Court's judgements and subsequently minimise the risk of family migrants being pushed into illegal channels.

SUMMARY

As long as refugees and migrants settle in European States, the human right to family life will continue to play a crucial role for national and supranational judicial examination in cases concerning family migration. Family decisions about where to live and when and whether to reunite are often dictated by migration status and migration control. Since family migration is one of the main legal migration routes to European States, it is crucial for both migrants and destination countries to have clear and predictable legalisation concerning family migration in place that is safeguarding human right while controlling migration. The member States have the primary responsibility to protect the rights and freedoms laid down in the ECHR[416] and the ECtHR plays a subsidiary role in protecting the rights. To uphold the Human Rights commitments under the ECHR the Contracting States have to provide for family unification subject to a margin of discretion to the State.

The ECtHR's case-law on the right to family life in the immigration context has shown a problematic development. The case-law lacks consistency in terms of procedural and substantive protection. The application of Article 8 of the ECHR remains very much State-biased, with marginal impact on sovereign discretion.[417] Cases often turn on distinguishing facts rather than principles and the multi-factor approach produces much uncertainty.[418] Different types of immigration cases are determined differently which results in unequal level of protection under Article 8 and the case-law has shown an uneven and uncertain application of the child's best interests. The inconsistent case law makes is difficult for national authorities to apply Article 8 which leads to widely diverging practices by the Contracting Parties and the precedent value of the Court's judgements is minimised which could result in family migrants being pushed into unauthorised channels to find host States where the regulations on family migration are less strict and subsequently unintentionally lead to an increase in illegal immigration flows.

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[416] See for example ECtHR *Markovic and others v Italy,* Judgement of 14 December 2006, Application No. 1398/03
[417] DRAHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Modern Studies in European Law, Hart Publishing, UK, 2017, p. 387
[418] COSTELLO, Cathryn, *The Human Rights of Migrants and Refugees in European Law*, Oxford Studies in European Law, Oxford, UK, 2016, p. 128

In this thesis the object of the inquiry is whether and how the case-law of the ECtHR on the right to respect for family life in the immigration context can be more consistent and fair among all applicants in order to give Contracting Parties and individuals more certainty and generate a more convergent practice by the States and increase the precedent value of the Court's judgements. Three assumptions are made in order to answer the research question. The first assumption is that the case law of the ECtHR on the right to respect for family life is inconsistent and unpredictable and the aim is to find out whether it can be helped by the influence of EU law and CJEU case law. The second assumption is that the differentiation in the level of protection between settled migrants and migrants seeking an entry or requesting to regularise their irregular migration status is not defendable and is in contrast with the ECtHR's own case law, which establishes that similar considerations should be applied regarding positive and negative obligations that derive from Article 8.[419] The aim is to find out whether the unequal level of protection in different migration cases can be reduced by determining all cases under the same test and distinguishing cases based on family matters instead of migration status. The third assumption in this thesis is that the Court doesn't examine the full range of relevant rights in the CRC when applying the principle of the best interests of the child. It is also uncertain what weight the child's best interests is given in the balancing exercise which generates unpredictability. The aim is to clarify whether the application of the best interests of the child can be more certain and predictable by examining the full range of relevant rights in the CRC and by providing guidance on which factors it would weigh more heavily in the balancing exercise.

The outcome of the dissertation suggests that when determining whether States have complied with Article 8 of the ECHR, in cases concerning family migration, the Court's inconsistent case-law can be improved by the influence of EU law and regulations and CJEU case-law. The use of the three part test of proportionality could make the case-law more consistent as well as putting more focus on the individual and increasing the engagement between the ECtHR and the CJEU.

In order to improve the unfair treatment between different types of immigration cases the Court should determine all cases under the same test and distinguishing cases based on family matters

[419] GEORGIOS, Milios, The Immigrants' and Refugees' Right to 'Family Life': How Relevant are the Principles Applied by the European Court of Human Rights? *International Journal on Minority and Group Rights*, 2018, p. 30

instead of migration status and paying more attention to insiders interests. In order to make a more fair distinction between different migration cases and determine the appropriate level of intensity of review the Court can make use of the margin of appreciation doctrine. Certain factors or elements based on the family ties can be taken into consideration in order to decide if a wide or narrow margin of appreciation should be applied.

Lastly, examining the full range of relevant rights in the CRC and provide guidance on which factors the domestic authorities should put forward and weigh more heavily in the balancing exercise when applying the child's best interests principle would make the application of the best interests of the child's principle less arbitrary.

These adjustments would lead to a more consistent and fair case-law, give Contracting Parties and individuals more certainty and generate a more convergent practice by the States. Given the influence of the Court's decisions in these matters on interpretation and application of the Convention at the domestic level, this will increase the precedent value of the Court's judgements and subsequently minimise the risk of family migrants being pushed into illegal channels.

BIBLIOGRAPHY

BERNERI, Chiara, 'Protection of Families Composed by EU Citizens and Third-country Nationals: Some Suggestions to Tackle Reverse Discrimination', 2014, 16 *European Journal of Migration and Law*, 249-275

CARENS, J.H., Who Should Get in? The Ethics of Immigration Admissions, 17 (1) *Ethics and International Affairs*, 2003 p. 96-97.

COSTELLO, Cathryn, *The Human Rights of Migrants and Refugees in European Law*, Oxford: Oxford Studies in European Law, 2016,

CONNELLY, AM., Problems of Interpretation of Article 8 of the European Convention on Human Rights, 35:3 *International and Comparative Law Quarterly*, 1986

DRAHICI, Carmen, *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Modern Studies in European Law, Hart Publishing, UK, 2017

EDLUND, Jennie and STEHLÍK, Václav, The Uncertain Place of the Child's Best Interests in ECtHR's Immigration Case Law. *International and Comparative Law Review*, 2020, vol. 20, no. 2

FENWICK, Helen, *Civil Liberties and Human Rights,* Cavendish Publishing Limited, London, 2005

FRESE, A., PALMER OLSEN, H, 'Spelling It Out−Convergence and Divergence in the Judicial Dialogue between CJEU and ECtHR', *Nordic Journal of International Law,* 88*,* 2019

GERARDS, Janneke, Judicial Deliberations in the European Court of Human Rights, in the Legitimacy of Highest Courts' rulings, N. Huls, M. Adams, J. Bomhoff, eds., The Hague: T.M.C. Asser Institute, 2008

GERARDS, Janneke, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17 *European Law Journal*, 2011

GERARDS, Janneke, *How to improve the necessity test of the European Court of Human Rights*, Oxford University Press and New York University School of Law, 2013

GERARDS, Janneke, The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination, in M. Balboni (ed), M. Balboni (ed.), *The principle of discrimination and the European Convention of Human Rights*, available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875230

GUILD, Elspeth, EU Citizens, Foreign Family Members and European Union Law, *European Journal of Migration and Law*, vol 21, 2019

HART, Betty de, Love Thy Neighbour: Family Reunification and the Rights of Insiders, *European Journal of Migration and law* 11, 2009

HENRARD, Kristin, A Critical Analysis of the Margin of Appreciation Doctrine of the ECtHR, with Special Attention to Rights of a Traditional Way of Life and a Healthy Environment: A Call for an Alternative Model of International Supervision, The Yearbook of Polar Law IV, 2012

HIRSCHBER, L. Der Grundsatz der Verhältnismässigkeit (The principal of proportionality),1981

KILKELY, Ursula, The Child and the European Convention of Human Rights, Aldershot, Ashgate/Dartmouth,1999

KLAASSEN, Mark and RODRIGUES, Peter, The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter, *European Journal of Migration and Law*, 2017, Vol. 19

KLAASSEN, Mark, Between facts and norms: Testing compliance with Article 8 ECHR in immigration cases, 37:2 *Netherlands Quarterly of Human Rights*, 2019

KLAVERBOER et al. The Best interests of the Child in Cases of Migration – Assessing and Determining the Best Interests of the Child in Migration Procedures, *The international Journal of Children's Rights,* 2017, Vol. 25

KROEZE, Hester, Distinguishing between use and abuse of EU free movement law: Evaluating use of the "Europe-route" for family reunification to overcome reverse discrimination, *European Papers*, vol. 3, 2018

LELOUP, Mathieu, The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency, *Netherlands Quarterly of Human Rights*, 2019, Vol. 37(1)

LETSAS, George, Strasbourg's Interpretive Ethics: Lessons for the International Lawyer, *The European Journal of International Law*, Vol 21 no. 3, 2010

LOCK, Tobias, The Influence of EU Law on Strasbourg Doctrines, *European Law Review*, Research Paper Series No 2017/03

MILIOS, Georgios, The Immigrants' and Refugees' Right to 'Family Life': How Relevant are the Principles Applied by the European Court of Human Rights? *International Journal on Minority and Group Rights*, 2018

POBJOY, J. M., The best interests of the child principle as an independent source of protection, *International Comparative Law Quarterly*, 2015

RÉAUME G, Denise, Limitations on Constitutional Rights: The Logic of Proportionality, *University of Oxford Legal Research Paper Series*, Paper No. 26/2009

ROCHEL, Johan, Working in tandem: Proportionality and procedural guarantees in EU immigration law, *German Law Journal,* 2019

SANDBERG, Kirsten, Children's Right to Protection under the CRC. In FALCH-ERIKSEN, Asgeir, BACKE-HANSEN, Elisabeth (ed) *Human Rights in Child Protection, Implication for professional Practice and Policy*, Springer, 2018

SCHEEK, Laurent, The relationship between the European Courts and Integration through Human Rights 65, *Heidelberg Journal of International Law*, 2005

SCHOKKENBROEK, Jeroen, "The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case Law of the ECHR," *Human Rights Law Journal* 19 *(*1998): 31

SCHOTEL, Bas, *On the Right of Exclusion: Law, Ethics and Immigration Policy,* Abingdon: Routledge, 2012, 1

SHUIBNE, N Nic, Free Movement of Persons and the Wholly Internal Rule: Time to Move On? 39 (4) *Common Market Law Review*, 2002

SIMON, Miranda et. al., A data-driven computational model on the effects of immigration policies, *Proceedings of the National Academy of Sciences of the United States of America,* 115 (34), 2018

SMYTH, Ciara, 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? *European Journal of Migration and Law*, 2015

SPAVENTA, E, Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects 45 (1) *Common Market Law Review*, 2008

SPIJKERBOER, Thomas, Structural Instability: Strasbourg Case Law on Children's Family Reunion, *European Journal of Migration and Law* 11, 2009

STRØMLAND et al., In Your Best Interest – A Discussion of How Capability Approach Could be Used as a Guideline to Strengthen and Supplement the Principle of the Child's Best Interests, *The international Journal of Children's Rights*, 2019, Vol. 27

THYM, Daniel, Respect for private and family life under Article 8 ECHR in immigration cases: A human right to regularize illegal stay? *International and Comparative Law Quarterly*, vol. 57, 2008

THYM, Daniel, Residence as De Facto Citizenship? Protection of Long-term Residence under Article 8 ECHR in R Rubio-Marin (ed), *Human Rights and Immigration*, Oxford, Oxford University Press, 2014

VAN BUREN, Geraldine, *Child Rights in Europe: Convergence and Divergence in Judicial Protection*, Strasbourg Council of Europe Publishing, 2007

VAN ELSUWEGE, Peter and KOCHENOV, Dimitry, 'On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights', 2011, 13 *European Journal of Migration and Law*, 443–466

VAN WALSUM, Sarah, Comment on the *Sen* Case. How Wide is the Margin of Appreciation Regarding the Admission of Children for Purposes of Family Reunification? *European Journal of Migration and Law*, 4, 2003

WALDOCK, Humphrey, "The Effectiveness of the System Set Up by the European Convention on Human Rights," *Human Rights Law Journal* 1, 1980, 9

WALTER, A Reverse Discrimination and Family Reunification, Nijmegen: Wolf Legal Publishers, 2008

WANDENHOLE, W, RYNGAERT J, *Mainstreaming Children's Rights in Migration Litigation: Muskahadzhiyeva and Others v Belgium,* 2012, Cambridge University Press

Overview of Caselaw

European Court of Human Rights

ECtHR *Abdulaziz, Cabales and Balkandali v. the United Kin*gdom, judgment of 28 May 1985, Application No. *9214/80; 9473/81;9474/81*
ECtHR *Ahmut v. The Netherlands*, Judgement of 28 November 1996, Application No. 21702/93
ECtHR *Al-Nashif v. Bulgaria,* Judgement of 20 June 2002, Application No. 50963/99
ECtHR *Amara v. The Netherlands*, Decision of October 2004, Application No. 6914/02, ECtHR
ECtHR *Antwi v. Norway*, Judgement of 14 February 2012, Application No. 26940/10
ECtHR *Berisha v. Switzerland,* Judgement of 30 July 2013, Application No. 948/12
ECtHR *Berrehab v. The Netherlands*, Judgement of 21 June 1988, Application No. 138
ECtHR *Boultif v. Switzerland*, Judgement of 2 August 2001, Application No. 54273/00
ECtHR *Boujlifa v. France*, judgment of 21 October 1997, 122/1996/741/940
ECtHR *Chandra and Others v. The Netherlands*, Decision of 13 May 2003, Application No. 53102/99
ECtHR *Connors v. UK*, Judgement of 27 May 2004, Application No. 66746/01
ECtHR *Emre v. Switzerland*, Judgement of 22 May 2008, Application No. 42034/04
ECtHR *Engel and Others v. the Netherlands*, Judgement of 23 November 1976, Application No. 5100/71-5102/71 ECtHR *El Ghatet v. Switzerland*, Judgement of 8 November 2016, Application No. 56971/10
ECtHR *Golder v. The United Kingdom*, Judgement of 21 February 1975, Application No. 4451/70
ECtHR *Gül v. Switzerland*, , Judgement of 29 February 1996, Application No. 23218/94
ECtHR *I.A.A. and Others v. United Kingdom*, Judgement of 8 March 2016, Application No. 25960/13
ECtHR *I.M. v. The Netherlands*, Decision of 25 March 2003, Application No. 41226/98
ECtHR *Jakupovic v. Austria*, Judgement of 6 February 2003, Application No. 36757/97
ECtHR *Jeunesse* v. *The Netherlands*, Judgement of 3 October 2014, Application No. 12738/10
ECtHR *Josef v. Belgium*, Decision of 27 February 2014, Application No. 70055/10
ECtHR *Kaplan v. Norway*, Judgement of 24 July 2014, Application No. 32504/10
ECtHR *Keegan v. Ireland*, judgment of 26 May 1994, App. No. 290
ECtHR *Konstantinov v. The Netherlands*, Judgement of 26 April 2007, Application No. 16351/03
ECtHR *Kroon and Others v. The Netherlands*, Judgement of 27 October 1994, Application No. 18535/91
ECtHR *Madah and others v. Bulgaria*, Judgement of 10 May 2012, Application No. 45237/08
ECtHR *Marckx v. Belgium*, Judgement of 13 June 1979, Application No. 6833/74
ECtHR *Markovic and others v Italy,* Judgement of 14 December 2006, Application No. 1398/03
ECtHR *Maslov v. Austria*, Judgement of 13 June 2008, Application No. 1638/03
ECtHR *M.P.E.V. and Others v. Switzerland*, Judgement of 8 July 2014, Application No. 3910/13
ECtHR *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Judgement of 12 Oct 2006, Application No. 13178/03
ECtHR *Neulinger and Shuruk v. Switzerland*, Judgment (GC) of 6 July 2010, Application No. 41615/07
ECtHR *Nunez v. Norway*, Judgement of 28 June 2011, Application No. 55597/09

ECtHR *Omoregie and Others v. Norway*, Judgement of 31 July 2008, Application No. 265/07
ECtHR *Osman v. Denmark*, Judgement of 14 June 2011, Application No. 38058/09
ECtHR *Palanci v. Switzerland*, Judgement of 25 March 2014, Application No. 2607/08
ECtHR *Papashvillo v. Belgium,* Judgement of 17 April 2014, Application No. 41738/10
ECtHR *Ramos Andrade v. The Netherlands*, Decision of 6 July 2004, Application No. 53675/00
ECtHR *Rasmussen v. Denmark*, Judgement of 28 November 1984, Application No. 8777/79
ECtHR *Rodriges da Silva and Hoogkamer v the Netherlands*, Judgement of 31 January 2006, Application No. 50435/99
ECtHR *S. and Marper v. UK,* Judgement of 4 December 2008, Application Nos. 30562/04 and 30566/04
ECtHR *Sen v. Netherlands*, Judgement of 21 December 2001, Application No. 31465/96
ECtHR *Sorabjee v. The United Kingdom*, Decision of 23 October 1995, Application No. 23938/94
ECtHR *Tuqabo-Tekle v. The Netherlands*, Judgement of 1 December 2005, Application No. 60665/00
ECtHR *Tyrer v. United Kingdom*, Judgement of 15 March 1978, Application No. 5856/72 5354/72, 5370/72
ECtHR *Üner v. the Netherlands,* Judgement of 18 October 2006, Application No. 46410/99
ECtHR *Useinov v. Netherlands*, Judgement of 11 April 2006, Application No. 61292/00
ECtHR *Yildiz v. Austria*, Judgement of 31 October 2002, Application No. 37295/97

Court of Justice of the European Union

Case C-165/14 *Alfredo Rendón Marín v Administración del Estado* [2016] EU:C:2016:675
Case C-413/99 *Baumbast* [2002] ECR I-7091
Case C-60/00 *Carpenter* [2002] ECR I-6279
Case C-200/02 *Chen* [2004] ECR I-9925
Case C-34/09 *Gerardo Ruiz Zambrano* v. *Office national de l'emploi* (ONEM) [2011] ECR I-1177
Case C-133/15 *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and others* [2017] EU: C:2017:354
Case C-40/11 *Iida* [2012] ECR,
Case C-434/09 *Mc Carty v. Secretary of State for the Home Department* [2011] ECR I-03375
Case C-400/10 *McB* [2010] ECR I-8965
Case C-127/08 *Metock* [2008] ECR I-6241.
Case C-256/11 *Murat Dereci and Others v. Bundesministerium für Inneres* [2011] ECR I-11315
Case C 456/12 *O. and B. v. Minister voor Immigratie, Integratie en Asiel*
Cases C-356/11, C-357/11 *O, S v Maahanmuuttovirasto, Maahanmuuttovirasto v L* [2012] EU:C:2012:776
Case C–105/03, *Pupino* [2005] ECR I-5285
Case C-578/08 *Rhimou Chakroun v. Minister van Buitenlandse Zaken* [2010] ECR-I-01839.
Case C-135/08 *Rottmann* [2010] ECR-I-1449
Case C-457/12, *S. and G. v. Minister voor Immigratie, Integratie en Asiel*
Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* [2013] ECR
Case C–105/03, *Pupino* [2005] ECR I-5285

Reports, Guidelines and General Comments

General Comment No. 12 (2009), *The right of the child to be heard,* UN Doc. CRC/C/GC/12

Committee on the Rights of the Child 'Consideration of reports submitted by States parties under article 44 of the Convention. Concluding Observations: Finland' (2011) CRC/C/FIN/CO/4

Committee on the Rights of the Child, 'General Comment No. 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration' UN Doc CRC/C/GC/14 (29 May 2013) Supra note 61

EMN, EMN Synthesis Report for the EMN Focused Study 2016, Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices (2017), 4

Council of Europe, Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence, Updated on 31 August 2020