

A PROCEDURAL APPROACH TO THE PUBLIC INTEREST IN MIGRATION CONTROL WHEN APPLYING ARTICLE 8 OF THE ECHR / Jennie Edlund, Václav Stehlík

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Abstract: *This research explores the European Court of Human Rights' (ECtHR or the Court) application of Article 8 of the European Convention of Human Rights (ECHR) when engaging the public interest in migration control. The study research explains the current case law of the Court and examines when the public interest in migration control can be applied as a legitimate aim. The research is questioning whether the public interest in controlling migration can be used as a legitimate aim when an interference of the right to family life has been established and whether the public interest in migration control should be seen as a static factor. The research claims that the Court's unclear way of distinguishing between positive and negative obligations and its lack of assessing the public interests when balancing the personal interests against the public interests in controlling migration makes the case law inconsistent and unclear. In order to make the case law more consistent the research suggests that the Court should use a procedural approach like in cases where the State's interest in public safety is engaged.*

Key words: *Human Rights; Migration Law; Family Life; Article 8 of the ECHR; Family Unification; Migration Control*

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1. INTRODUCTION

Several scholarly sources have pointed out various problematic matters connected to the application of Article 8 of the ECHR in the migration context.¹ It has even 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 (van Buren, 2007, p. 123).

When it comes to the balancing act between the individual rights and the public interest in migration control, the literature has so far mostly been dedicated to the examination of individual rights and the Court's approach towards the interest in family life. Less focus has been addressed to the consideration of how and when the public interest in migration control is being assessed and whether the Court evaluates how the applicants endanger this interest.

¹ See among others Leloup (2019); Klaassen (2019); Jacobsen; (2016) and Kilkelly (2010).

This research explores the ECtHR's application of Article 8 of the ECHR when engaging the public interest in migration control. The research explains the current case law of the Court and examines when the public interest in migration control can be applied as a legitimate aim. The research is questioning whether the public interest in controlling migration can be used as a legitimate aim when an interference with the right to family life has been established and whether the public interest in migration control should be seen as a static factor. The research claims that the Court's unclear way of distinguishing between positive and negative obligations and its lack of assessing the public interest when balancing the personal interests against the public interest in controlling migration makes the case law inconsistent and unclear. In order to make the case law more consistent the research suggests that the Court should use a procedural approach like in cases where the State's interest in public safety is engaged.

2. THE ECtHR'S CURRENT ASSESSMENT OF ARTICLE 8 OF THE ECHR

This research focuses on how the Court is determining cases where an applicant is applying for admission or trying to regularise an irregular stay based on family ties. Expulsion cases where a settled migrant² is facing expulsion due to criminal conviction will be included, for the purpose of comparison and with the intent of explaining the difference in treatment. When analysing these cases, the research concentrates on the Court's assessment when it comes to weighing the public interest in migration control against the right to family life.

The ECHR lacks reference to immigration or the right to enter or being expelled from a country. However, the applications filed before the ECtHR assert a right under Article 8 ECHR to have a national or migrant lawfully resident in the host country joined by third-country national (TCN) family members and for a migrant not to be expelled from the host country's territory in defence of the established family ties.

The primary purpose of Article 8 of the ECHR is to protect against arbitrary interference with family life by public authority.³ The manner in which the ECtHR examines whether the state has complied with its obligations under Article 8 ECHR depends on the nature of the immigration case. In admission cases, the Court states that refusal of entry does not constitute an interference with the right to respect for family life, but rather that it is necessary to determine whether the State has a positive obligation to allow the entry and residence of a foreign national on the basis of the national right to respect for family life. In these cases, the applicant must prove that there are obstacles to establishing or continuing a family life in the country of origin.⁴

In some cases, the Court does not make a sharp distinction between negative and positive obligations. This can be seen in cases where the foreign national remains in the host country without a right to residence and is aware of the uncertain residence right while developing family ties. In such cases, only in the most exceptional circumstances will the expulsion of the applicant constitute a breach of Article 8 ECHR.⁵

In expulsion cases, the court examines whether a state has a negative obligation not to deport a foreigner who is a settled migrant with a right of residence. The criteria

² When using the term 'settled migrants' the authors are referring to foreign nationals with a long-term lawful residence right.

³ 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 2022, p. 8 para 5.

⁴ See for instance ECtHR, *Gül v. Switzerland*, app. no. 23218/94, 19 February 1996.

⁵ See ECtHR, *Rodrigues da Silva and Hoogkamer v the Netherlands*, app. no. 50435/99, 31 January 2006.

set out in the case law constitute a solid test of whether an interference with the right to respect for family life of a settled foreign national is justified under Article 8(2).⁶

In all cases, regardless of positive or negative obligations for the State, a fair balance has to be struck between the competing interests of the individual and the community as a whole.

The ECtHR's case law on Article 8 of the ECHR in the migration context 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.⁷ Furthermore, Article 8 does not contain a general obligation for a State to respect the immigrant's choice of country of residence and to authorise family reunification within its territory. Nevertheless, in a case involving both family life and immigration, the extent of a State's obligation to admit into its territory relatives of persons living there varies depending on the particular circumstances of the persons concerned and the general interest.

This said, there is a widely different approach towards cases where settled migrants are facing expulsion because of criminal offences compared to non-settled migrants⁸ facing expulsion for administrative breaches of immigration law.

2.1 The Assessment of Settled Migrants Facing Expulsion because of Criminal Offences

When it comes to settled migrants, case law provides fairly clear guidance on how to determine whether expulsion violates Article 8 ECHR and whether the State has a negative obligation not to expel the applicant.⁹ The case law on Article 8 paragraph 2 provides for a detailed justification test with individual steps. It must be determined whether there is an interference with the right to respect for family life¹⁰ and whether the interference with the right to respect for family life is in accordance with the law.¹¹ 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 comprehensive.

Finally, interference should be necessary in a democratic society. According to the case law,¹² 'necessary in a democratic society' means that there is a 'pressing social need' that justifies the interference with the protected right and that the interfering measure is proportionate to the aim responding to that need. In other words, in order for the Court to decide whether there is a violation of Article 8(2), it has to apply a proportionality test and strike a fair balance between the interests of the community and

⁶ See ECtHR, *Boultif v. Switzerland*, app. no. 54273/00, 2 August 2011, and ECtHR, *Üner v. The Netherlands*, app. no. 46410/99, 18 October 2006.

⁷ ECtHR, *Gül v. Switzerland*, app. no. 23218/94, 19 February 1996, para 38.

⁸ When using the term 'non-settled migrants' the authors are referring to migrants who either are seeking admission or are trying to regularise an irregular stay.

⁹ ECtHR, *Boultif v. Switzerland*, app. no. 54273/00, 2 August 2011, and ECtHR, *Üner v. The Netherlands*, app. no. 46410/99, 18 October 2006.

¹⁰ See for instance ECtHR, *Boultif v. Switzerland*, app. no. 54273/00, 2 August 2011, para. 37.

¹¹ See ECtHR, *Madah and others v. Bulgaria*, app. no. 45237/08, 10 May 2012, para. 95.

¹² See among others ECtHR, *Nasri v. France*, app. no.19465/92, 13 July 1995, para.41, and ECtHR, *Boughanemi v. France*, app. no. 22070/93, 24 April 1996, para. 41.

in particular those mentioned in Article 8(2) and the interest of the individual that is the right to respect for his or her 'family life' (Milius, 2018, p. 421).

In sum, the Court weighs the relocation difficulties for the deportee's partner or children against the public interest in controlling public safety which might tip the balance in favour of the State. This was the case in *Üner v. the Netherlands*.¹³ In this case the Court found that public safety outweighed the right to family life after the applicant had been convicted of manslaughter and assault.¹⁴ However, in the *Boultif* case, the Court found the interference with the applicant's rights to family life was disproportionate to the aim of public safety.¹⁵ The case concerned an Algerian citizen who was facing deportation after being convicted of armed robbery. The court found that the Algerian national's Swiss wife could not have followed him to Algeria as she would encounter difficulties there and since the applicant only posed a limited threat to public order, the interference was disproportionate.

When looking at the recent case law, the Court has been taking a more procedural approach in expulsion cases.¹⁶ This approach means that the Court takes the quality of the decision making process at the legislative, the administrative and the judicial stage as decisive factors for assessing whether government interference in the right to family life was proportionate (Popelier and van de Heyning, 2017, p. 9). The Court looks at the decision making process of the national authorities instead of conducting a substantive proportionality review (Gerards, 2014, p. 52). If the Court finds that the national authorities have assessed the proportionality of the measure on the basis of careful and informed balancing of the interests at stake, the Court will more easily be convinced that the measure is proportionate (Popelier and van de Heyning, 2017, p. 10). On the other hand, if the national measure was taken without such consideration, the Court will more easily decide that it is disproportionate.

This approach can for instance be seen in the *Loukili* case.¹⁷ In this case, the applicant had entered the Netherlands 40 years ago. Still, the Court found that the national authorities and domestic courts carefully examined the facts and reviewed all the relevant facts which emerge from the Court's case-law in detail.¹⁸ The Court put particular emphasis on the seriousness and repetitive nature of the offences committed and their impact on society as a whole. This was balanced against the lack of proper substantiation of the applicant's interaction with his children and his social and cultural ties with Morocco. Therefore, the Court accepted that the domestic authorities adequately balanced the applicant's right to respect for his family life against the State's interests in public safety and preventing disorder and crime.

In the case *I.M. v. Switzerland*¹⁹ that concerned the refusal of renewal of residence permit of the applicant and the issuance of a removal order on the basis of a criminal conviction for rape committed 2003, the Court found that the Federal Administrative Court had failed to fully assess the impact that the measure of removal would have on the applicant. The Court stated that the evolution of the applicant's conduct, the occurrence of the crime, the applicant's deteriorating medical condition, and his social, cultural and family ties to the host country were not sufficiently examined in

¹³ ECtHR, *Üner v. The Netherlands*, app. no. 46410/99, 18 October 2006.

¹⁴ *Ibid.*, para 58.

¹⁵ ECtHR, *Boultif v. Switzerland*, app. no. 54273/00, 2 August 2011, para 53.

¹⁶ For a general overview of the procedural approach, see Arnardóttir (2017) and Gerards (2017).

¹⁷ ECtHR, *Loukili v. The Netherlands*, app. no. 57766/19, 11 April 2023.

¹⁸ *Ibid.*, para 60.

¹⁹ ECtHR, *I.M v. Switzerland*, app. no. 23887/18, 9 April 2019.

the decision. The Court referred to its own case law²⁰ and pointed out that it is necessary to make the assessment with consideration of both the gravity of the crime committed by the applicant, the interests of the society, and the applicant's individual rights, particularly his right to private and family life under Article 8 of the ECHR.²¹

2.2 The Assessment of Non-Settled Migrants Facing Expulsion for Administrative Breaches of Immigration Law

In cases concerning non-settled migrants, there is a mix of positive and negative obligations that sometimes are difficult to distinguish. For migrants seeking an entry, the Court needs to determine whether the State is under a positive obligation to allow entry. This is determined by the so called 'elsewhere test'²² which means that in order for the State to have a positive obligation to admit the applicant has to show that family life can't be exercised anywhere else apart from the host State.²³

In cases where the applicant's immigration status was precarious at the time of family formation, the court does not consider it necessary to determine whether the disputed domestic decision constitutes an interference with the exercise of the right to respect for family life or whether it should be viewed as a case where the defendant state fails to fulfil a positive obligation.²⁴ The Court has stated that only in the most exceptional circumstances will the applicant's expulsion constitute a violation of Article 8 ECHR.²⁵ In addition to the 'elsewhere test' the Court uses a variety of criteria to ascertain whether there are exceptional circumstances in the case.²⁶

This mix of positive and negative obligations, and the lack by the Court of establishing what obligations the state has, creates an uncertainty and challenge in distinguishing between cases. The difficulty to distinguish between cases and whether a State has a negative or positive obligation has been explained by the dissenting judge Martin in the *Gül v. Switzerland* case.²⁷ According to the judge, the refusal of the Swiss authorities to let a son reunite with his parents can be considered both as a negative and positive obligation.²⁸ The refusal by the Swiss authorities to let the son and the parents be reunited can be considered as an action from which the Swiss authorities should have refrained from and therefore be seen as a negative obligation. However, the action can also be viewed as a failure by the Swiss authorities to take the action and make the reunion possible i.e., a positive obligation. In the dissenting judge Martin's opinion, this illustrates that the ECtHR's approach should be exactly the same irrespectively whether the case concern a positive or a negative obligation.

²⁰ It referred to ECtHR, *Üner v. The Netherlands*, app. no. 46410/99, 18 October 2006.

²¹ Other cases where the Court has used the procedural approach see ECtHR, *Ndidi v UK*, app. no. 41215/14, 14 September 2017, Final 29 January 2018, paras. 75-82; ECtHR, *Alam v. Denmark*, app. no. 33809/15, 29 June 2017, paras. 33-37, and ECtHR, *Hamesevic v. Denmark*, app. no. 25748/15, 8 June 2017, paras. 41-43.

²² The term 'elsewhere test' is borrowed from *Milios* (2018, p. 13).

²³ See ECtHR, *Sen v. The Netherlands*, app. no. 31465/96, 21 December 2001.

²⁴ See for instance ECtHR, *Nunez v. Norway*, app. no. 55597/09, 28 June 2011, para. 69; ECtHR, *Osman v. Denmark*, app. no. 38058/09, 14 June 2011, para. 53, and ECtHR, *Konstantinov v. The Netherlands*, app. no. 16351/03, 26 April 2007, para. 47.

²⁵ See ECtHR, *Rodrigues da Silva and Hoogkamer v the Netherlands*, app. no. 50435/99, 31 January 2006.

²⁶ See the different factors the Court is considering in ECtHR, *Rodrigues da Silva and Hoogkamer v the Netherlands*, app. no. 50435/99, 31 January 2006, para. 39.

²⁷ ECtHR, *Gül v. Switzerland*, app. no. 23218/94, 19 February 1996.

²⁸ See dissenting opinion of judge Martin, para 9, in ECtHR, *Gül v. Switzerland*, app. no. 23218/94, 19 February 1996.

The difficulty or uncertainty whether a case is treated as a positive or negative obligation case can be seen in *I.A.A. and Others v. United Kingdom*.²⁹ The case concerns the admission of 5 Somali siblings who wanted to join their mother in the UK. In this case the Court recognised that an interference with the right to family life has taken place for all applicants.³⁰ However, the Court does not justify the interference of the right according to the justification test with different steps under Article 8(2) of the ECHR, namely in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society. Instead, the Court is using the elsewhere test and comes to the conclusion that there are no insurmountable obstacles for the mother to join her children in Ethiopia and that there is no breach of the best interests of the child principle. Therefore, the Court finds that the UK government had struck a fair balance between the applicants' interests in developing family life in the responding state on the one hand and the State's own interest in controlling migration on the other.³¹

Another example where the mix of positive and negative obligations results in an unclear application of Article 8 is in the *Omoregie* case.³² This case concerned a Nigerian asylum seeker who was rejected, but stayed in Norway without resident 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 had breached immigration law. In this case, the Court first recognises an interference and finds that the interference pursued the legitimate aims of preventing 'disorder or crimes' and protecting the economic well-being of the county.³³ However, when assessing the question of necessity, the Court first refers to the factors indicated in the *Üner* judgement, which is a case concerning negative obligations, and underlines that the State must strike a fair balance between the competing interests of the individual and of the community as a whole and that in both contexts the State enjoys a certain margin of appreciation. The Court continues to explain that in a case which concerns family life as well as immigration, the 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 and refer to cases concerning positive obligation and mixed obligations.³⁴ The Court then finds that the national authorities had struck a fair balance between the personal interests of the applicants on the one hand and the public interest in ensuring an effective implementation of immigration control on the other.³⁵ This means that the Court determines the case as a case of mixed obligations, uses the justification test under Article 8(2) of the ECHR, but applies the legitimate aim of controlling migration even though it's not one of the aims listed under Article 8(2) of the ECHR.

Another case, where the Court uses the justification test under Article 8(2) in an alleged positive or mixed obligations case, is the case *Biraga v. Sweden*.³⁶ This case concerned a rejected asylum seeker who sought to regularise her resident status based on her marriage with a foreign national with a valid resident permit with whom she had a child. The Court stated that it did not find it necessary to determine whether there was an interference with the right to respect for family life or whether the State failed to comply with a positive obligation, since in both contexts the State has to strike a fair balance

²⁹ ECtHR, *I.A.A. and Others v. United Kingdom*, app. no. 25960/13, 31 March 2016.

³⁰ *Ibid.*, para. 42.

³¹ *Ibid.*, para. 47.

³² ECtHR, *Omoregie and others v. Norway*, app. no. 265/07, 31 July 2008.

³³ *Ibid.*, para. 56.

³⁴ *Ibid.*, para. 57.

³⁵ *Ibid.*, para. 68.

³⁶ ECtHR, *Biraga and Others v. Sweden*, app. no. 1722/10, 3 April 2012.

between the competing interests involved.³⁷ However, then the Court proceeds to discuss whether the interference - which it did not find necessary to determine – was justified.³⁸ The Court determines that it finds no grounds for concluding that the national authorities failed to strike a fair balance between the applicant's interests on the one hand and the State's interests in controlling immigration on the other.³⁹

It is also worth noting that in cases where the Court clearly underlines whether the State is under positive or negative obligations, the balancing test is distorted by the interest in controlling migration. This can be seen in the case *Berisha v. Switzerland*⁴⁰ where the Court is determining whether the State is under a positive obligation and whether it has the duty to allow the applicants to reside legally on its territory.⁴¹ When weighing the personal interests against the States interests the Court does not find that the respondent State has failed to strike a fair balance between the applicants' interests in family reunification on the one hand and its own interests in controlling immigration on the other.⁴² However, the Court does not consider the circumstances regarding the migration control and what implications this specific case has for the society. The only interest considered is the personal interest.

Although, in the case *El Ghatet v. Switzerland*⁴³ the Court uses a different method and applies the procedural approach even though the case concerns first entry. 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 its 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.⁴⁴ 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 entry of foreigners into its territory.⁴⁵ 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.

³⁷ *Ibid.*, para. 55.

³⁸ *Ibid.*, para. 56.

³⁹ *Ibid.*, para. 64.

⁴⁰ ECtHR, *Berisha v. Switzerland*, app. no. 948/12, 13 July 2013 (Final 20/1/2014).

⁴¹ *Ibid.*, para. 47.

⁴² *Ibid.*, para. 61.

⁴³ See ECtHR, *El Ghatet v. Switzerland*, app. no. 56971/10, 8 February 2017.

⁴⁴ *Ibid.*, para. 47.

⁴⁵ *Ibid.*, para. 52.

This procedural approach can also be seen in the case *Guliyev and Sheina v. Russia*.⁴⁶ This case concerned an Azerbaijan national who was expelled after overstaying an authorised stay in Russia. The applicant didn't apply for Russian residence permit while developing family life in Russia with his wife, with whom he had three children. The Court referred to the case law where the States had mixed obligations.⁴⁷ However, the Court found that in the present case, unlike in the four cases referred to, the domestic courts neither carefully balanced the different interests involved – including the best interests of the children – nor made a thorough analysis as to the proportionality of the measure applied against the first applicant and its impact on the applicants' family life. Consequently, they failed to take into account the considerations and principles elaborated by the Court and to apply standards which were in conformity with Article 8 of the Convention.⁴⁸ It is also interesting to note that the Court found the decision on the applicant's administrative removal fall short of Convention requirements and did not touch upon all the elements that the domestic authorities should have taken into account for assessing whether the measure was "necessary in a democratic society" and proportionate to the legitimate aim pursued.⁴⁹

Nevertheless, the case law shows that the unclear mix of positive and negative obligations, which occurs in cases because of either irregular residence or voluntary departure and readmission, results in an inconsistent application of Article 8 of the ECHR. The Court uses different tests and it is unclear why it is doing so and when it is using which test. The way the Court is using the legitimate aim of controlling migration is also problematic and infuses the application of Article 8 and makes the right to respect for family life in the migration process very unstable. The following chapter outlines some of the problems linked to the interest in controlling migration.

3. PROBLEMS CONNECTED TO THE PUBLIC INTEREST IN MIGRATION CONTROL

Several problems arise when the Court mixes positive and negative obligations in the assessment and uses the interest in controlling immigration as a legitimate aim. It is conflicting with the Court's own case law to recognise an interference with the right to family life but not justifying it according to Article 8(2) of the ECHR. Additionally, using the public interest in controlling migration as a legitimate aim infuses the balancing assessment since migration control tends to generally override all other interests without any explanations.⁵⁰ This research is specifically pointing out three main problems which are connected to the application of migration control.

3.1 Using the Public Interest in Migration Control When an Interference has been Established

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) of the ECHR is not triggered (Connolly, 1986, p. 572). Instead, the Court has to determine whether the state is under a positive obligation to allow for entry and residence, based on the right to respect for family life. The Court is then assessing

⁴⁶ ECtHR, *Guliyev and Sheina v. Russia*, app. no. 29790/14, 17 April 2018.

⁴⁷ ECtHR, *Omorgie and others v. Norway*, app. no. 265/07, 31 July 2008; ECtHR, *Antwi v. Norway*, app. no. 26940/10, 14 February 2012.

⁴⁸ ECtHR, *Guliyev and Sheina v. Russia*, app. no. 29790/14, 17 April 2018, para. 58.

⁴⁹ *Ibid.*, para. 59.

⁵⁰ See for instance ECtHR, *Berisha v. Switzerland*, app. no. 948/12, 13 July 2013 (Final 20/1/2014).

whether a fair balance has been struck under Article 8(1) and not under the second paragraph of the article. The first paragraph does not limit the public interest, as can be seen from the second paragraph. Since there are no restrictions in the first paragraph, the State can rely on all the interests of the community and in particular on the control of immigration. Furthermore, when applying the first paragraph, the authorities must not demonstrate that exclusion is necessary to achieve the objectives of the immigration policy and that exclusion was the only and least burdensome measure available to achieve the objectives, as is the case with the application of the second paragraph of Article 8 (Schotel, 2012, p. 38). Although, a fair balance still has to be struck between the competing interests of the individual and the community as a whole. Nevertheless, Article 8(1) is more favourable for States to apply.

Although, as soon as an interference of a right to family life has been established the second paragraph of Article 8 is triggered and only the listed legitimate aims under that paragraph can be used. Consequently, since the public interest in migration control is not one of the legitimate aims under the second paragraph, it cannot be used when an interference has been established. However, as can be seen from the ECtHR case law, the Court still uses the public interest in migration control as a legitimate aim, even though an interference with the right to family life has been established.⁵¹ This is troublesome and can be seen as in conflict with the Court's own case law.

Therefore, this research suggests that in cases where an interference of the right to family life has been established, the legitimate aim of the economic well-being of the country should be engaged instead of the aim of controlling migration. This was done in the case *Berrehab v. The Netherlands*.⁵² The Court identified the case as one that engaged the legitimate aim of economic wellbeing and considered that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued.⁵³ Even though this case concerned a settled migrant, which was emphasised in the judgement,⁵⁴ the Court's way of assessment should be the same in a case concerning a non-settled migrant. The outcome might be different depending on the particular circumstances in the individual case, but the way the Court assesses whether Article 8 has been violated should not differ.

3.2 Public Interest in Migration Control as a Static Factor

In cases where an interference has not been established, and the Court is rightfully using the public interest in controlling migration in the balancing act, other problems arise. One problem is that the public interest in migration control does not seem to change depending on the factual circumstances of the individual case, which makes the balancing act distorted.

In fact, when using the public interest in controlling public safety in the balancing act, the public interest can be seen to have two factors.⁵⁵ One of the factors is the importance of deportation of a foreign national offender. This is considered to be a 'good' because of factors that are not related to the individual, the so-called extrinsic factor.⁵⁶

⁵¹ See ECtHR, *I.A.A. and Others v. United Kingdom*, app. no. 25960/13, 31 March 2016, and ECtHR, *Omeregje and others v. Norway*, app. no. 265/07, 31 July 2008.

⁵² ECtHR, *Berrehab v. The Netherlands*, app. no. 10730/84, 28 May 1988, para. 25.

⁵³ *Ibid.*, para. 29.

⁵⁴ *Ibid.*, para. 29.

⁵⁵ See Collinson's argumentation on extrinsic and intrinsic factors in Collinson (2020).

⁵⁶ *Ibid.*, p. 34.

The importance of deportation can be seen as a static factor that reflects the relative importance of the public policy of deporting foreign national offenders in comparison to the legitimate aims that may support the removal of a foreign national.

Factors such as the type of crime, the length and type of sentence imposed, the relative severity of the offence (such as whether there were aggravating or mitigating circumstances), and whether the offence was an aberration or pattern of offending behaviour, are all considered relevant to the severity of the need to deport and are factors linked to the individual foreign national offender, the so-called intrinsic factor.⁵⁷ In other words, this public interest is related to the factual circumstances of the individual case that can be seen as connected to the seriousness of the crime.⁵⁸

Thus, in the balancing test the importance of deportation is a static factor and does not vary depending on the circumstances in any individual case. However, the severity of the crime can vary and therefore be seen as a movable factor of the public interest side of the balancing exercise. This means that the importance of deportation and severity of the need to deport stand in relationship with each other to determine the overall weight given to the public interest side of the balance.⁵⁹

Moreover, this can be seen in the *Boultif* case where the Court found the applicant only presented a limited danger to public order and therefore found the interference with the applicant's rights to family life disproportionate to the aim of public safety.⁶⁰

However, when the Court is using the public interest in migration control as a legitimate aim in the balancing act, there is no movable factor present in the Court's assessment. When using the interest in public safety, a criminal conviction can vary in severity and consequently tip the balance in favour of the personal interests. This flexibility does not seem to exist when using the interest in migration control. The public interest in migration control does not seem to have a factor related to the factual circumstances of the individual case. The only factor seems to be the importance of controlling migration. This makes the public interest in migration control static that does not change.

There is a problem when the public interest in migration control is seen as a static factor that has to be weighed against the personal interest in family life that vary depending on the individual circumstances of the case. It's not logical to have a static factor on one side of the balancing test that has to be weighed against a movable factor on the other side.

Moreover, it is not defensible when the overall weight of the public interest is determined in an individual case only with reference to the importance to control migration as the only factor of the public interest side of the balancing exercise.

In order to strike a fair balance between the interests both have to vary depending on the circumstances in the individual case. Therefore, the public interest in controlling migration, like the public interest in controlling public safety, should also be related to the factual circumstance of the individual case. These circumstances could for instance be related to the severity in administrative breaches of immigration law, whether the applicant's entry or stay in the host country can be seen as a burden for the country and how this is a burden for the state.

⁵⁷ *Ibid.*, p. 34.

⁵⁸ *Ibid.*, p. 35.

⁵⁹ *Ibid.*, p. 34.

⁶⁰ ECtHR, *Boultif v. Switzerland*, app. no. 54273/00, 2 August 2011, para 53.

3.3 The Lack of Assessment on How the Refusal of an Applicant Secures the Legitimate Aim

The research is questioning the Court's lack of explaining how the applicant is endangering the public interest in migration control. The paper finds that in cases concerning non-settled migrants, the Court just concludes that national authorities didn't act arbitrarily or otherwise transgressed the margin of appreciation.⁶¹ In cases concerning settled migrants facing expulsion due to a criminal conviction, the Court uses a procedural approach and conclude that as long as national authorities put forward enough reasons for their decision, 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. According to the case law, it is necessary to make the assessment with considerations of both gravity of the crime committed by the applicant, the interests of the society and the applicant's individual rights.⁶²

The research suggests that the same assessment should be applied in cases concerning non-settled migrants trying to regulate an irregular stay. Enough reasons should include seriousness of the immigration breach and the impact on the society. The statement 'the maintenance of effective immigration controls is in the public interest' is insufficient. The State would need to explain what makes immigration control 'effective', what public interests are being furthered by effective immigration control and what evidence there is that the public interests are furthered in the manner asserted (Collinson, 2020a).

According to the Court's case law, 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. Therefore, all interests have to be taken into consideration when assessing the States interests in migration control. Consequently, the Court must require from the States, as it does in cases concerning settled migrants facing expulsion due to a criminal conviction, that they put forward enough reasons for their decisions and make assessment with consideration of both gravity of the immigration breach committed by the applicant, the interests of the society and the individuals' rights.

4. CONCLUSION

This research is highlighting the inconsistent application of Article 8 of the ECHR that occurs in cases where there is an unclear mix of positive and negative obligations because of irregular residence or voluntary departure and readmission. The research points out the different application of Article 8 of the ECHR in expulsion cases concerning settled migrants where the Court is using a procedural approach compared to the application in cases concerning non-settled migrants where the Court is using different tests and it's unclear why it is doing so and when it is using which test.

The research is questioning whether the public interest in controlling migration can be used as a legitimate aim when an interference of the right to family life has been established. The research suggests that once an interference of the right to family life

⁶¹ See for instance ECtHR, *Berisha v. Switzerland*, app. no. 948/12, 13 July 2013 (Final 20/1/2014).

⁶² See ECtHR, *I.M v. Switzerland*, app. no. 23887/18, 9 April 2019 and ECtHR, *Üner v. The Netherlands*, app. no. 46410/99, 18 October 2006.

has been established the legitimate aim of controlling immigration cannot be used. Instead, the legitimate aim of the economic well-being of the country can be used as could be seen in the case *Berrehab v. The Netherlands*.⁶³

In cases, where the Court rightfully applies the interest of controlling migration, other problems arise. One problem is that the public interest in migration control is seen as a static factor. Thus, when the Court is using the public interest in migration control as a legitimate aim in the balancing act there is no movable factor present in the Court's assessment. When using the interest in public safety a criminal conviction can vary in severity and consequently tip the balance in favour of the personal interests. This flexibility does not seem to exist when using the interest in migration control. The public interest in migration control does not seem to have a factor related to the factual circumstances of the individual case. The only factor seems to be the importance of controlling migration. In order to strike a fair balance between the interests both have to vary depending on the circumstances in the individual case. Therefore, the public interest in controlling migration, like the public interest in controlling public safety, should also be related to the factual circumstance of the individual case. These circumstances could, for instance, be related to the severity in administrative breaches of immigration law, whether the applicant's entry or stay in the host country can be seen as a burden for the country, and how this is a burden for the state.

Finally, the research claims that the Court does not assess how the refusal or expulsion of an applicant secure the legitimate aim of controlling migration. The paper suggests that when it comes to non-settled migrants trying to regulate an irregular stay the Court should apply the same assessment as in cases concerning the expulsion of settled migrants and use the procedural approach. This means that in order for the Court, in line with the principle of subsidiarity, to 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, the national authorities have to put forward enough reasons for their decision. According to the Court's case law, 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.⁶⁴ Therefore, it is necessary to make the assessment with considerations of both gravity of the breach committed by the applicant, the interests of the society and the applicant's individual rights.

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⁶³ ECtHR, *Berrehab v. The Netherlands*, app. no. 10730/84, 28 May 1988, para. 25.

⁶⁴ *Ibid.*, para. 47.

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