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Article

# RESPECT FOR PRIVATE AND FAMILY LIFE UNDER ARTICLE 8 ECHR IN IMMIGRATION CASES: A HUMAN RIGHT TO REGULARIZE ILLEGAL STAY?

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**Abstract**

Applying the European Convention on Human Rights (ECHR) to immigration cases has always been a balancing exercise between the effective protection of human rights and the Contracting States' autonomy to regulate migration flows. In its recent case law, the European Court of Human Rights in Strasbourg (ECtHR) has considerably extended the protective scope of Article 8 ECHR by granting autonomous human rights protection to the long-term resident status independent of the existence of family bonds under the heading of 'private life'. This has important repercussions for the status of legal and illegal immigrants across Europe, since the new case law widens the reach of human rights law to the legal conditions for leave to remain, effectively granting several applicants a human right to regularize their illegal stay. The contribution analyses the new case law and develops general criteria guiding the application of the ECHR to national immigration laws and the new EU harmonization measures adopted in recent years.

## I. Introduction



The application of the ECHR to immigration law contrasts the universal claim of human rights law with the States' traditional autonomy to regulate migration flows. As the starting point of its jurisprudence the European Court of Human Rights maintains the principle that the Contracting States enjoy the right 'as a matter of well-established international law and subject to their treaty obligations to control the entry, residence and expulsion of aliens'.[1] Its case law has nonetheless restricted the statal room for manoeuvre; in 1991, the Court first qualified the deportation of a foreigner as a violation of his right to family life under Article 8 ECHR and applied the prohibition of inhuman or degrading treatment in Article 3 ECHR to the expulsion of aliens.[2] Ten years later, the Strasbourg Court first obliged a Contracting State to grant within its territory the family reunion with a family member living abroad.[3] After a period of consolidation, the Court has recently entered a new phase in its expansive case law on the respect for the family and private life of foreigners which shall be the subject of this contribution.

In retrospect, the Court laid the basis for the new line of argument in its Grand Chamber judgment of 9 October 2003 on the application of *Slivenko et al v Latvia*, which prominently confronted the Court with the precarious situation of the russophone minority in the Baltic States. The important innovation of the judgment relates to the re-conceptualization of family

and private life; the Court restricts its formerly wide understanding with a new focus on the 'nuclear family' of spouses and minor children, while at the same time broadening the protective reach of Article 8 ECHR to the network of personal, social and economic relations that make up the private life of every human being (section II). Building upon this new approach the Court extended the field of application of the Article 8 ECHR to the conditions for leave to remain in different judgments of 2005 and 2006, whose reception has been complicated by the late or non-availability of English language versions. Initial divergences in the case law were resolved in the eventual judgment of the Grand Chamber in *Sisojeva et al v Latvia* of 15 January 2007 (section III.B).

The aforementioned cases concern the russophone minority in the Baltic States, which had settled there in the decades after the Second World War (complementing an indigenous Russian minority) as members of the Red Army or as a result of the advanced industrialization of these Soviet Republics—in all cases, however, with the hidden agenda of 'russification' to undermine the defiant attitude of the Baltic population against Soviet rule.[4] After the break-up of the Soviet empire, Latvia and Estonia refused citizenship to the Russian 'occupants'.[5] Progress has only been achieved in recent years, also owing to the political pressure by the OSCE, the Council of Europe and the European Union.[6] For Latvia and Estonia the status of the russophone minority is a matter of crucial social and political concern, since it makes up between 30 and 40 per cent of the overall population.[7] This specific context invites a narrow reading of the aforementioned cases without repercussions for the legal situation of irregular migrants in other European countries.

A closer examination of the new Strasbourg case law, however, reveals its implications for the wider Europe. It gained particular prominence in German immigration law after various decisions by administrative courts of first and second instance granted illegal immigrants a right to regularize their stay under recourse to the Strasbourg cases.[8] Moreover, the European Court has itself extended its new understanding of Article 8 ECHR to the social and legal situation of immigrants in the industrialized States of Western Europe. In *Ariztimuno Mendizabal v France* the Court considers the granting of a residence permit to fall within the protective scope of Article 8 ECHR (section III.A). Of even greater relevance is another judgment of January 2006 in the case *Rodrigues Da Silva & Hoogkamer v the Netherlands*, where the Court effectively granted a Brazilian mother a residence permit for the Netherlands, although the Dutch authorities had never authorised her stay in the country (section III.C).

This series of judgments confirms that Strasbourg has started a new era in its human rights jurisprudence in the field of immigration. Its new readiness to oblige the Contracting Parties to grant residence permits to irregular migrants poses the more general question of general criteria guiding the application of the European Convention to immigration cases. This contribution shall therefore conclude with general considerations on the relationship between the Convention and immigration law with a view to the ongoing reform measures at national and European level (section IV). Such a general analysis helps us to better understand the future interaction between the Convention and national and European immigration law at a time when the Strasbourg Court seems to position itself to actively develop the human rights dimension of migration flows.

## II. Re-conceptualizing family life



In its case law on the application of Article 8 ECHR to domestic issues, the Court developed a wide understanding of family life. Instead of relying on abstract legal criteria, it focused on the existence of substantive family life in real terms, thereby leading the legal drive for the equal treatment of 'illegitimate' children and the recognition of non-married couples.[9] It also extended

the substantive reach of Article 8 ECHR to 'ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life'.[10] Against this background it was not surprising that the Court applied its wide understanding of family life to immigration cases alike. Thus, the Court did not only examine whether an expulsion or deportation of a foreigner would affect the joint life of spouses and children, but extended its reasoning to the relations of the applicant with their parents and siblings.[11] In most cases, the Court did however refrain from a substantiated analysis of the depth and quality of the family bond with the relatives.[12]

Academic observers soon identified a 'hidden agenda' of the Strasbourg Court to expand the legal safeguards of Article 8 ECHR beyond the realms of family life with the intention of effectively protecting the long-term residence status of second-generation immigrants, who had often been born in the Western European reception States or joined their migrant parents at young age.[13] In cases involving adult foreigners without a family of their own, the Court did indeed refer not only to the relations with their parents and siblings, but similarly highlighted the length of their stay in the reception country and their continuous schooling there. On this basis it regularly concluded that the expulsion or deportation 'amounts to interference with the applicant's right to respect for his private *and* family life'.[14] The Court did however never formally renounce the linkage to family life, despite the recurring call of separate opinions to grant autonomous protection to the personal bond of the foreigners with the receiving country independent of the existence of family life.[15]

### A. *Slivenko* et al *v Latvia*

The Grand Chamber of the Court eventually granted autonomous human rights protection to the network of personal, social and economic relations under the heading of 'private life' in a judgment of 9 October 2003 on the application of *Slivenko et al v Latvia*.[16] It did, however, not limit the dynamic interpretation of the Convention to the autonomous protection of the foreigners' private life. Instead, it also re-defined the understanding of family life with a new focus on the 'nuclear family' of spouses and minor children (the 'core family' in the terminology of the ECtHR). More specifically, the applicants, a former Soviet army officer and his family which had lived in Latvia most of their lives, contested their deportation from Latvia after their claims for residence rights under the 1994 Russo-Latvian Treaty on troop withdrawal had been rejected. From an immigration law perspective, the case follows the well-established application of Article 8 ECHR to expulsion and deportation cases and does in that regard not require close attention. The important innovation of the judgment rather relates to the re-conceptualisation of family and private life within the meaning of Article 8 ECHR. Since the family was expelled collectively, the applicants' joint family life was not directly affected. Nonetheless, the Court concluded that the removal amounted to an interference with Article 8 ECHR:

96. They were thus removed from the country where they had developed, uninterruptedly since birth, the *network of personal, social and economic relations that make up the private life of every human being* …. In these circumstances, the Court cannot but find that the applicants' removal from Latvia constituted an interference with their 'private life' and their 'home' within the meaning of Article 8 §1 of the Convention … 97. (T)he existence of 'family life' could not be relied on by the applicants in relation to the first applicant's elderly parents, *adults who did not belong to the core family* and who have not been shown to have been dependent members of the applicants' family, the applicants' arguments in this respect not having been sufficiently substantiated.[17]

Unfortunately, the reversal of prior case law is not spelt out in clear terms, but hidden behind superficial references to earlier judgments, omitted in the quote above, which contain language in this direction, but never departed from the original wide understanding of family life.[18] Similarly, the Grand Chamber eschews a clear distinction in its later judgment in *Sisojeva et al v Latvia* when it concludes that the applicants were able to exercise 'their private and family life as protected by Article 8 of the Convention and interpreted in the Court's established case-law'.[19] From a dogmatic point of view such a clear distinction is indeed not mandatory, since family and private life are both equally protected by Article 8 ECHR and together constitute a single human right with one set of legal criteria for state interferences and their justification. But the systematic analysis illustrates that there is a need for a substantive distinction between the family life of the nuclear family and the private life of every human being which reflects different needs for protection and responds to the social phenomenon of irregular migration.

### B. A Systematic Delineation of Private and Family Life

On closer inspection, the new distinction between the protection of the nuclear family and the private life of wider social relations should be welcome. It illustrates the readiness of the Court to interpret the Convention as a living instrument and take into account social changes, which have in recent years arguably reinforced the importance of the immediate family in European societies to the detriment of wider family relations, as any reader may assess from their own experience. Of course, this new delineation draws the criticism of ignoring the different social traditions of immigrants from African or Asian societies, where the individual and the nuclear family are often still firmly embedded in the network of extended family bonds.[20] In special circumstances it may indeed be necessary to adopt a wider understanding of family life, as the Court has suggested for situations where the applicant shows a degree of personal dependence with relatives which amounts to de facto family ties.[21] But this extension of the family life beyond the nuclear family should be limited to exceptional situations with a focus on the nuclear family in regular circumstances.

It should be underlined that the restrictive new understanding of family life does not translate into a restriction of human rights protection, since it is complemented by the autonomous protection of wider social relations constituting the foreigners' private life, which had hitherto not been explicitly recognised by the Court. As a result, the long-term residence status now enjoys autonomous human rights protection independent of the family situation and the existence of formal bonds with siblings and parents, which had always been relied upon in the early case law on the expulsion and extradition of second-generation immigrants.[22] This is a considerable extension of human rights protection for any third country national born in a European reception State or having lived there legally (or illegally)[23] for some time. On the basis of this new delineation the Court may in future develop further distinctions taking into account the different needs for protection of family and private life. Both are equally protected under Article 8 ECHR, but may be differently affected by immigration law.

The nuclear family is protected by Article 8 ECHR *ratione materiae* independent of the length of its existence, while the private life of a person only comes within its reach after the lapse of a certain time period and gains weight the longer a person has lived in a country and developed 'the network of personal, social and economic relations that make up the private life of every human being'.[24] This general definition of the private life 'of every human being' suggests that the Court will not embark upon a substantive analysis of the quality of the personal relations of a given individual and instead primarily rely upon the time criterion to determine the material reach of private life under Article 8 ECHR. Qualitative criteria such as the education, employment, non-reliance on social assistance, language skills or criminal offences will play an important role when considering the justification of restrictive measures by the Contracting Parties.

Thus, the effective protection of family and private life may lead to the development of different criteria for state interferences and their justification under Article 8(2) ECHR, including the proportionality test. The protection of family life primarily requires the co-habitation of the spouses with their minor children, be it in the host country of the applicant or abroad. Any state measure preventing the cohabitation of the family members will constitute an interference and require a justification, as confirmed by the existing case law on the expulsion and deportation of foreigners after a criminal conviction. The Court has so far developed the eight '*Boultif* criteria' guiding the proportionality test in response to repeated criticism that the Court's case law lacked a coherent approach.[25] These '*Boultif* criteria' include the nature and seriousness of the criminal offence, the length of the stay in the host country, the time elapsed since the offence was committed and the conduct during that period, the nationalities of the various persons concerned, the applicant's family situation, whether the spouse knew about the offence when they entered into the relationship, the age of children, and the seriousness of the difficulties which the spouse is likely to encounter in the country of origin.[26] When a foreigner was born in the host country or moved there in his young childhood, the Court limits its assessment to the three first criteria, thereby effectively extending the degree of protection granted to the person concerned.[27]

Of course, this balancing exercise is often difficult and has important implications for the foreigner involved, but from a legal dogmatic point of view the scales are relatively easy to identify (family unity versus sanction for criminal behaviour). In cases concerning the protection of private life, the judicial perspective however has to broaden its analysis to the general integration of the applicant into the host society. This is the logical consequence of the wide understanding of every person's private life, which is not limited to the cohabitation with family members but characterized by 'the network of personal, social and economic relations that make up the private life of every human being'. In such situations, the Grand Chamber of the Court has recently set itself the task to 'analyse the legal and practical implications' of the

immigrants living conditions.[28] The resulting proportionality test will be much more complex than in cases concerning the 'simple' protection of family life and cover criteria whose interaction is not always straightforward in a plurilateral balancing exercise. Decisive factors will include the integration into the labour market, dependence on social assistance, language skills as an indicator of social integration, criminal behaviour, links with the country of origin or their absence and the duration of the stay in the host country. Here, the eight '*Boultif* criteria' may only be a starting point for a complex jurisprudence which the Court has only started to develop.

In a wider European perspective, the new delineation of private and family life does not only reflect changes in European societies and correspond to different actual and legal needs for protection. It similarly corresponds to the new regulatory instruments adopted at European level in recent years. Both the Directive 2003/86/EC on the right to family reunification and the Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents primarily apply to the nuclear family of spouses and their minor children.[29] This departure from the more generous rules on the free movement of Community nationals[30] has been criticized for not fulfilling the original political pledge rights 'which are as near as possible to those enjoyed by EU citizens'.[31] The new Strasbourg case law now suggests that the narrow understanding of family life does not interfere with Article 8 ECHR in so far as the family unity of the nuclear family is concerned, and also probably does not constitute indirect race discrimination.[32] At the same time, the extension of Article 8 ECHR to the wider social relations constituting the private life of every human being will become an important criterion for the evaluation of whether the new Community instruments and national implementation measures live up to European human rights standards.[33] This is of particular relevance for restrictions of the long-term residence status under Article 12 of Directive 2003/109/EC.[34] Thus, the new system delineation of the family life of the nuclear family and the private life of any long-term resident may become an important guiding principle for the human rights dimension of European and national immigration law.

## III. IS THERE A HUMAN RIGHT TO REGULARIZE ILLEGAL STAY?



Until the late 1970s, the traditional concept of state sovereignty over the regulation of migration flows supported the interpretation of the European Convention by the Strasbourg institutions. Thus, the former European Commission of Human Rights maintained that foreigners may be expected to establish their family life in their home country and rejected the claim that the denial of family reunification in the host country amounted to an interference with Article 8 ECHR.[35] This only changed in the late 1980s with the realization that the 'guest workers' and other migrants in the industrialized societies of western Europe had turned into de facto immigrants who would remain in the host state indefinitely. In many cases, the second generation of children had been born in Europe, and rarely visited their parents' home country. Against this background, academic authors started to challenge the traditional view of unfettered state discretion on matters of immigration.[36] Gradually also the ECtHR began applying Article 8 ECHR to immigration cases, thereby effectively ending the immigration law's traditional status as a human rights exclave.

Hitherto, the Court had identified two situations where state action amounts to an interference with Article 8 ECHR: First, the expulsion or deportation of foreigners, usually after a criminal conviction. For these cases the Court developed the eight '*Boultif* criteria' mentioned above, which essentially require a balance between the preservation of family unity and the maintenance of public order.[37] Secondly, requests for family reunion with spouses or children living abroad, as first recognised in the landmark 1985 judgment of *Abdulaziz et al v the United Kingdom*.[38] Applicants repeatedly had recourse to this principle, but the Court maintained a restrictive practice; a first affirmative judgment was only rendered in 2001.[39] In situations of family reunion the guiding legal criteria correspond to cases of expulsion and deportation, with

the variation that the cohabitation of the family members must be balanced with the Contracting Parties' prerogative to control the entry of foreigners. The new third category of cases goes one important step further: here, an immigrant claims that his legal or illegal residence should be respected under the heading of private life. In such cases, the long-term residence status obtains autonomous human rights protection with important implications for the status of illegal immigrants who may in particular circumstances gain a human right to regularize their illegal stay.

### A. *Ariztimuno Mendizabal v France*

The extension of Article 8 ECHR to the conditions for the granting of residence permits is illustrated by the judgment in *Ariztimuno Mendizabal v France* of 17 January 2006.[40] The facts of the case are atypical: the applicant was originally granted refugee status in France as a Spanish national in 1976, which was revoked three years later following the political changes in her home country. Until 1989 she received temporary residence permits for a duration of one year each, which were then renewed on a quarterly basis until 1993. In the following 10 years, the intervals of renewal were reduced dramatically, to a few weeks on some occasions; altogether the ECHR counted 69 renewals until November 2003, when she was eventually granted the *carte de séjour* to which she was entitled under EC law as an intra-Community migrant worker. The Court held that Article 8 ECHR had been violated and afforded her just compensation of €50,000.

Apart from the peculiarities of the case, which simply constitute a malfunction of the French administrative and court system in disrespect of EC law, the findings of the Court differ from the traditional cases on the application of the Convention to the legal status of foreigners in two respects: first, the applicant did not invoke the protection of family life (her husband, an alleged member of the ETA terror group, had been extradited to Spain). Secondly, the French authorities had never threatened to expel or deport her; she complains about the failure of the French authorities to deliver the residence permit to which she was entitled. In short, the case neither concerned the maintenance of family life nor the right to stay in France, but is essentially about the conditions for the granting of residence permits. The Court's findings are representative of its new approach to the application of Article 8 ECHR to the legal status of immigrants.

It deliberately takes up the original conclusion on the general indifference of Article 8 ECHR towards the structure of national immigration law by confirming that the provision 'does not guarantee the persons concerned the right to a particular type of residence permit (indefinite, temporary or other), as long as the solution proposed by the authorities allows for the effective exercise of their right to respect for private and family life'.[41] But instead of stopping at this point and relying on the applicant's continued presence in France without the direct threat of expulsion or deportation, the Court continues with an examination of the effects of the 'precarious and uncertain situation the applicant sustained for a long period' and which 'had important consequences for her in material and psychological terms (precarious and uncertain employment, social and financial difficulties, impossibility to open a bar in default of a *carte de séjour* required for the exercise of the profession she was trained for)'.[42]

The implications are clear: the Court's examination is no longer limited to the essential balancing between the preservation of family unity and the maintenance of public order, but extends to the factual implications of a foreigner's legal status. The uncertainty and precariousness of the applicant's situation affected the network of her personal, social and economic relations that make up her private life and did thus constitute an infringement of Article 8 ECHR in line with the new case law analysed above. *In casu*, the Court did, however, not engage in an extensive weighing of arguments under the proportionality test, since the denial of the *carte de séjour* was an evident violation of Community law[43]—in the light of which the Court interprets the ECHR reflecting the increased convergence between the two European courts in Strasbourg and Luxembourg.[44] Since the restrictive state measure did therefore lack an adequate legal basis, it was not adopted 'in accordance with the law' and was therefore in violation of Article 8 ECHR (in contrast to the situation of most third country nationals, in particular illegal immigrants, where restrictive national practices are explicitly foreseen in national or European laws).

### B. Case *Sisojeva* et al *v Latvia*

From an immigration law perspective the judgment of the Grand Chamber in *Sisojeva et al v Latvia* of 15 January 2007 commands particular attention, since it illustrates the potential of the new Strasbourg case law for the legal status of illegal immigrants,[45] while at the same time avoiding an substantive overstretch of Article 8 ECHR which the earlier chamber judgment of June 2005 might have entailed.[46] The case concerns an ethnic Russian family which has been living in Latvia for more than 20 years, mirroring the *Slivenko* case mentioned above with the important difference that the Latvian authorities were tolerating the applicants' residence in Latvia and had assured them that they would not proceed with deportation measures.[47] Eventually, the Latvian authorities offered the regularisation of their stay by means of renewable temporary residence permits in accordance with Latvian immigration law, which the applicants rejected, since they essentially maintained they should be granted unconditional residence rights under the Russo-Latvian Treaty on troop withdrawal. The Grand Chamber confirms that Article 8 ECHR extends to situation of illegal residents in principle, but rejects the claim that the regularisation offer was insufficient:

Article 8 cannot be construed as guaranteeing, as such, the right to a particular type of residence permit. Where the domestic legislation provides for several different types, the Court must analyse the legal and practical implications of issuing a particular permit. If it allows the holder to reside within the territory of the host country and to exercise freely there the right to respect for his or her private and family life, the granting of such a permit represents in principle a sufficient measure to meet the requirements of that provision. In such cases, the Court is not empowered to rule on whether the individual concerned should be granted one particular legal status rather than another, that choice being a matter for the domestic authorities alone.[48]

The Convention should indeed be limited to questions pertaining with the exercise of the applicants' family and private life under Article 8 ECHR and not be extended to substantive questions of national immigration law. The interpretation and application of the latter does not fall within the competence of the Strasbourg Court, which as an international human rights court is no supreme court for the interpretation and application of national laws.[49] In the *Sisojeva* case these general considerations entail that the regularisation offer resolved the cases from a human rights perspective—despite the unpleasant aftertaste of an attempt to avoid a verdict against Latvia only after the Strasbourg court had found the application to be admissible.[50] It is to be expected that the Grand Chamber will come to the same conclusion in the applications of *Kaftailova v Latvia* and *Shevanova v Latvia* which, *mutatis mutandi*, follow the pattern of the *Sisojeva* case and have all been referred to the Grand Chamber after a chamber of the Court had found a violation of Article 8 ECHR despite regularisation proposals by the Latvian authorities.[51] This confirms that Article 8 ECHR may require the Contracting Parties to regularize the illegal stay of foreigners without guaranteeing a right to a particular type of residence permit.

### C. Case *Rodrigues Da Silva & Hoogkamer v the Netherlands*

The potential of Article 8 ECHR for the regularisation of illegal stay was underlined in a chamber judgment of 31 January 2006 in *Rodrigues Da Silva & Hoogkamer v the Netherlands*.[52] Again, the case goes beyond the specific situation in the Baltic States and confirms the pan-European repercussions of the Court's interpretation of Article 8 ECHR also in Western European countries. Conceptually, the judgment follows the Court's earlier decisions on the protection of the family life of the nuclear family, *in casu* between the applicant and her young daughter, and is not based on the new understanding of private life. But the Court's conclusions on the limited implications of the applicant's illegal residence status under the proportionality test command general recognition for the human rights dimension of illegal residents.

*Rodrigues Da Silva & Hoogkamer* concerns a 'classic' situation of illegal immigration. The applicant entered the Netherlands in 1994 at the age of 22 from her native Brazil, apparently with a tourist visa which she overstayed. Soon afterwards she started a relationship with Mr Hoogkamer, a Dutch national, with whom she conceived a daughter (the daughter automatically acquired Dutch citizenship). Her second son out of an earlier relationship in Brazil joined her after one year, the firstborn followed a few years later; neither the applicant nor her sons have ever been granted a (temporary) residence permit. After three years, the relationship broke up and Mr Hoogkamer was granted child custody in a prolonged court battle. Ms Rodrigues Da Silva nonetheless continued to care for the child in alternation with the father's parents, which confirmed the positive impact of the mother on the daughter's joint upbringing. The Court grants her a right to regularize her illegal stay.

From the perspective of child custody law, the Court's conclusion that the applicant's factual care for the baby is sufficient for granting it protection under Article 8 ECHR is not self-evident,[53] but continues the Court's aforementioned concern with the protection of family and private life in real terms and moreover corresponds to a wider trend in European human rights law.[54] On this basis, the Court holds that the separation of the mother and the child would infringe the obligations of the Netherlands under Article 8 ECHR. It could thus build upon its earlier case law on the subsequent immigration of family members and extend it to parents already present in the host country.[55] In this respect, it noticeably attempts to establish abstract criteria for situations of family reunification, reflecting the '*Boultif* criteria' for the expulsion and deportation of foreigners.[56] These general standards include the 'important consideration … whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious'. In such circumstances 'it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8'.[57]

In general terms, these parameters do not appear as a generous extension of the human rights status of illegal immigrants. The innovation rather lies in the prior assumption that illegal entry and residence status are only one, albeit important, element in the proportionality test and require balancing with other factors arguing in favour of the illegal immigrants. This provides immigration lawyers, respective interest groups and national courts with an important new legal tool to redesign national immigration law from a human rights perspective, since the weighing of interests under the proportionality tests is inherently no strict dogmatic undertaking and opens the law for considerations of equity. The ECtHR's own reasoning in *Rodrigues Da Silva & Hoogkamer* illustrates the potential of Article 8 to effectively grant illegal immigrants a right to regularize their illegal stay under the proportionality test.

When applying its general criteria, the Court seems to pay particular attention to the conclusion of the Amsterdam Child Care and Protection Board that it would be 'traumatic' for the daughter to leave the Netherlands.[58] In contrast, the lack of custody rights and in particular the mother's irregular stay are only considered at the sideline, when it generally

reiterates that persons who, without complying with the regulations in force, confront the authorities of a Contracting State with their presence in the country as a *fait accompli* do not, in general, have any entitlement to expect that a right of residence will be conferred upon them.[59]

But it then turns to the vague suggestion that the mother might have regularized her stay during her relationship with the father from which they refrained due to the 'unavailability of documents concerning Mr Hoogkamer's income'.[60] The final balancing of the different arguments further restricts the importance of the illegal residence status. In the eyes of the Court, illegal residence expresses a 'cavalier attitude to Dutch immigration rules' and 'by attaching such paramount importance to this latter element, the authorities may be considered to have indulged in excessive formalism'.[61]

If this latter reference hints at the corresponding case law of the European Court of Justice on the declaratory character of residence permits for Union citizens exercising their free movement rights under the EC Treaty, which the same chamber explicitly cites in *Ariztimuno Mendizabal* deliberated three weeks earlier, it misconceives the fundamental difference between the two situations. Whereas Union citizens have a directly applicable fundamental freedom to settle in other Member States, Ms Rodrigues Da Silva had never been authorised to reside in the Netherlands and is granted this right by the Court itself.[62] It is obvious that the Court's conclusion is dissatisfactory from the point of view of immigration policy. The Dutch authorities have at no point taken a deliberate decision to grant the applicant or her two sons the immigration to the Netherlands; nonetheless it is to be expected that they will now remain in the Netherlands indefinitely. It remains to be seen how the ECtHR and national courts decide in other cases where illegal immigrants claim their regularization under reference to the protection of their family or private life. In *Rodrigues Da Silva & Hoogkamer*, however, the Court has clearly attributed too little weight to the necessary effectiveness of immigration law, for which the sanctioning of illegal entry and stay are important foundations to maintain the credibility of the overall system.

## IV. INTERACTION OF THE ECHR WITH NATIONAL AND EUROPEAN


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# IMMGRATION LAW



The renewed activism of the Court in the field of immigration revives the inherent tension between the effective protection of human rights and the legitimate objective of the Contracting Parties to control 'as a matter of well-established international law … the entry, residence and expulsion of aliens'.[63] Within the European Union the experience of integrating the nation-states into a cosmopolitan empire which is founded upon the rule of law and the free movement of people blurs our understanding of the regular significance of state sovereignty over cross-border migration, stemming from the practical and political impracticality of free international migration.[64] This section therefore analyses the interaction of the ECHR with national and European immigration law in more general terms. To this end the following five subsections will consider the Contracting Parties' margin of appreciation, their corresponding leeway to maintain and apply the structure of their national migration laws, the Court's orientation at the adjudication of individual cases, the prospect of an gradual conversion of immigration law from a human rights angle and the future interaction between the European Convention and EU harmonisation measures in the field of immigration.

## A. Margin of Appreciation in the Field of Immigration

In the first 30 years of their existence, the Strasbourg institutions remained largely silent on matters of migration. This was no coincidence, since the Convention contains to this day no reference to immigration, in particular neither a right to asylum nor an explicit prohibition of *refoulement* (with the minor exception of Article 4 of Additional Protocol No 4 on collective expulsion). This silence on immigration reflects the original choice of the Contracting Parties to regulate migration flows without a supranational human rights superstructure.[65] Applications relating to immigration law may therefore reach the Court only indirectly, through the effects of state measures on other human rights of the foreigners concerned. The obligation to permit subsequent immigration for purposes of family reunification with members of the nuclear family already residing on the territory of a Contracting Party is a prime example of this indirect application: The Contracting Party is under no obligation to admit the foreigner in its own right, but may be obliged to do so in respect for the human rights of its family members.

The indirect relationship between the Convention and immigration law is the principal justification for the general margin of appreciation which the Contracting Parties enjoy in this policy field and which has consistently been upheld by the ECtHR.[66] It implies that each application of the European Convention to immigration cases extends its scope beyond the area which the Contracting Parties had originally intended to be covered by the Convention.[67] Giving less weight to the intention of the Contracting Parties in the interpretation of the Convention illustrates its gradual 'constitutionalization' with the Court focusing instead on the concept of effective human rights protection, which underlies many of its dynamic decisions.[68] This concept of effective protection may well be criticised for defining the legal contents of a norm with undue consideration to its effects in practice, with the Court overstepping its role as an adjudicator and ignoring the regular mechanism for amendments to the Convention. But it is well established in the jurisprudence of the Strasbourg Court and international human rights law in general and has repeatedly served as the dogmatic justification for an extension of the Convention's scope.[69]

Whenever the Contracting Parties adopt positive measures to actively protect the private and family life of foreigners, the margin of appreciation is additionally based upon the dogmatic consideration that positive obligations to actively protect human rights leave the Contracting Parties the discretion to choose among different modes of fulfilment.[70] The twofold justification for the Contracting Parties' margin of appreciation in the field of immigration reaffirms its principled importance for the adjudication of immigration cases which the Court expressed in representative terms in *Gül v Switzerland*:

However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and

in both contexts the State enjoys a certain margin of appreciation… . As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory… . Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory.[71]

## B. Application of National Immigration Law

In principle, the Court's competence is limited to the interpretation of the ECHR and it may not engage in the interpretation and application of national law, which remains the prerogative of national courts. But the latter are not similarly prevented from interpreting and applying the Convention to domestic cases. Such a reciprocal demarcation line may only be drawn in strictly dualistic legal orders. In all jurisdictions which incorporate the ECHR into the national legal order (by far the overwhelming majority among the Council of Europe Member States these days) the national courts are empowered to take the ECHR and the Court's case law into account when they interpret and apply national immigration law. National civil servants or judges do, however, often struggle to integrate the case law on Article 8 ECHR into the specific structure of their domestic legal system. This is no coincidence, since the immigration laws of most Contracting Parties are highly sophisticated normative systems with various finely balanced institutional principles, whose application is closely inter-related with the respective administrative procedures.

Whenever the Court decides an individual case, its general conclusions on the interpretation of Article 8 ECHR may therefore have different implications in different national systems. What seems to be comparable at first glance may appear different when looked at more closely. One minor but illustrative example: after the chamber judgment in *Sisojeva*, various administrative courts in Germany relied upon the new case law to oblige the German authorities to regularize the illegal stay of foreigners, who had never been granted a residence permit after the rejection of their asylum claims but had nonetheless been living in the country for many years in which the authorities did not proceed with deportation measures.[72] Different courts came to different conclusions on how to integrate the new Strasbourg judgment into the national legal system and, arguably, all different solutions could realistically claim to follow the Court's argument in the *Sisojeva* judgment. The inherent problem lay with the specificities of the German legal systems which the Strasbourg Court did not have in mind when it rendered the *Sisojeva* judgment. Indeed, the ECtHR itself held a few months later that a similar claim of failed asylum-seekers from Germany was manifestly ill-founded and therefore inadmissible.[73]

The difficulty of translating the Strasbourg case law into the domestic legal context alone argues for a certain leeway to allow the Contracting Parties to maintain and apply the structure of their national immigration laws reflecting the Contracting Parties' margin of appreciation.[74] The margin of appreciation is an expression of judicial self-restraint and 'embraces an element of deference to decisions taken by democratic institutions … It is not the role of the European Court systematically to second-guess democratic legislators.'[75] In its *Sisojeva* judgment the Grand Chamber prominently reaffirms this leeway of the national authorities to integrate Strasbourg's case law into the specific context of their national legal systems:

The Court further reiterates that the machinery for the protection of fundamental rights established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention does not lay down for the Contracting States any given manner for ensuring within their internal law the effective implementation of the Convention. The choice as to the most appropriate means of achieving this is in principle a matter for the domestic authorities, who are in continuous contact with the vital forces of their countries and are better placed to assess the possibilities and resources afforded by their respective domestic legal systems.[76]

It is therefore to be expected that the Court will in future pay due respect for the normative structure of national legal systems and the specific balance between the public and individual interests they embody. National courts, in particular those of last instance, are the primary place to integrate the Convention into the specific normative framework of national immigration laws. When the national courts assume this function, the Court will in return pay tribute to the subsidiary character of the Convention's court system, which after the accession of many new Contracting Parties has gained renewed importance as a tool for the preservation of the Court's effectiveness.[77] Strasbourg may still intervene in specific cases when the national legal system produces an intolerable result. In regular situations, the ECtHR and national courts should however develop and cultivate a relationship of mutual trust and confidence.[78]

## C. Orientation of the ECtHR at the Individual Case

Respect for the margin of appreciation and the corresponding leeway in the application of national immigration law are enhanced by the Court's focus on the adjudication of hardship cases. National immigration law and its application by state authorities and courts arguably resolve most disputes within the domestic system by striking an adequate balance between the private and public interests involved. This allows the Strasbourg Court to concentrate on situations of failure of the national bodies by correcting intolerable outcomes in individual cases. A closer look at the Court's case law does indeed show a concentration of hardship cases, where the individual circumstances of the persons concerned may at least partly explain the Court's finding of a violation of the Convention. Such an orientation towards the circumstances of the individual case may for example be found in the three judgments discussed in more detail above:

The facts of the *Sisojeva* case confronted the Court with the difficult situation of the russophone minority in the Baltic States; *Ariztimuno Mendizabal* concerns the failure of the French authorities to apply EC law over a period of more than 10 years; and in *Rodrigues Da Silva & Hoogkamer* the Court granted a right to residence to a caring mother who may negligently not have regularized her illegal stay during the relationship with a Dutch citizen (see above sections III. A–C). Similar specificities may be found in other landmark judgments on the application of Article 8 ECHR, where the Court prevented the deportation of a deaf and dumb offender (*Nasri*) and the subsequent immigration of the son of an incapacitated father and a mother with epilepsy (*Gül*).[79] In *Slivenko*, the Court explicitly rules that the expulsion of former Soviet military personnel

would normally not appear disproportionate… . However, application of such a scheme without any possibility of taking into account the individual circumstances of persons not exempted by the domestic law from removal is in the Court's view not compatible with the requirements of that Article.[80]

This focus on the resolution of hardship cases with an emphasis on the individual circumstances of the applicants is not contradicted by the Court's endeavour to develop systematic criteria for the interpretation and application of Article 8 ECHR.[81] Its eight '*Boultif* criteria' for the expulsion and deportation of foreigners illustrate this quest for coherence in the same way as its latest attempt to find general criteria for the subsequent immigration of family members.[82] The attention to the individual case does not absolve the Court from the development of a coherent and predictable jurisprudence, which guarantees the comparability of its results and guides the national authorities and courts in the autonomous interpretation and application of the Article 8 ECHR in immigration cases.

If the academic observer and national practitioner are nonetheless left with a feeling of uncertainty, this remaining doubt reflects a wider ambiguity about the role of the Court vis-à-vis the national jurisdictions of the Contracting Parties. The Court assumes a hybrid function between the binding force of its judgments *inter partes* under Article 46(1) ECHR and its quest for a pan-European human rights superstructure in line with 'the Convention's role as a "constitutional instrument of European public order" in the field of human rights'.[83] The judges are aware of their hybrid status as the protector of the individual and the guarantor of the pan-European human rights constitution.[84] This structural tension between the Court's focus on the individual case and the requirements of constitutional adjudication should be borne in mind by everyone applying the Court's case law within its domestic legal context.

## D. Converting Immigration Law from the Human Rights Angle?

Human rights oblige national authorities and courts to take into account the legitimate interests of the individuals concerned. Immigration law, on the contrary, has long been characterized by its focus on the public interest. The concept of state sovereignty is the ultimate legal justification for the general freedom of States to control the entry, residence and expulsion of aliens. With their emphasis on the individual, human rights do therefore pose a direct challenge to the concept of state sovereignty.[85] Human rights law holds the potential to reverse the immigration law's traditional orientation at the public interest and redirect it towards the individual. The impact of EC law on intra-Community migration is a perfect illustration of such a conversion *in extremis*: its rules on the free movement of EU citizens and their interpretation by the European Court of Justice (ECJ) have systematically obliged the Member States to justify their restrictive laws and practices, gradually extending the rights of Union citizens.[86] On the

basis of Decision 1/80 of the EEC–Turkey Association Council the ECJ has largely extended this orientation at the individual to Turkish nationals covered by the decision.[87]

Is the Strasbourg Court positioning itself to redirect the remaining national immigration laws in a similar manner? Its case law on the application of Article 8 ECHR in the field of immigration does indeed contain various examples which oblige the Contracting Parties to attach more importance to the interests of the foreigners concerned. Thus, the chamber judgment in *Sisojeva* expresses, with obvious reference to the public order clauses in most national immigration laws, that in cases of long-term residence the rejection of regularization 'reasons of a particularly serious nature may only be justified for'.[88] In *Rodrigues Da Silva & Hoogkamer* the Court argues that the Dutch authorities had 'indulged in excessive formalism' when they attached primary importance to the illegal residence status to the detriment of the family ties of the applicant.[89] In *Slivenko* the Grand Chamber demonstrates the importance of private interests in even more general terms: '(I)t seems that in this context the authorities did not examine whether each person concerned presented a specific danger to national security or public order. Nor has any allegation been made in this particular case that the applicants presented such a danger. The public interest instead seems to have been perceived in abstract terms underlying the legal distinctions made in domestic law.'[90]

More generally, the '*Boultif* criteria' on the expulsion and deportation of foreigners include numerous references to the situation of the individual concerned, such as the conduct after the criminal offence which led to the expulsion, the applicant's family situation, the length of the stay in the host country and whether the spouse knew about the offence when they entered into the relationship.[91] This readiness to point at the specific situation of the applicant should however not be misread as the judicial call for a legal revolution. With a view to the aforementioned margin of appreciation of the Contracting Parties and the focus on the adjudication of the individual case, the ECHR does not command a fundamental re-structuring of national immigration laws. Whenever the situation of a specific foreigner requires special treatment under the Court's case law, the hardship clauses which are nowadays an integral part of most European immigration law systems will usually provide a sufficient remedy preserving the specific balance between individual and public interests which underlie the national immigration laws of the Contracting Parties.

## E. European Perspectives: Strasbourg's Glance to Luxembourg?

The plurality of national immigration laws in Europe is coming to its end. Since the entry into force of the Treaty of Amsterdam, the European Union has adopted numerous legislative instruments building the 'area of freedom, security and justice'.[92] The gradual adoption of a common asylum and immigration policy under Articles 62–63 EC is an important building block of this development. For the purposes of this contribution, Directive 2003/86/EC on the right to family reunification and Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents deserve particular attention, since they establish a uniform pan-European set of principles.[93] While the United Kingdom, Ireland, and Denmark are not bound by the said directives, the Strasbourg jurisprudence does of course apply to them similarly. In the case of the United Kingdom more specifically, the recent clashes between the legal and the political establishment on the application of human rights to immigration cases heralds the potential of conflict between the legislator and the courts in this policy area.[94] Arguably, the potential of the new case law on Article 8 ECHR has not yet been fully exhausted by immigration law practitioners and national court.

In its recent judgments on Article 8 ECHR, the Court does not mention the new European Directives. It would, however, not be surprising if the harmonization of European asylum and immigration law had an indirect influence on the reasoning of the Strasbourg judges. Indeed, the renewed activism of the Court in matters of immigration may be motivated by the desire to actively influence the adjudication of these new European laws. Of course, the Strasbourg Court has no direct competence in the field of EU law (notwithstanding its recent judgment in *Bosphorus Airways*).[95] But it interprets the Convention in the awareness that the European Court of Justice in Luxembourg refers to the Convention and the Strasbourg case law as the principal sources of its human rights jurisprudence.[96] Its judgment in *Pupino* deserves particular attention in this respect, since it did for the first time require European law to respect 'the Convention, *as interpreted by* the European Court of Human Rights'.[97]

The first judgment of the European Court of Justice on the EC harmonization measures illustrates the importance of Article 8 ECHR for the emerging European asylum and immigration system: the action of annulment brought by the European Parliament against certain provisions

of the family reunification Directive 2003/86/EC. In its judgment of 27 June 2006, the ECJ refers extensively to the ECtHR's case law in immigration cases and concludes on this basis that the provisions attacked by the European Parliament comply with European human rights standards as long as they are interpreted in conformity with the Strasbourg case law (it does however not refer to the extensive interpretation of Article 8 ECHR in the judgments discussed in this article, which were all delivered after the opinion of Advocate General Kokott with its comprehensive analysis of the earlier ECtHR jurisprudence to which the ECJ has recourse).[98]

It has already been mentioned at the outset that the re-conceptualization of private and family life within the meaning of Article 8 ECHR may lay the ground for the structural alignment of ECHR standards and EU legislative instruments. The Court's criteria for the protection of family life may serve as the human rights standard for the family reunification Directive, while its jurisprudence on the respect for the long-term residence status would become the parameter for the rights of long-term residents under Directive 2003/109/EC.[99] On this basis, one may for example imagine a restrictive interpretation of the directives' provisions on the protection of foreigners against expulsion in the light of the Convention case law.[100] When Article 8 ECHR is applied to the common normative framework of EU immigration law, the underlying rationale of the margin of appreciation and the corresponding respect for the structural specificities of national legal systems partly loses its relevance.[101] Knowing that its case law will serve as the European Union's constitutional human rights standard in immigration cases might thus well encourage the ECtHR to tighten its control intensity and pay less attention to the Contracting Parties' margin of appreciation.

# V. CONCLUSION



The case law of the European Court of Human Rights on the respect for private and family life demonstrates its new readiness to extend the protective reach of Article 8 ECHR in the field of immigration. It no longer confines its application to situations of cross-border migration in expulsion and family reunion cases, but broadens its scope to the legal conditions for leave to remain. In *Sisojeva* and *Rodrigues Da Silva & Hoogkamer* the Court enters uncharted territory by concluding that the Contracting Parties had violated their obligations under Article 8 ECHR by refusing the regularization of the applicants' illegal stay. This extension of the Convention to the legal status of immigrants under the heading of private life independent of the existence and preservation of family bonds raises important questions about the general interaction of the Convention with national and European immigration laws. Here, the Court has to strike a careful balance between the requirements of effective human rights protection and the preservation of the Contracting Parties' margin of appreciation and the corresponding respect for the normative structure of national immigration law, as underlined by the Grand Chamber in its *Sisojeva* judgment of January 2007.

It is to be expected that the Court will clarify the interaction of the Convention with national and European immigration laws in the coming years. Its case law on Article 8 ECHR in immigration cases is otherwise characterized by a welcome quest for clarity: The new delineation between the respect for the family life of the nuclear family and the protection of the long-term residence status under the head of private life lays the basis for new conceptual delineations. In the same vein, the formulation of eight general criteria for the expulsion and deportation of foreigners and similar developments concerning the subsequent immigration of family members illustrate the willingness of the Court to build a coherent case law, which facilitates the autonomous application of Article 8 ECHR by domestic courts. It seems that the Court is generally positioning itself to actively accompany the harmonization of national immigration laws within the European Union, with its case law on Article 8 ECHR establishing a reinforced pan-European human

dimension for the national and European immigration law. In this respect, however, the last word remains to be spoken.

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**Notes**

[1] This standard formula was first used in ECtHR, judgment of 18 February 1991, No 12313/86, *Moustaquim v Belgium*, para 43.
[2] See ECtHR, *Moustaquim v Belgium*, ibid, and ECtHR, judgment of 20 March 1991, No 15576/89, *Cruz-Varas v Sweden*, which extended the logic of the *Soering* case on extradition to expulsion and deportation.
[3] ECtHR, judgment of 21 December 2001, No 31465/96, *Sen v the Netherlands*.
[4] See the instructive study by James Hughes, '"Exit" in Deeply Divided Societies: Regimes of Discrimination in Estonia and Latvia and the Potential for Russophone Migration' (2005) 43 Journal of Common Market Studies 739–62.
[5] For more details see Nida M. Gelazis, 'The European Union and the Statelessness Problem in the Baltic States' (2004) 6 European Journal of Migration and Law 225, 226–32.
[6] Cf Hughes (n 4) 749–56 and Gwendolyn Sasse, 'EU Conditionality and Minority Rights', EUI Working Papers RSCAS No. 2205/16 (2005) <http://www.iue.it/RSCAS/WP-Texts/05_16.pdf>.
[7] Lithuania has a rather homogenous ethno-linguistic society with a russophone minority of less than 10 per cent; see the statistic in the article by Hughes, ibid 744.
[8] For more details, see Michael Hoppe, 'Verwurzelung von Ausländern ohne Aufenthaltstitel' (2006) 26 Zeitschrift für Ausländerrecht 125–31; Daniel Thym, 'Menschenrecht auf Legalisierung des Aufenthalts?' (2006) 33 Europäische Grundrechte-Zeitschrift 541–54 and Reinhard Marx, 'Aufenthaltserlaubnis nach §25 V AufthG wegen Verwurzelung' (2006) 26 Zeitschrift für Ausländerrecht 261–8.
[9] Cf Pieter van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn Kluwer, The Hague, 1998) 504–8 and Nicholas Blake and Raza Husain, *Immigration, Asylum and Human Rights* (OUP, Oxford 2003) 165–73.
[10] ECtHR, judgment of 13 June 1979, No 6833/74, *Marckx v Belgium*, para 45.
[11] The wide understanding of family life in migration cases was first applied to the deportation of a deaf and dumb adult delinquent without a family of his own in ECtHR, judgment of 13 July 1995, No 19465/92, *Nasri v France*, para 34.
[12] It did however reject the invocation of Art 8 ECHR by an aunt who had looked after her nieces and nephews before their full age due to the lack of 'further elements of dependency involving more than the normal emotional ties' in ECtHR, decision of 3 July 2001, No 47390/99, *Javeed v the Netherlands*.
[13] Cf Ryszard Cholewinski, 'Strasbourg's "Hidden Agenda": The Protection of Second-Generation Migrants from Expulsion' (1994) 12 Netherlands Quarterly of Human Rights 287–306 and Stefan Hobe, 'Aufenthaltsbeendende Maßnahmen und Menschenrechte', in Kay Hailbronner and Eckhart Klein (eds), *Einwanderungskontrolle und Menschenrechte* (CF Müller, Heidelberg, 1999) 197, 200.
[14] ECtHR, judgment of 21 October 1997, No 25404/94, *El Boujlifa v France*, para 36 (emphasis added); similarly judgment of 13 February 2001, No 47160/99, *Ezzouhdi v France*, para 26 and ECtHR, judgment of 19 February 1998, No 26102/95, *Dalia v France*, para 45. See also the overview of the early case law by the former judge Pieter van Dijk, 'Protection of "Integrated" Aliens Against Expulsion under the European Convention on Human Rights' (1999) 1 European Journal of Migration and Law 293, 298–301.
[15] See, in particular, the concurring and separate opinions of judges Martens und de Meyer in ECtHR, judgment of 26 March 1992, No 12083/86, *Beldjoudi v France* and the concurring and partly dissenting opinions of judges Wildhaber, Morenilla and de Meyer in ECtHR, *Nasri* (n 11). Similarly in the UK, Sedley LJ in *B v SSHD* [2000] Imm AR 478 concluded that the network of everyday contacts was protected as private life under Art 8 ECHR.
[16] ECtHR, judgment of 9 October 2003 (GC), No 48321/99, *Slivenko et al v Latvia*.
[17] ECtHR, *Slivenko* (n 16), paras 96–7 (emphasis added); with eleven votes to six the Court holds that the expulsion was disproportionate.
[18] This is shown persuasively in the partly concurring and partly dissenting opinion of judge Kovler, ibid, para. 1. On the prior wide understanding of family life in domestic and immigration cases see above nn 10 and 11.
[19] See ECtHR, judgment of 15 January 2007 (GC), No 60654/00 *Sisojeva et al v Latvia* (hereinafter *Sisojeva II*), para 102 under reference to various of its 'classical' judgments on Art 8 ECHR—instead of confirming the categorical differentiation between private and family life by the prior chamber judgment of 16 June 2005 (hereinafter *Sisojeva I*), para 103, which had stated unequivocally that family life protects the relations between spouses and minor children

and that the parents 'can no longer claim the existence of a "family life" with the third applicant [their daughter], who is an adult'.
[20] For the contextual debate on conflicting cultural traditions and human rights protection see Henry J Steiner and Philip Alston, *International Human Rights in Context* (2nd edn, OUP, Oxford, 2000) 403 et seq and, specifically on Art 8 ECHR, the call for legal respect for 'the family tradition within the religious, ethnic, and/or cultural community to which the persons in question belong' by van Dijk and van Hoof (n 9) 508.
[21] ECtHR, *Slivenko* (n 16), para 97; this might apply, for example, to disabled persons depending on continued support from near relatives. However, one may similarly view such cases under the heading of 'private life' with special attention to the degree of dependence in the proportionality test.
[22] For an overview see van Dijk (n 14) 293–312 and Cholewinski (n 13) 287–306.
[23] For more details on the protection of illegal residence status see sections III.B and III.C below.
[24] ECtHR, *Slivenko* (n 16), para 96.
[25] See Marie-Benedicte Dembour, 'Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals in Strasbourg' (2003) 21 Netherlands Quarterly of Human Rights 63, 66 who shows that neither the facts, general legal principles nor the composition of the Court seemed to guide the outcome of individual cases in a 'judicial lottery'; correspondingly the conclusions of Martina Caroni, *Privat- und Familienleben zwischen Menschenrecht und Migration* (Duncker & Humblot, Berlin, 1999). More positive the attempt to elaborate general criteria underlying the apparently incoherent case law by the former judge van Dijk (n 14) 301–11.
[26] Established case law since ECtHR, judgment of 2 August 2001, No 54273/00, *Boultif v Switzerland*, para 48. ECtHR, judgment of 18 October 2006 (GC), No 46410/99, *Üner v the Netherlands*, para 57–8 differentiates the best interests and the wellbeing of the children as well as the solidity of the family ties as two additional sub-criteria.
[27] ECtHR, judgment of 10 July 2003, No 53441/99, *Benhebba v France*, para 33.
[28] ECtHR, *Sisojeva II* (n 19), para 91; the Court later refers, among others, to the applicants' employment situation and education possibilities in para 95.
[29] See Art 4(1) of Council Directive 2003/86/EC (OJ 2003 L 251/12) and, following its pattern, Art 2(1)(e) of Council Directive 2003/109/EC (OJ 2004 L 16/44); the United Kingdom, Ireland, and Denmark are not bound by both directives on the basis of their respective opt-outs.
[30] See the wide definition of 'family' for Unions citizens in Art 10 of Regulation No 1612/68 (OJ 1968 L 257/2) and the new Art 6 of Directive 2004/58/EC (OJ 2004 L 158/77).
[31] Thus the political promise of the European Council in Tampere on 15/16 October 2000, Presidency Conclusions, para 21 whose demise in the Council negotiations on the said directives is analysed and criticised by Ryszard Cholewinski, 'Family Reunification and Conditions Placed on Family Members: Dismantling a Fundamental Human Right' (2002) 4 European Journal of Migration and Law 271, 279–86.
[32] As argued with a view to the different treatment of third country nationals and Union citizens by Steve Peers, 'Family Reunion and Community Law' in Neil Walker (ed), *Europe's Area of Freedom, Security and Justice* (CUP, Cambridge, 2004) 143, 189–95, which rejects the argument of ECtHR, judgment of 28 May 1985, No 9214/80, 9473/81 & 9474/81, *Abdulaziz et al v the United Kingdom*, paras 85–6.
[33] In its first judgment on the substantive EC immigration law, the European Court of Justice (ECJ) has made clear that it is ready to follow the ECtHR case law on Art 8 ECHR as the central source of EU human rights standards, cf. ECJ, judgment of 27 June 2006, Case C–540/03, *Parliament v Council* [2006] ECR I-5769.
[34] See eg Elspeth Guild, *The Legal Elements of European Identity* (Kluwer, The Hague 2004) 215–34 and Sonja Boelaert-Suominen, 'Non-EU Nationals and Council Directive 2003/109/EC' (2005) 42 CML Rev 1011, 1041–51. Of course, the new judgments from Strasbourg apply similarly to all other Contracting Parties, also if they are not bound by the new EC directives or whenever these directives do no regulate the legal status of foreigners.
[35] eg European Commission on Human Rights, Decision of 14 July 1977, No 7289/75 & 7349/75, *X and Y v Liechtenstein*, *Decisions and Reports*, vol 9 (1978) 57, 74–5.
[36] As illustrated by the analysis of James AR Nafziger, 'The General Admission of Aliens under International Law' (1983) 77 AJIL 804–47 and, more recently Thomas Aleinikoff and Vincent Chetail (eds), Migration and International Legal Norms (TMC Asser, The Hague, 2003) and Sylvie Saroléa, *Droits de l'homme et migrations. De la protection du migrant aux droits de la personne migrante* (Bruylant, Brussels, 2006).
[37] See ECtHR, *Boultif* (n 26) and accompanying text.
[38] ECtHR, *Abdulaziz* (n 32).
[39] ECtHR, judgment of 21 December 2001, No 31465/96, *Sen v the Netherlands*; similarly, ECtHR, judgment of 1 December 2005, No. 60665/00, *Tuquabo-Tekle et al v the Netherlands.*
[40] ECtHR, judgment of 17 January 2006, No 51431/99, *Ariztimuno Mendizabal v France* (only available in French).
[41] ibid, para 66 (own translation).

[42] ibid, paras 70–1 (own translation).
[43] ibid, paras 73–9 under explicit reference to various instruments of EC legislation and the case law of the European Court of Justice.
[44] The formerly strict demarcation line between the European Convention and the Community legal order has been blurred in recent years after the continued reference to the ECtHR case law by the ECJ and the seminal decisions of ECtHR, judgment of 18 February 1999, No 24833/94, *Matthews v United Kingdom* and ECtHR, judgment of 30 June 2005, No 45036/98, *Bosphorus Airways v Ireland*. The ECtHR judgment in *Ariztimuno Mendizabal v France* does underline the increasing intimacy of the two European courts, with regular prophecies of conflict now subsiding to the acknowledgment of mutual interests in the maintenance of supranational law and the protection of human rights; cf the intelligent study by Laurent Scheek, 'The Relationship between the European Courts and Integration through Human Rights' (2005) 65 Heidelberg Journal of International Law 837, 864 et seq.
[45] ECtHR, *Sisojeva II* (n 19).
[46] ECtHR, *Sisojeva I*, ibid.
[47] On ECtHR, *Slivenko*, see section II.A above.
[48] ECtHR, *Sisojeva II* (n 19), para 91.
[49] See section IV.B below.
[50] The regularization offer was made after the Court's decision on admissibility in its decision of 28 February 2002 and shortly after the prominent Grand Chamber judgment in *Slivenko*. In *Sisojeva II*, the Grand Chamber therefore rightly concludes that the matter has been resolved under Art 34, 37(1)(c) ECHR, since the applicants have seized to be the 'victim' of a violation of Art 8 ECHR.
[51] Cf the chamber conclusions in ECtHR, judgment of 13 June 2006, No 59643/00, *Kaftailova v Latvia* (only available in French; not final) and ECtHR, judgment of 15 June 2006, No 58822/00, *Shevanova v Latvia* (only available in French; not final); the judgments were accepted for referral to the Grand Chamber on 15 November 2006. The Grand Chamber in *Sisojeva* rightly rejects the respective conclusion of the chamber judgment that the regularisation offers was insufficient.
[52] ECtHR, judgment of 31 January 2006, No 50435/99, *Rodrigues Da Silva & Hoogkamer v the Netherlands*.
[53] Art 4(1) of Council Directive 2003/86/EC on the right to family reunification (OJ 2003 L251/12) does in principle only cover children for which the sponsor or his/her present spouse has sole or, exceptionally, shared custody.
[54] In a re-alignment of its interpretation of the German constitution, the German Constitutional Court decided shortly before the Strasbourg court to extend human rights protection to factual situations of dependency without custody rights; see Bundesverfassungsgericht, judgment of 5 December 2005, 2 BvR 1001/04, para 18 <http://www.bverfg.de>.
[55] See in particular the judgments of the ECtHR, *Abdulaziz*, *Sen* and *Tuquabo-Tekle* (nn 38–9).
[56] See ECtHR, *Rodrigues Da Silva & Hoogkamer* (n 52), para 39 and on the '*Boultif* criteria', n 26 and accompanying text.
[57] ibid, para 39.
[58] ibid, para 41.
[59] ibid, para 43.
[60] ibid, para 9, which immigration practitioners might correctly interpret that Mr Hoogkamer did not have the regular income necessary to sponsor the residence permit.
[61] ibid, paras 43 and 44.
[62] The Court's second section held its deliberation of ECtHR, *Ariztimuno Mendizabal* (n 40), with its reference to the ECJ case law in para 68, on 13 December 2005, three weeks before the final deliberation of ECtHR, *Rodrigues Da Silva & Hoogkamer* (n 52), on 5 January 2006 in largely identical composition. On the role of residence permits under Community law see ECJ, Case 48/75, *Royer* [1976] ECR 497, para 40: Any expulsion measure 'would, if it were based solely on that person's failure to comply with the legal formalities concerning the control of aliens or on the lack of a residence permit, be contrary to the provisions of the Treaty'.
[63] ECtHR, *Moustaquim* (n 1), para 43, cited in the introductory paragraph of this article.
[64] See however the differentiated analysis by the contributions to Aleinikoff and Chetail (n 36) and Saroléa (n 36).
[65] The Council of Europe deliberately decided against the inclusion of a right to asylum in the ECHR, which had been tabled by some delegations during the drafting conference.
[66] For a summary of the case law see Clare Ovey, 'The Margin of Appreciation and Article 8 of the Convention' (1998) 19 Human Rights Law Journal 10–12.
[67] In international law, the will of the Contracting Parties remains of central importance for the interpretation of international agreements, such as the ECHR; see Art 31 Vienna Convention on the Law of Treaties and Ian Brownlie, *Principles of Public International Law* (6th edn, OUP, Oxford, 2003) 602–8.
[68] See eg ECtHR, judgment of 7 July 1989, No 14038/88, *Soering v the United Kingdom*, para 87: 'the object and purpose of the Convention as an instrument for the protection of individual

human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.'
[69] See the survey of the Court's case law by Alastair Mowbray, 'The Creativity of the European Courts of Human Rights' (2005) 5 Human Rights Law Review 57, 72–9 and for general human rights law, including the Geneva Convention on the Protection of Refugees, James C Hathaway, *The Rights of Refugees under International Law* (CUP, Cambridge 2005) 48–74; for a powerful critique of the ECtHR see Kay Hailbronner, 'Art. 3 EMRK—ein neues europäisches Konzept der Schutzgewährung?' (1999) 52 Die Öffentliche Verwaltung 617–24.
[70] On positive obligations Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Oxford, 2004) 171–6 and Paul Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 Human Rights Law Journal 1–6.
[71] ECtHR, judgment of 19 February 1996, No 23218/94, *Gül v Switzerland*, para 38. Similarly among the recent judgments ECtHR, *Slivenko* (n 16), para 113; ECtHR, *Sisojeva I* (n 19), paras 109–10, ECtHR, *Tuquabo-Tekle* (n 39), para 42 and ECtHR, *Rodrigues Da Silva & Hoogkamer* (n 52), para 39.
[72] See the references in n 8 above.
[73] ECtHR, decision of 13 October 2005, No. 40932/02, *Yildiz v Germany* concerning the protection of family life only.
[74] See above section IV.A.
[75] The former President of the ECtHR Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights' (2002) 23 Human Rights Law Journal 161, 162; similarly, from a dogmatic perspective, Mahoney (n 70) 3–4.
[76] ECtHR, *Sisojeva II* (n 19), para 90.
[77] See Wildhaber, ibid, and Ingrid Siess-Scherz, 'Die Bedeutung des Subsidiaritätsprinzips für den Reformprozess des EGMR' in Wolfram Karl (ed): *Internationale Gerichtshöfe und nationale Rechtsordnung* (NP Engel, Kehl/Strasbourg 2005) 83–110.
[78] This position is convincingly argued by Judge Renate Jaeger, 'Menschenrechtsschutz im Herzen Europas' (2005) 32 Europäische Grundrechte-Zeitschrift 193, 202–3 and, again, the former President Luzius Wildhaber, 'Europäischer Grundrechtsschutz aus der Sicht des EGMR' (2005) 32 Europäische Grundrechte-Zeitschrift 689, 689–90.
[79] See the facts of ECtHR, *Nasri* (n 11) and ECtHR, *Gül* (n 71).
[80] ECtHR, *Slivenko* (n 16), paras 117 and 122; see also the dissenting opinion of six judges.
[81] To counter the criticism of lack of structure and coherence by, for example, Caroni and Dembour (n 25).
[82] See sections II.B and III.C above for more details.
[83] ECtHR, *Bosphorus Airways* (n 44), para 156.
[84] Cf the deliberations by Wildhaber (n 75) 162–3.
[85] See, eg, the different contributions to Bimal Ghosh (ed): *Managing Migration* (OUP, Oxford, 2000) as well as Aleinikoff and Chetail (n 36).
[86] See the emphasis on the individual interest and wellbeing of the citizens concerned in Arts 27–33 of Directive 2004/38/EG (OJ 2004 L229/35) and, lately, ECJ, Joint Cases C–482 and 493/01, *Orfanopoulos & Olivieri* [2004] ECR I-5257. The development of the ECJ's case law is traced by Guild (n 34) Chs 2–6.
[87] See the latest judgments in this direction: ECJ, Case C–467/02, *Cetinkaya* [2004] ECR I-10895 and ECJ, judgment of 2 June 2005, Case C–136/03, *Dörr & Ünal* [2005] ECR I-4759.
[88] ECtHR, *Sisojeva I* (n 19), para 108.
[89] ECtHR, *Rodrigues Da Silva & Hoogkamer* (n 52), para 44.
[90] ECtHR, *Slivenko* (n 16), para 121 with the joint dissenting opinion of six judges (n 80).
[91] See ECtHR, *Boultif* (n 26), para 48.
[92] See the overview of the main developments in Walker (n 32), Guild (n 34) and Steve Peers, *EU Justice and Home Affairs Law* (2nd edn, OUP, Oxford, 2006).
[93] See n 29 above.
[94] Cf the famous 'Belmarsh' case *A et al & X et al v Secretary of State for the Home Department* [2004] UKHL 56 and the dispute on the reform of immigration appeals analysed by Richard Rawlings, 'Review, Revenge and Retreat' (2005) 68 MLR 370–410.
[95] ECtHR, *Bosphorus Airways* (n 44).
[96] See the various references to the ECJ case law by Scheek (n 44) 849–57.
[97] ECJ, judgment of 16 June 2005, Case C–105/03, *Pupino* [2005] ECR I-5285, para 60 (emphases added).
[98] See ECJ, Case C–540/03 (n 33) with the opinion of Advocate General Juliane Kokott of 8 September 2005, paras 59–78.
[99] See above II.B.
[100] The eight '*Boultif* criteria' referred to in II.B may thus guide the interpretation of the public order provisions Art 17 Directive 2003/86/EC and Art 12 Directive 2003/109/EC.
[101] The margin of appreciation described in IV.A above originates in the specificities of vertical human rights adjudication where international courts rule outside an existing legal framework;

in cases of horizontal adjudication of national courts (and the ECJ) with a view the specific national or European legislative instruments, the courts may enter into a more substantive analysis; cf. for the European context Jürgen Kühling, 'Fundamental Rights' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, Oxford 2006) 501, 524–30 and for the British situation Lord Hoffmann per House of Lords, *A et al & X et al v Secretary of State for the Home Department* [2004] UKHL 56, para 92.

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