Check for updates

THE EUROPEAN COURT OF HUMAN RIGHTS: A GUARDIAN OF MINIMUM STANDARDS IN THE CONTEXT OF IMMIGRATION

Jukka Viljanen and Heta-Elena Heiskanen*

Abstract

The innovative use of the general doctrines and the nature of the European Convention on Human Rights as a living instrument have enabled the progressive protection of immigrants. This research illustrates how the immigration case law of the European Court of Human Rights has been evolving in the past years. The development of the immigration jurisprudence of the ECtHR has connection to EU law and general concepts of international law, such as the best interest of child. In addition, the recent case law on positive obligations is contributing to discussion over the reception conditions of asylum seekers. The Strasbourg jurisprudence sets a minimum standard for the European immigration policy that should be taken into account even in exceptional circumstances.

Keywords: European Court of Human Rights (ECtHR); family reunification; immigration law; international trends; living instrument; object and purpose

1. INTRODUCTION

Europe is facing unprecedented challenges on immigration. According to the UN Refugee Agency (UNHCR) over 1 million people had reached Europe across the Mediterranean, mainly to Greece and Italy, in 2015.[1] During this period the number of asylum claims in Europe has reached around 1,3 million.[2] The European Council spoke (18 and 19 February 2016) about the response to the migration crisis facing the European Union (EU), and stated that 'the objective must be to rapidly stem the flows, protect our external borders, reduce illegal migration and safeguard the integrity of

* Jukka Viljanen (PhD) is Adjunct Professor of Human Rights Law and University Lecturer of Public Law; Heta-Elena Heiskanen is Doctoral Student, preparing her Doctoral Thesis on the ECtHR and environmental rights. Both authors work in the School of Management, University of Tampere, Finland. They want to express their gratitude to the anonymous reviewers for their valuable comments and suggestions.

1 See UNHCR statistics on Mediterranean Sea Arrivals by Country <http://data.unhcr.org/mediterranean/download.php?id=490> accessed 30 March 2016.

2 See EuroStat Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data (rounded) Last update: 18–03–2016 <http://ec.europa.eu/eurostat/product?code=migr_asyappctza&language=en&mode=view> accessed 30 March 2016.

Netherlands Quarterly of Human Rights, Vol. 34/2, 174–193, 2016.
© Netherlands Institute of Human Rights (SIM), Printed in the Netherlands.

the Schengen area'.[3] In this migration crisis debate the human rights considerations are not sufficiently on the agenda.

Sovereign States have the primary right to control the entry of non-nationals into their territories.[4] However, the immigration policy in Europe is not as state-driven as it used to be. The European immigration policy is currently a combination of EU governance and the case law of European Court of Human Rights (ECtHR or Strasbourg Court). The ECtHR has established diverse immigration case law.[5] Immigration case law includes deportation, expulsion, the right to enter a country, international protection, reception conditions, integration, and family-related issues. Reading of the cases shows that there are a number of controversial findings. Thus, there is need for clarifying what are the common European standards for human rights protection of the immigrants.

This paper develops a systematisation of immigration jurisprudence of the ECtHR in order to define the minimum standards for human rights protection. The paper illustrates that currently the issue of immigration is no longer an isolated area with a specific kind of interpretation and context dependency.[6] Landmark judgments such as *M.S.S. v. Greece and Belgium and Hirsi Jamaa v. Italy* have a European-wide impact on immigration policy-making. The paper further reflects on how the minimum standards are connected to the legal concepts such as the best interest of the child and integration. One of the key concepts to provide ways to go further in the field of immigration policy and human rights is the positive obligations doctrine examined in relation to the case of *Tarakhel v. Switzerland*. Furthermore, the paper

---

3 See European Council Conclusions 18 and 19 February 2016 <www.consilium.europa.eu/en/meetings/european-council/2016/02/EUCO-Conclusions_pdf/> accessed 18 March 2016.

4 See *Gül v Switzerland* App no 23218/94 (ECHR, 19 February 1996) para 38. For sovereignty, Richard Perruchoud, 'State Sovereignty and Freedom of Movement' in Opeskin, Perruchoud, and Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press 2012) 123–125.

5 The problems related to rights under Article 8 have been under review in several cases, starting from the case of *Berrehab v the Netherlands* App no 10730/84 (ECHR, 21 June 1988). It was followed by the cases of *Moustaquim v Belgium* App no 12313/86 (ECHR, 18 February 1991); *Beldjoudi v France* App no 12083/86 (ECHR, 26 March 1992); *Gül v Switzerland* (n. 4); *Boughanemi v France* ECHR 1996-II; *Ahmut v the Netherlands* App no 21702/93 (ECHR, 28 November 1996); *Ciliz v the Netherlands* App no 29192/95 (ECHR, 11 July 2000). These cases can be divided into groups where the Court found a violation of Article 8 and where there was no violation. The Court found a violation in the cases of *Berrehab*, *Moustaquim*, *Beldjoudi* and *Ciliz*, while in the cases of *Gül*, *Boughanemi* and *Ahmut*, no violation was found. Since cases like *Boultif*, *Üner* and *Maslov*, the Court has established criteria that apply to immigration cases in general. This continuum can be described as providing principles in the context of immigration cases and linking them to a living instrument approach rather than keeping the traditional separation between immigration cases and other types of human rights problems. See *Boultif v Switzerland* App no 57273/00 (ECHR, 2 August 2001); *Üner v the Netherlands* App no 46410/99 (ECHR, 18 October 2006); *Maslov v Austria* App no 1638/03 (ECHR, 23 June 2008); *Savasci v Germany* App no 45971/08 (ECHR, 19 March 2013); *Udeh v Switzerland* App no 12020/09 (ECHR, 16 April 2013). For recent literature, see Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015).

6 Many scholars and judges noted that this led to an approach tainted with arbitrariness. See eg the dissenting opinion of Judge Martens in the case of *Boughanemi v France* (n. 5).

reflects on how the relationship between the EU and ECtHR has developed within the immigration context and how this relationship is related to setting minimum standards.[7]

2. SETTING UP MINIMUM CRITERIA ON IMMIGRATION PRACTICES: ARTICLE 8 CASES

Harris, O'Boyle and Warbrick recognise that there is a new approach to immigration cases under Article 8, as in *Üner* and *Maslov*, which supports the view that the Court is deepening its understanding of what is at stake for individuals in these cases.[8] They note that the new type of cases move away from the *á la carte* approach whereby each case was determined largely in isolation and on its own merits.[9] The Court now places greater emphasis on general principles. However, they also observe that the practice is not uniform.[10]

Only recently have new elements, such as procedural safeguards, been the focus of the Court's attention in the field of respect for family life.[11] These cases fall under the requirement of 'in accordance with the law'. The *Berrehab* case was one of the early cases where the relevance of the legitimate aim was instrumental in the immigration policy context. The Court found that the applicant's criminal activities justified expulsion, although there was interference with the right to respect for family life.[12] Similar argumentation has been decisive also in several other cases after the *Berrehab* case.

If the *Berrehab* case decision over the legitimate aim was crucial, the *Boultif* continuum,[13] continues from that interpretation by also introducing other mitigating factors to be taken into account in the balancing process concerning individual rights and the competing legitimate aims, such as national security or economic interest. Thus, the balancing process in immigration cases has come closer to the other Article 8 cases. It could be said that this area of case law has become more coherent to

7 *MSS v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011). See also Council Regulation (EC) no 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex). See also De Witte and Imamović, 'Opinion 2/13 on accession to the ECHR: defending the EU legal order against a foreign human rights court' (2015) 40(5) EL Rev 683.

8 *Üner v the Netherlands* (n. 5); *Maslov v Austria* (n. 5).

9 David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, (eds) *Harris, O'Boyle and Warbrick Law of the European Convention on Human Rights* (Oxford University Press 2014) 423.

10 Ibid 591. The third edition is more cautious in its conclusions.

11 See *Liu and Liu v Russia*, App no 42086/05 (ECHR, 6 December 2007).

12 See *El Boujaidi v France* App no 25613/94 (ECHR, 26 September 1997); *Dalia v France* App no 154/1996/773/974 (ECHR, 19 February 1998); *Baghli v France* App no 34374/97 (ECHR, 30 November 1999). See also the balancing of interests and mitigating circumstances, *Boultif v Switzerland* (n. 5) para 51.

13 Case continuum refers to consistent continuance of the application of certain principles in cases.

other fields of family life and therefore general principles are applied correspondingly in the immigration context.

In the words of Murphy, 'the Court's jurisprudence has gradually evolved to the point of assessing complex questions of the applicant's social and cultural ties and economic links to the Contracting State, in addition to the more straightforward issue of family ties'.[14] This evolution is illustrated by the creation of an integration test and the strong emphasis on such general principles of law as the best interests of the child.

2.1. THE INTEGRATION TEST CONTINUUM

The guiding integration criteria approach was developed in *Boultif* and *Üner*. In the *Boultif* case, a test comprising eight factors was created in order to exercise a fair balancing of rights.[15] Weight was given to the analysis of how the spouse would integrate into a new culture and society. The Court contended that Switzerland was the only possible country in which the couple could enjoy the right to family life. These circumstances overruled the fact that *Boultif* had a criminal background.

Thym contends that after the ruling of *Boultif*,

> decisive factors will include the integration into the labour market, dependence on social assistance, language skills as an indicator of social integration, criminal behaviour, and 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.[16]

The criteria favour settled immigrants whose lives are deeply rooted in the new country. In addition, the balancing test also includes financial and security considerations on how the immigrant is contributing to the society. Thus, the protection of family life is only part of the holistic assessment.

---

14 Clíodhna Murphy, 'The Concept of Integration in the Jurisprudence of the European Court of Human Rights' (2010) 12 European Journal of Migration and Law 23, 27.

15 The Boultif criteria is closer to other types of guiding principles and criteria cases like Huvig and Kruslin and other telephone tapping cases where the tradition of creating yardsticks have been practiced since 1990. A similar idea is essential in the immigration context in order to give more foreseeability to decision-making and providing the inherent rule of law and less potential elements of arbitrariness. See also *Halford v the United Kingdom* App no 20605/92 (ECHR, 25 June 1997); *Kopp v Switzerland* App no 23224/94 (ECHR, 25 March 1998); *Valenzuela Contreras v Spain* App no 58/1997/842/1048 (ECHR, 30 July 1998); *Lambert v France* App no 23618/94 (ECHR, 24 August 1998); *Amann v Switzerland* App no 27798/95 (ECHR, 16 February 2000); *Khan v the United Kingdom*, App no 3539/97 (ECHR, 12 May 2002); *Taylor-Sabori v the United Kingdom* App no 47114/99 (ECHR, 22 October 2002).

16 Daniel Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?' (2008) 57 International and Comparative Law Quarterly 87, 92.

The Grand Chamber reiterated and consolidated the criteria in the case of *Maslov v. Austria*.[17] *Maslov v. Austria* illustrates that the interpretation should be made in light of the particular circumstances, but at the same the focus should be on the object and purpose of the provision. The object and purpose of the provision is to prevent arbitrary actions that would violate the right to respect for private and family life. In addition to providing guiding principles and criteria to consider at the national level, the case raises the question of the relevance of particular circumstances. Therefore, the weight attached to the respective criteria will vary according to the specific circumstances of the case.[18]

The *Boultif* continuum is different from subsequent Article 3 cases, especially because the margin of the appreciation doctrine is instrumental to the right to respect for family life cases. However, there has been some significant transformation compared to immigration cases since the 1990s. The presumption of a wide margin of appreciation in all immigration cases is disappearing, step by step, and instead the immigration issues are following the same kind of logic as other Article 8 cases, where there is no automatic weight placed on the State's interest in the balancing test.

3. NEW PROSPECTS IN THE BEST INTERESTS OF THE CHILD CONTINUUM

The focus on the best interests of the child and children's rights has enabled progressive protection in some recent cases.[19] This child-centred approach is in line with the actions of both the international and European community, showing a special commitment to protect children in the field of migration. The development illustrates the importance and effects of the cross-fertilisation of human rights, referring to the dialogue between different legal instruments and supervisory organs.

The Court made extensive assessments of the general development of the principle of the best interests of the child in the case *Neulinger and Shuruk v. Switzerland* [GC] and supported its arguments strongly with international agreements.[20] The Court held that

> there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (see

17 *Maslov v Austria* (n. 5),.

18 *Maslov v Austria* (n. 5), paras 70–75.

19 David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, (eds) *Harris, O'Boyle and Warbrick Law of the European Convention on Human Rights* (Oxford University Press 2009) 422; Thomas Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' (2009) 11 European Journal of Migration and Law 271.

20 *Neulinger and Shuruk v Switzerland* App no 41615/07 (ECHR, 6 July 2010) paras 131–151; *Rahimi v Greece* App no 8687/08 (ECHR, 5 July 2011) para 108.

> the numerous references in paragraphs 49–56 above, and in particular Article 24 §2 of the European Union's Charter of Fundamental Rights).[21]

The reliance of international sources can also be found in *Maslov v. Austria*.[22] This strong protection of the best interests of the child is taken into consideration both in the context of detention and in the actual assessment for expulsion. For example, in the case *Mubilanzila Mayeka and Kanini Mitunga v. Belgium*, the Court held that an applicant, who was only five years old during the time he was kept in a closed centre for adults for two months, was subject to treatment under Article 3.[23] The Court considered that

> informing the first applicant of the position, giving her a telephone number where she could reach her daughter, appointing a lawyer to assist the second applicant and liaising with the Canadian authorities and the Belgian embassy in Kinshasa – were far from sufficient to fulfil the Belgian State's obligation to provide care for the second applicant. The State had, moreover, had an array of means at its disposal. – Nor could the authorities who ordered her detention have failed to be aware of the serious psychological effects it would have on her. In the Court's view, the second applicant's detention in such conditions demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment.[24]

As can be seen from the Court's reasoning, attention was given both to the specific circumstances of the case as well as the more general considerations of humanity. The Court has been consistent in its decisions relating to immigrant child detention issues as it has maintained in recent years that Article 3 imposes positive obligations[25] on the State concerning detention of a minor.[26] The Court underlined that the extreme vulnerability of children overrides their illegal residence status, especially in the case *Kanagaratnam v. Belgium*.[27]

---

21 *Neulinger and Shuruk v Switzerland* (n. 20) para 135.

22 *Maslov v Austria* (n. 5) para 82.

23 *Mubilanzila Mayeka and Kanini Mitunga v Belgium* App no 13178/03 (ECHR, 12 January 2007).

24 Ibid para 58.

25 For the positive obligation doctrine, see Brice Dickson, 'Positive obligations and the ECtHR' (2010) 61(3) Northern Ireland Legal Quarterly 203; Laurens Lavrysen, 'Protection by the Law: The positive obligation to develop a legal framework to adequately protect ECHR' in Eva Brems and others (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer 2014); Dimitris Xenos, *The positive obligations of the State Under the European Convention of Human Rights* (Routledge 2012); Khanlar Hajiyev 'The Evolution of positive obligations under the European Convention on Human Rights – by the European Court of Human Rights' in Dean Spielmann and others (eds), *The ECHR, a living instrument: essays in honor of Christos L Rozakis, Brizelles* (Bruylant 2011); Matthias Klatt, 'Positive obligations under the ECHR' (2011) 71(4) Zeitschrift fur ausländisches öffentliches Recht und Völkerrecht, Vol. 691; Jean-Paul Costa, 'The ECtHR: Consistency of its case law and positive obligations'(2008) 26(13) Netherlands Quarterly of Human Rights 449.

26 See *Rahimi v Greece* (n. 20); *Muskhadzhiyeva and Others v Belgium* App no 41442/07 (ECHR, 19 January 2010); *Popov v France* App no 39472/07 and 39474/07 (ECHR, 19 January 2012).

27 *Kanagaratnam v Belgium* App no 15297/09 (ECHR, 13 December 2011); *Mubilanzila Mayeka and Kanini Mitunga v Belgium* (n. 23) para 81.

The Court has also developed its child-centred approach under Article 8 cases focusing on family life. The recent case of *X v. Latvia* is an example where the Court uses international sources to establish consensus. Reference is also made to the object and purpose of the Convention.[28] The case is a good example of a judgment representing the living interpretation of the Convention together with international development.

Thym, along with scholars such as Choewinski and Hobe, has recognised that there is a

> "hidden agenda" of the Strasbourg Court to expand the legal safeguards of Article 8 ECHR beyond the realms of family life with 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.[29]

Osman v. Denmark, from 2011, is a good example of this category of cases. The Court refers to 'very serious reasons' required to justify the authorities' refusal to restore the applicant's residence permit in the case of an applicant who spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old.[30] The Court acknowledged that the applicant actually had not only cultural and social relations to Denmark, but also nuclear family ties. The relationship between the mother and the child had been maintained, even though for practical and economic reasons they were unable to keep in close contact with one another.

In addition, in the case of *Rodrigues Da Silva and Hoogkamer v. the Netherlands*, the Court valued the relationship between a parent and child over the fact that the parent was an illegal immigrant. The Court found that the expulsion was not justified because it would not have been in the best interests of the child, who was very young and had very close ties to her mother. The Court reasoned as follows:

> In view of the far-reaching consequences which an expulsion would have on the responsibilities which the first applicant has as a mother, as well as on her family life with her young daughter, and taking into account that it is clearly in Rachael's best interests for the first applicant to stay in the Netherlands, the Court considers that in the particular circumstances of the case the economic well- being of the country does not outweigh the applicants' rights under Article 8, despite the fact that the first applicant was residing illegally in the Netherlands at the time of Rachael's birth.

A similar approach is adopted in *Nunez v. Norway.*[31] Despite Nunez's illegal acts, the ECtHR acknowledged that it would be against the best interests of the child to expel the mother, who had provided primary care for the children for most of their lives.

28 *X v Latvia* App no 27853/09 (ECHR, 26 November 2013).

29 Daniel Thym (n. 16) 87.

30 *Osman v Denmark* App no 38058/09 (ECHR, 14 June 2011) para 65.

31 *Nunez v Norway* App no 5597/09 (ECHR, 28 June 2011).

The Court found that deportation and the ban on visiting Norway would constitute a violation under Article 8 and that the Norwegian authorities had failed to strike a proper balance between the public interest of immigration control and the right to family life. A year later in another Norwegian case, *Butt v. Norway*, the Court also refers to 'exceptional circumstances' and observed that the authorities were not able to strike a fair balance between public interest in ensuring effective immigration control, on the one hand, and the applicants' interests in remaining in Norway in order to pursue their private and family life, on the other hand.[32] The case of *Kaplan and Others v. Norway* confirmed the same line of reasoning based on exceptional circumstances and the best interests of the child. The Court was not convinced by the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the child for the purposes of Article 8 of the Convention.[33] The Court considered that the first applicant's expulsion from Norway with a five-year re-entry ban entailed a violation of Article 8 of the Convention.

Jeunesse v. the Netherlands is one of the recent cases that was expected to provide more clarification on the right to respect for family life in the context of immigration policy.[34] The child's best interest argument is also essential in this case. The *Jeunesse* case follows the continuum set by cases like *Neulinger and Shuruk v. Switzerland* and *X v. Latvia*.[35] From these cases, the Court observes 'that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance'.[36] Accordingly, the Grand Chamber found that a fair balance had not been struck between the competing interests involved (the personal interest of continuing family life and the public interest of controlling immigration). The Court considered that 'in view of the particular circumstances of the case, it is questionable whether general immigration policy considerations of themselves can be regarded as sufficient justification for refusing the applicant residence in the Netherlands'.[37] The Court emphasised that the circumstances were exceptional.[38]

At the heart of the *Jeunesse* case is the consistency of Dutch immigration policy. The interest of controlling immigration should be in balance with the right to respect for family life of the applicant and her children. The immigration policy consideration clearly dominated the decision-making and the best interests of the child were given insufficient weight. In fact, the Court questioned whether actual evidence on matters related to settling into a new country (Suriname) had been considered and assessed by domestic authorities. There was thus a failure by the Dutch authorities to secure

32 See *Butt v Norway* App no 47017/09 (ECHR, 4 December 2012) para 90.

33 See *Kaplan and Others v Norway* App no 32504/11 (ECHR, 24 July 2014) para 98.

34 *Jeunesse v the Netherlands* App no 12738/10 (ECHR, 3 October 2014).

35 *Neulinger and Shuruk v Switzerland* (n. 20) para 135; *X v Latvia* (n. 28). para 96.

36 See *Jeunesse v the Netherlands* (n. 34) para 109.

37 *Jeunesse v the Netherlands* (n. 34) para 121.

38 Ibid paras 121–122.

the applicant's right to respect for her family life as protected by Article 8 of the Convention.

The *Jeunesse* case is based on argumentation that is a mix of a 'case-specific' approach without stating the underlying principles that could be applied in subsequent immigration case law and a '*Nunez-Butt* criteria' approach introducing some factors to be taken into account for a test in analogous cases concerning family life and immigration.[39] Factors include 1) the extent to which family life would effectively be ruptured; 2) the extent of the ties in the Contracting State; 3) whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned; 4) whether there are factors of immigration control (for example, a history of breaches of immigration law); and 5) considerations of public order weighing in favour of exclusion.[40] The high threshold is clearly established in these cases by referring to the 'exceptional circumstances' mentioned already in the case of *Abdulaziz, Cabales and Balkandali*[41] and confirmed in the case of *Butt v. Norway*.[42] However, the parallel development in the context of the best interests of the child case law provides a reasonable variety of relevant factors that contribute to a finding of a violation.

4. STRASBOURG COURT ANSWERING TO THE PROBLEMS OF EU'S IMMIGRATION POLICY (*HIRSI JAMAA/M.S.S.* CONTINUUM)

The question over the responsibility with immigration-related issues has formed a prominent part of the most recent Strasbourg immigration case law. The traditional principle of the State's primacy to exercise border control is no longer without limits. EU Member States have delegated powers to FRONTEX, and common rules on immigration set restrictions on domestic measures. While EU Member States are also parties to the European Convention on Human Rights, immigration legislation, even though defined by the EU, is also under the supervision of the Strasbourg Court.[43]

39 See *Nunez v Norway* (n. 31) para 70: "a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest".

40 See *Butt v Norway* (n. 32) para 78; *Antwi and Others v Norway* App no 26940/10 (ECHR, 14 February 2012) para 89.

41 *Abdulaziz, Cabales and Balkandali v the United Kingdom* App nos 9214/80, 9473/81, 9474/81 (ECHR, 28 May 1985) para 68.

42 See *Butt v Norway* (n. 32).

43 For the relationship between the EU and the ECHR, see eg Xavier Groussot, and Eduardo Gill-Pedro, 'The Scope of EU rights versus that of ECHR rights' in Gerards and Brems (eds) *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013) 253–254.

The *Hirsi Jamaa* and *M.S.S.* cases[44] are leading examples in immigration and in examining the legitimacy of the *Bosphorus* threshold, which refers to the 'manifestly deficient' threshold in the EU context. Both of these cases relate to the arbitrary nature and collective approach that has been adopted in EU immigration policy under the different instruments related to the area of freedom, security and justice,[45] like the Dublin II regulation.[46]

Hirsi Jamaa illustrates how the application of immigration rules in accordance with EU regulations is not sufficient and adequate alone. This interpretation applies if the State is aware of the fact that an individual is at real risk of being subjected to torture contrary to Article 3.[47] The Court has recognised that factual circumstances may override the automatic application of EU law and domestic legislation, and such circumstances also cause indirect responsibilities for the State authorities. Recent case law has thus benefited from examining non-legal materials related to the situations of countries.

The use of reports by NGOs have been central for the analysis of the general level of security of particular countries as well as the vulnerability of particular individuals.[48] This applies to Dublin cases, where the analysis concerns a possible systemic problem of immigration reception, and to general deportation cases to any country.

Recent cases, such as *I v. Sweden* illustrate the importance of country reports relating to the Russian security situation.[49] In this case, the Court relied heavily on human rights reports compiled by NGOs, the Commissioner for Human Rights of the Council of Europe, and State officials.[50] In respect to some States, for example

---

44 For more on the Bosphorus doctrine, see Tobias Lock, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10(3) Human Rights Law Review 529; Olivier De Schutter, 'Bosphorus Post-Accession: Redefining the Relationship between the European Court of Human Rights and the Parties to the Convention, The EU accession to the ECHR' in Kosta, Skoutaris and Tzevelekos (eds) *Modern studies in European Law* (Hart Publishing 2014) 177; Leonard F.M. Besselink, 'Should the European Union ratify the European Convention on Human Rights? Some Remarks on the Relationship Between the European Court of Human Rights and the European Court of Justice' in Føllesdal, Peters and Ulfstein (eds), *The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 310–312.

45 Title V of the Treaty on the Functioning of the European Union, which regulates the "Area of freedom, security and justice".

46 Council Regulation (EC) no 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

47 *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECHR, 23 February 2012) paras 136–137.

48 For the concept of vulnerability, see Romina I. Sijniensky, 'From the Non-Discrimination Clause to the Concept of Vulnerability in International Human Rights Law: Advancing on the Need for Special Protection of Certain Groups and Individuals' in Haeck, McGonigle Leyh, Burbano-Herrera and Contreras-Garduno (eds), *The Realisation of Human Rights: When Theory Meets Practice, Studies in Honour of Leo Zwaak* (Intersentia 2013).

49 *I v. Sweden* App no 61204/09 (ECHR, 20 January 2014).

50 Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, *Report following his visit to the Russian Federation from 12 to 21 May 2011*, 6 September 2011;

deportations to Somalia, the decisions of the Strasbourg court have clearly guided all the Member States on deportations. Between 2011 – when the *Sufi and Elmi* case was decided – and *K.A.B. v. Sweden* in 2013, it was clear that the security situation in Mogadishu was generally so serious that nobody was deported. However, as the factual circumstances changed and the vulnerability of the applicant differs in *K.A.B. v. Sweden*, the ECtHR reconsidered the security situation in Mogadishu and found that taking into account the personal situation of the applicant, there would be no real risk of ill-treatment. As a consequence, the absolute ban on deportation vanished.

4.1. THE *M.S.S. v. BELGIUM AND GREECE* CASE

In the *M.S.S.* case, the Court challenged the national implementation of the EU's immigration policy.[51] The Court analysed the role of the Dublin Regulation and other texts that supplement it. One of the key instruments used in the argumentation is Directive 2003/9 of 27 January 2003, which lays down minimum standards for the reception of asylum seekers in the Member States (the Reception Directive). It requires States to guarantee asylum seekers several basic services, including allowances sufficient to protect from extreme need. The Court considered that the Greek authorities had failed in their responsibilities regarding the applicants' vulnerable status. The obligation to provide accommodation and decent living conditions to disadvantaged asylum seekers was entered into positive law and the Greek authorities were bound to comply with their own legislation, which transposes Community law.[52]

According to the Court, the applicant had been the victim of humiliating treatment that showed a lack of respect for his dignity. The Court held that the applicant's living conditions, combined with the prolonged uncertainty in which he had remained and the total lack of any prospect of his situation improving, had attained the level of severity required to fall within the scope of Article 3 of the Convention.[53]

The *Bosphorus* doctrine was especially relevant in the complaint against Belgium. The Court had to consider whether Belgium was responsible for exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece. The Court found that the presumption of equivalent protection did not apply in the circumstances. The distinguishing factor in relation to the *Bosphorus* case was that discretion was left to the Belgian authorities. Belgium itself could have examined the

United States Department of State, *2010 Human Rights Report on Russia,* 8 April 2011; Schweizerische Flüchtlingshilfe (Swiss Refugee Council), *North Caucasus: Security and human rights*, 12 September 2011; *Chechens in the Russian Federation: Report from the Danish Immigration Service's fact-finding mission to Moscow and St. Petersburg from 12 to 29 June 2011*, October 2011; European Council on Refugees and Exiles (ECRE), *Guidelines on the treatment of Chechen internally displaced persons, asylum seekers and refugees in Europe*, updated March 2011.

51 *MSS v Belgium and Greece* (n. 7).

52 Ibid para 250.

53 Ibid para 263.

asylum application and considered that Greece was not fulfilling its obligations under the Convention.[54]

The living instrument nature is often related to consensus – or the lack of it.[55] In the *M.S.S.* case, the Court speaks about a broad consensus. The consensus is based on the Reception Directive and international treaties (for example the 1951 Geneva Convention Relating to the Status of Refugees) together 'with the remit and the activities of the UNHCR'.[56] Thus, there exists a broad consensus at the international and European level concerning the need for the special protection of asylum seekers and, as such, members of a particularly underprivileged and vulnerable population in need of special protection, which cannot be overridden with the automatic application of EU norms.[57]

There are two main messages in the *M.S.S.* case. First, when discretion is left to the authorities, they cannot refer to an equivalent protection presumption mentioned in the *Bosphorus* case. Second, there is a network of international human rights instruments providing a broad consensus that vulnerable groups of asylum seekers should receive special protection from national authorities.

According to Gragl, the pressure of the Strasbourg judgments involving EU law and the impeding accession can help to overcome gaps within the EU's system of human rights protection. Gragl especially mentions the references to the M.S.S. case in the Court of Justice of the European Union judgments.[58] However, there are also

---

54 Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013) 74–75; *MSS* (n. 43) para 340: "The Court concludes that, under the Regulation, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention. Consequently, the Court considers that the impugned measure taken by the Belgian authorities did not strictly fall within Belgium's international legal obligations. Accordingly, the presumption of equivalent protection does not apply in this case".

55 For more on the consensus doctrine, see Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015); Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights (2011) 12(10) German Law Journal 1730; Pauli Rautiainen, 'Moninaisuudessaan yhtenäinen Eurooppa: konsensusperiaate ja valtion harkintamarginaalioppi' (2011) 6 Lakimies 1152; Laurence Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26(1) Cornell International Law Journal 143–144; George Letsas, 'Strasbourg's Interpretive Ethic: for the International Lawyer' (2010) 21 The European Journal of International Law 505.

56 *MSS v Belgium and Greece* (n. 7) para 251.

57 Ibid para 251.

58 Paul Gragl, 'The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR', *European Yearbook on Human Rights* (Intersentia 2015) 75, 120–121. In Joined Cases C-411/10 and C-493/10, *N S v Secretary of State for the Home Department and ME* and *Others v Refugee Applications Commissioner* [2011] para 90: "In finding that the risks to which the applicant was exposed were proved, the European Court of Human Rights took into account the regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency

other judgments pointing to the practice where the CJEU merely refers to its own case law and the EU Charter of Fundamental Rights rather than the Strasbourg cases in their analysis over reception directives.[59] The CJEU Opinion 2/13 on EU accession to the ECHR is the most recent reflection of this negative development in the relationship between the Strasbourg and Luxembourg Courts. According to Gragl it reveals CJEU's "unreasonable jealousy towards the ECtHR".[60] The Opinion 2/13 means that the accession process is suspended for a long time. In the aftermath of Opinion 2/13 some scholars have been concerned that the CJEU seeks to preserve the possibility for EU law to offer less protection to Convention rights than what is required by ECtHR case law.[61] This argument is related to the immigration case law and especially in the *Tarakhel* case where the ECtHR increased its standard of protection, making it a duty for States to check reception conditions (see more Ch. 5).

4.2. THE *HIRSI JAMAA* CASE

The *Hirsi Jamaa* case is an example of the fight against clandestine immigration under the auspices of not just nation States but also via the major role played by FRONTEX[62] in what is happening in the Mediterranean context.[63] In the *Hirsi Jamaa* case, the vulnerability of the group of asylum seekers is not the focus of the argumentation.[64] In other migration situations, the Court would take into account the considerable difficulties related to the increasing influx of immigrants 'which are all the greater in the present context of economic crisis'.[65] This approach would ultimately broaden the margin left to authorities in the balancing process of provision with a limitation clause. However, in the context of Article 3, the Court is referring to a strict approach, and with regard to the absolute character of the rights secured by Article 3. As such,

---

of the system and the effective protection of fundamental rights"; *MSS v Belgium and Greece* (n. 7) paras 347–350.

59 See eg C-79/13 Judgment 27 February 2014, *Saciri and Others*, para 35; and reference to the case of C-179/11 *Cimade and GISTI*, para 56.

60 See Paul Gragl (n. 58) 27–49.

61 See De Witte and Imamović (n. 7) 683, 701. See more on the CJEU's approach later in chapter five.

62 The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Council Regulation (EC) no 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Coordination at the External Borders of the Member States of the European Union (FRONTEX).

63 *Hirsi Jamaa and Others v Italy* (n. 47) para 122. The Court states that "It is particularly aware of the difficulties related to the phenomenon of migration by sea, involving for States additional complications in controlling the borders in southern Europe." There is a similar reference in para 176: "A long time has passed since Protocol No. 4 was drafted. Since that time, migratory flows in Europe have continued to intensify, with increasing use being made of the sea, although the interception of migrants on the high seas and their removal to countries of transit or origin are now a means of migratory control in so far as they constitute tools for States to combat irregular immigration".

64 Ibid. There are a few references to vulnerability: paras 125 and 155.

65 Ibid para 122.

these difficulties cannot absolve a State of its obligations under that provision.[66] Similar references to understanding the burden and pressure in the context of the economic crisis are also referred to in the *M.S.S.* case.[67]

A specific reference in *Hirsi Jamaa* is also made in relation to the use of collective measures in immigration control and their background in the reality of the migratory flows. The systemic element of the application is highly relevant. The Court refers to this as follows:

> A long time has passed since Protocol No. 4 was drafted. Since that time, migratory flows in Europe have continued to intensify, with increasing use being made of the sea, although the interception of migrants on the high seas and their removal to countries of transit or origin are now a means of migratory control, in so far as they constitute tools for States to combat irregular immigration.
> The economic crisis and recent social and political changes have had a particular impact on certain regions of Africa and the Middle East, throwing up new challenges for European States in terms of immigration control.[68]

The Court is therefore concentrating on the question of whether the Member State was circumventing the treaty obligations. The examination not only focuses on traditional documentation by authorities, but it also:

> attaches particular weight to the statements given after the events to the Italian press and the State Senate by the Minister of the Interior, in which he explained the importance of the push-back operations on the high seas in combating clandestine immigration and stressed the significant decrease in disembarkations as a result of the operations carried out in May 2009.[69]

This approach is analogous to the case of *El-Masri v. Macedonia*.[70] A shift in the burden of proof took place in the case of extraordinary rendition followed by torture and inhuman treatment against the applicant in a secret prison in Afghanistan. In addition, in that case, the other material available gave reliable information that the applicant would be at real risk of being subjected to treatment contrary to Article 3 of the Convention.[71]

---

66 *Hirsi Jamaa and Others v Italy* (n. 47) para 122.

67 *MSS v Belgium and Greece* (n. 7) para 223: "The Court does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis. It is particularly aware of the difficulties involved in the reception of migrants and asylum seekers on their arrival at major international airports and of the disproportionate number of asylum seekers when compared to the capacities of some of these States. However, having regard to the absolute character of Article 3, that cannot absolve a State of its obligations under that provision".

68 *Hirsi Jamaa and Others v Italy* (n. 47) para 176.

69 *Hirsi Jamaa and Others v Italy* (n. 47) para 181.

70 *El-Masri v Macedonia* App no 39639/09 (ECHR, 13 December 2012).

71 Ibid para 218: "Thirdly, the Court attaches importance to the reports and relevant international and foreign jurisprudence, and given the specific circumstances of the present case, to media

The overall message of the *Hirsi Jamaa* case concentrates on combating arbitrariness in immigration control procedures. The Court is opposing measures that can be seen as collective in their nature instead of ensuring that the individual circumstances of each of those concerned is actually subject to a detailed examination.[72] The *Hirsi Jamaa* interpretative continuum is not distinctive to immigration cases; it also relates to other types of human rights-sensitive phenomena including the combating of terrorism and failures to take necessary preventive measures in order to comply with the prohibition of torture.[73]

5. WHEN EU STANDARDS DO NOT SUFFICE, POSITIVE OBLIGATIONS HAVE A ROLE TO PLAY (*TARAKHEL v. SWITZERLAND*)

The latest addition to immigration case law is the requirement for guarantees in case the applicant is removed to another country under Article 3 (Prohibition of torture and inhuman or degrading treatment). This was the finding in the case of *Tarakhel v. Switzerland,* where the applicants were complaining about being made to return to Italy without any individual guarantees regarding their care.[74]

Tarakhel continues the approach taken in the M.S.S. case, which considered that a presumption can be rebutted in the case of systematic flaws in the asylum procedure and reception conditions. This approach is also confirmed by the CJEU.[75]

The exceptional circumstances referred to in *Tarakhel* were related to assessing the best interests of the child. The child's extreme vulnerability should be taken into

articles, referred to above (see paragraphs 99, 106–122, 126 and 127 above), which constitute reliable sources reporting practices that have been resorted to or tolerated by the US authorities and that are manifestly contrary to the principles of the Convention. The Court has already found some of these reports 'worrying' and expressed its grave concerns about the interrogation methods used by the US authorities on persons suspected of involvement in international terrorism and detained in the naval base in Guantánamo Bay and in Bagram (Afghanistan) (see *Al-Moayad v Germany* App no 35865/03 (ECHR, 20 January 2007) para 66). This material was in the public domain before the applicant's actual transfer into the custody of the US authorities".

72 *Hirsi Jamaa and Others v Italy* (n. 47) para 185.

73 *Hirsi Jamaa case is referred in cases like Al Nashiri v Poland* App no 28761/11 (24 July 2014) paras 586–587.

74 *Tarakhel v Switzerland* App no 29217/12 (ECHR, 4 November 2011).

75 In its judgment of 21 December 2011, in the cases *N S v Secretary of State for the Home Department* and *M E, A S M, M T, K P, E H v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (CJEU C-411/10 and C-493/10), the Grand Chamber of the Court of Justice of the European Union ("the CJEU") held, on the subject of transfers under the Dublin Regulation, that although the Common European Asylum System was based on mutual confidence and a presumption of compliance by other Member States with European Union law and, in particular, with fundamental rights, that presumption was nonetheless rebuttable.

account and it 'is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant'.[76]

However, after *Tarakhel*, the Court has been rather strict and there is no automatic requirement for medical assurances from the country to which the person is to be removed. This is apparent in the case *M.T. v. Sweden*, where the Court does not question the government's argumentation.[77] This failure to question to the government's argumentation is emphasised in the dissenting opinion of Judge De Gaetano.[78] He makes reference to the *Tarakhel* judgment and its line of reasoning and fails to see why a similar kind of condition (requiring authorities to obtain guarantees) was inserted into the operative part of the judgment. He notes that conditions have been inserted without difficulty into other judgments against Sweden, such as *W.H. v. Sweden* and *A.A.M. v. Sweden*.[79] Instead, the Court reiterates the high threshold that was developed in the case of *D. v. the United Kingdom* in the context of AIDS.[80] In that case, medical care was not available in St Kitts and there was no family to support the applicant's treatment.[81]

The question of insufficient medical care as a factor to be taken into account in the case of expulsion of seriously ill persons has also been brought to the attention of the Court in the case of *S.J. v. Belgium*.[82] However, the Court struck out the case due to a friendly settlement between the applicant and Belgium. In his dissenting opinion, Judge Pinto de Albuquerque expressed that the Court missed an opportunity to depart from its problematic approach to the expulsion of the seriously ill in the case of *N. v. the United Kingdom*.[83] In this kind of case, the Court should be aware of the wider impacts of its judgments. Judge Pinto noted that when the Grand Chamber decided to

---

76 *Tarakhel v Switzerland* (n. 74) para 99. The Court refers to cases of *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (n. 23) para 55; *Popov v France* App no 39472/07 and 39474/07 (ECHR, 19 January 2012) para 91.

77 *MT v Sweden* App no 1412/12 (ECHR, 26 February 2015). Dissenting opinion of Judge De Gaetano.

78 *MT v Sweden* (n. 77).

79 *WH v Sweden* App no 49341/10 (ECHR, 27 March 2014); *AAM v Sweden* App no 68519/10 (ECHR, 3 April 2014).

80 *D v the United Kingdom* App no 30240/96 (ECHR 2 May 1997).

81 See *MT v Sweden* (n. 77) para 58: "The present case does not disclose the very exceptional circumstances of *D v the United Kingdom* ECHR 1997 III. Contrary to that case, where the applicant was in the final stages of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St Kitts, in the present case, blood dialysis is available in Kyrgyzstan, the applicant's family are there and he can rely on their assistance to facilitate making arrangements for treatment and he can also count on help from the Swedish authorities for such arrangements if necessary".

82 *SJ v Belgium* App no 70055/10 (ECHR, 19 March 2015).

83 See *N v the United Kingdom* App no 26565/05 (ECHR, 27 May 2008) Joint dissenting opinion of Judges Tulkens, Bonello and Spiellman. In the case of *N v the United Kingdom*, the Grand Chamber decided by 14 to 3 that there was no violation of Article 3. In their dissenting opinion, Judges Tulkens, Bonello and Spielmann expressed that compared to the case of *D v the United Kingdom, N* presented a clear setback and they considered that it was misconceived to distinguish the case from that of *D v the United Kingdom* App no 30240/96 (ECHR, 2 May 1997).

strike out the case of the applicant, the much needed improvement of current casuistic European case law in this field was denied.[84] The case provided an opportunity to develop a standard in light of international refugee law and international migration law.[85]

The Court's argumentation in *Tarakhel* clearly defines the reception conditions in Italy that require the Swiss authorities to obtain assurances. This is especially related to children and their age:

> In the present case, as the Court has already observed (see paragraph 115 above), in view of the current situation as regards the reception system in Italy, and although that situation is not comparable to the situation in Greece which the Court examined in *M.S.S.*, the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded. It is therefore incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together.[86]

The question of assurances has fascinating potential within immigration case law. In a number of recent Article 3 cases concerning assurances from the receiving State, the Court has not been satisfied with the diplomatic assurances and statistics provided by the authorities. This has been especially relevant to extradition to the US in cases related to terrorist offences and life prison sentences. The Court has to examine the quality of assurances given and whether, in light of the receiving State's practices, they can be relied upon. The *Othman* (Abu Qatada) case established these factors related to evaluation of assurances.[87] The reliability of assurances should be considered in the light of other information gathered on the circumstances of the receiving State and its record on keeping those assurances. The rigorous scrutiny over the assurances

84 *SJ v Belgium* App no 70055/10 (ECHR, 19 March 2015) dissenting opinion of Judge Pinto de Albuquerque, footnote 3.

85 In his dissenting opinion, Judge Pinto de Albuquerque (para 5) describes the current state of interpretation as "messy", "with its flagrant internal contradictions".

86 *Tarakhel v Switzerland* (n. 74) para 120.

87 See *Othman (Abu Qatada) v the United Kingdom* App no 8139/09 (ECHR, 17 January 2012) paras 188–189: "In assessing the practical application of assurances and determining what weight is to be given to them, the preliminary question is whether the general human rights situation in the receiving State excludes accepting any assurances whatsoever. […] More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving State's practices they can be relied upon. In doing so, the Court will have regard 11 mentioned factors eg (i) whether the terms of the assurances have been disclosed to the Court and (ii) whether the assurances are specific or are general and vague. One essential factor is also whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers. It is also important to consider whether local authorities can be expected to abide by the assurances"; See also *Trabelsi v Belgium* App no 140/10 (ECHR, 4 September 2014) para 135.

is essential in order to improve current mechanisms within the asylum procedures. Otherwise, the *Tarakhel* criteria become an exception rather than a rule.

The Chamber judgment in the case of *V.M. and others v. Belgium* is currently pending before the Grand Chamber.[88] It is a case that fits in the continuum of *Tarakhel* and *M.S.S.* One of the important findings is related to *M.S.S* and *Tarakhel* cases and their findings over the requirement of "special protection" of asylum seekers which is even more important when the persons concerned are children.[89] According to the Court this approach was reinforced in the *V.M.* case by the presence of young children, including an infant, and of a disabled child, themselves inherently fragile and more vulnerable than adults to the deprivation of their basic needs.[90]

It is argued by De Witte and Imamovic that the *Tarakhel* judgment and the CJEU's Opinion 2/13 on the accession to the ECHR are intrinsically linked.[91] According to De Witte and Imamovic, the Luxemburg Court's 'argument, in reality, boils down to a claim that EU law should be allowed to give *less protection* than the Convention requires to certain rights in certain circumstances'.[92] They further question the development of disregarding Article 52(3) of the Charter meaning that EU law itself contains a clear constitutional rule prohibiting the EU from giving less protection to the Convention rights than the minimum standard laid down by the Strasbourg court.[93]

The Strasbourg Court increased the standard of protection in *Tarakhel*. The chosen approach questions the automatic application of the EU's mutual trust principle. The Strasbourg Court's message has been that immigration is one of those fields where the States should be aware of whether the individual reception conditions in other countries are in compliance with the Convention. Departure from the *Tarakhel* approach in the subsequent case law would be detrimental to the coherent line of interpretation which has affirmed the role of the Court as the guardian of minimum standards in the field of immigration also in the EU context.

6. ONE STEP FURTHER: FINDING INSPIRATION TO IMPROVE THE LEVEL OF PROTECTION

The *Hirsi Jamaa* case is an example of the Court's response to human rights supervision in the case, when the authorities have ignored the human rights standards and tried to circumvent their obligations based on the Conventions. It is related to the presumption of good faith that has to be reassessed. Consequently, the circumvention

88 *VM and others v Belgium* App no 60125/11(ECHR, 7 July 2015 (pending before Grand Chamber).

89 *MSS v Belgium and Greece* (n. 7) para 251; *Tarakhel v Switzerland* (n. 74) para 119.

90 See *VM and others v Belgium* (n. 88) para 153 (pending before Grand Chamber).

91 De Witte and Imamović (n. 7) 702.

92 De Witte and Imamović (n. 7) 702.

93 See De Witte and Imamović (n. 7) 702.

of the rights doctrine could be applicable in a situation when the State is aware of the compliance of the integration test but ignores the individual consideration by not analysing each of the criteria objectively. Alternatively, the circumvention of rights theme could be used when the State has to decide on the best interests of the child and is not investigating the issue sufficiently or is alternatively ignoring statements made by social workers and doctors, for example.

Another example where there is an interpretative transfer from the absolute right context to the limitation clause context, is the approach taken in cases like *Liu and Liu*.[94] The Court applies leading Article 3 cases like *Chahal v. the United Kingdom* as part of its argumentation.[95] The Court focused on the argumentation in relation to the quality of the law and whether the legislation provided necessary protection.[96] The *Chahal* continuum opposed the inability to challenge information on which the deportation decision was founded because of national security interests.

Currently, procedural rights in the immigration context have played a minor role. The Court speaks about procedural requirements in immigration matters only where there is an arguable claim that expulsion threatens to interfere with the alien's right to respect for his private and family life. The Court refers to the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum that offers adequate guarantees of independence and impartiality.[97]

Due to the limited development in procedural rights under Article 8, some researchers regard the Court to be more activist in its interpretation in immigration cases compared to other cases.[98] The Court provides substantive protection rather than keeping its approach purely procedural and focusing on the applicability of legal safeguards. This observation is well-grounded if the focus is only on the quantity of the cases. However, while the focus has not been purely on procedural issues, the threshold for compliance of the integration test or alternatively examining the case under Article 3 cases is often high. Thus, the Court may not be as activist as first impressions may imply. However, there is further potential to develop the protection of immigrants under procedural rights if the applicants have the capacity to make convincing legal argumentation in cases where substantive protection is weaker.

7. CONCLUDING REMARKS

Often the Court's approach in immigration context goes hand in hand with inconsistencies in national immigration policy. The Court is ready to shift the burden

94 *Liu and Liu v Russia* (n. 11).

95 *Chahal v. the United Kingdom* App no 22414/93 (ECHR 15 November 1996).

96 See *Liu and Liu v Russia* (n. 11) para 62.

97 *De Souza Ribeiro v France* App no 22689/07 (ECHR, 13 December 2012) para 83.

98 David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley (eds) (n. 9) 423.

of proof onto the government in cases where there is evidence of arbitrariness, as in the case of *Osman v. Denmark*. National authorities are not, for example, examining the circumstances of individual expulsion cases; rather, the decision has been made as a result of a collective policy towards stricter control of immigration flows.

An important development in the recent case law has been the emphasis in obtaining sufficient assurances from the receiving country. The finding from the *Tarakhel* case on inadequate personal assurances is a major contribution to the doctrinal development of immigration cases. However, at the moment, the *Tarakhel* threshold seems to be exceptionally high and it has not developed into a prevailing standard. Nevertheless, it still has the potential as was shown in the *V.M.* Chamber judgment now pending before the Grand Chamber.[99] *Tarakhel's* increased standard of protection together with the *Othman* criteria provides the underlying principles for examining the quality of assurances and creates a basis to determine whether, in light of the receiving State's practices, assurances can be relied upon.

The Court has been able to expand the scope of protection, partly due to the strong international consensus on the importance of the "special protection" of asylum seekers. When Europe is struggling to respond to the growing refugee crisis, the Strasbourg Court must rigorously observe the object and purpose of the Convention and guarantee the effective and practical protection of the rights of the vulnerable individuals. In order to follow this progressive interpretation of the Convention in the field of immigration law, the Court must be aware that the chosen line of interpretation will set the common European minimum standard.

[99] *VM and others v Belgium* (n. 88). The *Tarakhel* case has also influenced national courts in their immigration case law. See for example Finnish Supreme Court's decision KHO 2016:53, 20 April 2016, in which the Finnish court prevented a return of an asylum seeker to Hungary.