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# The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?

Alan Desmond\*

## Abstract

*This article critically examines the evolving practice of the European Court of Human Rights (ECtHR) towards the definition and use of the concepts of family life and private life in cases involving migrants who seek to resist deportation by invoking Article 8 of the European Convention on Human Rights. The examination reveals an approach on the part of the Court that has the effect of shrinking the protection potential of Article 8 for migrant applicants, allowing state interest in expulsion to carry the day. This is symptomatic of Strasbourg's deference to state sovereignty in the realm of migration. While the ECtHR has issued a number of landmark rulings roundly vindicating migrants' rights, these are the exception to the rule of Strasbourg's deference to state powers of immigration control. This approach has far-reaching implications for migrants in the member states of the Council of Europe. The article concludes by highlighting the tools at the Court's disposal that could be employed to construct a more human rights-consistent approach in this strand of jurisprudence, which is an issue all the more relevant in light of the growing number of migrants seeking to establish a life in Europe.*

## 1 Introduction

Article 8 of the European Convention on Human Rights (ECHR) has provided fertile ground from which the European Court of Human Rights (ECtHR) has cultivated a broad understanding of the protection that this Convention provision affords.<sup>1</sup> Article

\* Lecturer, Leicester Law School, University of Leicester, United Kingdom. Email: alan.desmond@le.ac.uk. I am indebted to the two external reviewers for their insightful and constructive comments and wish to acknowledge the financial assistance of the Irish Research Council. Any and all errors are most likely to be mine.

<sup>1</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, 213 UNTS 222, as amended by Protocols nos 3, 5, 8, 11, 14, which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, 1 November 1998 and 1 June 2010 respectively.

8(1) codifies the right of everyone to respect for private and family life, home and correspondence. The scope for dynamic interpretation of Article 8 hewn by the Court in its jurisprudence has seen it subsume spheres as diverse as physical integrity and data collection under the heading of private life and accommodate changing social structures through a flexible definition of family life. In relation to migrants, the family and private life limb(s) of Article 8 has been successfully invoked to both secure entry to the host state of a migrant's family member<sup>2</sup> and to resist expulsion<sup>3</sup> from a host state.<sup>4</sup> The latter cases have consisted in migrant applicants arguing that removal from the respondent state entails separation from family members, thereby violating their right to respect for family life and/or private life as enshrined in Article 8.

In its case law concerning expulsion, the ECtHR usually begins its assessment of an alleged violation by determining whether the applicant enjoys 'private and family life' in the host state within the meaning of Article 8 – the burden of the present article. If such private and/or family life is found to exist, the Court accepts that expulsion would constitute an interference. To ascertain whether such interference is justified and does not violate Article 8, or conversely is not justified and thereby violates Article 8, the ECtHR examines the proposed or effected deportation through the lens of Article 8(2), which sets out the conditions necessary in order for an interference with Article 8 rights to be justified.<sup>5</sup> This sees the Court undertake a balancing exercise to ascertain whether the interference with family and/or private life in the form of expulsion is a measure that is proportionate to the achievement of the legitimate aim identified under Article 8(2).<sup>6</sup>

In this article, I argue that the ECtHR is applying Article 8 in a way that reduces its scope of protection for migrant, as distinct from non-migrant, applicants. It does this, first, by tending to define family life for migrants as the nuclear or core family of parents and their dependent, minor children. This has the effect of depriving the family life limb of Article 8 of its protection potential for adult migrants who have neither a spouse/partner nor dependent children in the host state. Second, where the

<sup>2</sup> See, e.g., ECtHR, *Şen v. the Netherlands*, Appl. no. 31465/96, Judgment of 21 December 2001 (French only). All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

<sup>3</sup> Throughout this article, the terms expulsion, deportation and removal are used interchangeably.

<sup>4</sup> See, e.g., the first irregular migrant deportation case in which the Court delivered a judgment on the merits, ECtHR, *Rodrigues da Silva & Hoogkamer v. The Netherlands*, Appl. no. 50435/99, Judgment of 31 January 2006; and, more recently, ECtHR, *Jeunesse v. The Netherlands*, Appl. no. 12738/10, Judgment of 3 October 2014.

<sup>5</sup> The full text of Art. 8(2) is: 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

<sup>6</sup> For insightful discussions of the Court's assessment of the proportionality of expulsion under Art. 8, see, *inter alia*, M. Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (2015); Farahat, 'The Exclusiveness of Inclusion: On the Boundaries of Human Rights in Protecting Transnational and Second Generation Migrants', 11 *European Journal of Migration and Law (EJML)* (2009) 253.

Court finds either that family life does not exist for the purposes of Article 8 or has not sustained an interference sufficient to give rise to a violation, it typically fails to then consider whether expulsion violates the private life limb of Article 8. In the absence of a meaningful examination of migrants' private life in Article 8 cases, the family ties that do not fall within the concept of the nuclear family may therefore, to all intents and purposes, be disregarded by the Court. This approach to Article 8 in migration cases has the effect of making it easier for states to effect the expulsion of migrants.

The argument advanced in this article challenges the claim that the ECtHR's narrow definition of family life in migration cases does not result in a 'diminution of human rights protection'.<sup>7</sup> It also addresses the mis-identification of a shift in the Court's migration-related jurisprudence from a wide to a narrow definition of family life.<sup>8</sup> More generally, the article builds on, and chimes with, recent work by Marie-Bénédicte Dembour, which characterizes the Court's case law concerning migrants as being so deferential to state powers of immigration control that the ECtHR often seems to be at pains not to upset states in the migration-related rulings it delivers.<sup>9</sup>

The article very briefly addresses in section 2 the argument from state sovereignty which some may advance so as to give the ECtHR carte blanche to shrink the protection potential of Article 8 for migrant applicants. The subsequent sections draw on the Court's case law concerning deportation of what might helpfully be viewed as three distinct categories of migrant – namely, irregular migrants or those who have knowingly entered and settled in a state unlawfully or who have remained *in situ* after they should have left following an initial lawful stay;<sup>10</sup> long-term lawfully resident migrants whose expulsion is sought following a criminal conviction; and long-term residents whose situation has been irregularized largely owing to exogenous events such as state succession. While the family and private life limbs of Article 8, taken either together or separately, may serve as a bar to deportation, we begin by looking in section 3 at the Court's treatment of the right to respect for family life, which is the Article 8 limb that the Court has consistently emphasized in expulsion cases.<sup>11</sup>

<sup>7</sup> Thym, 'Residence as De Facto Citizenship? Protection of Long-term Residence under Article 8 ECHR', in R. Rubio-Marín (ed.), *Human Rights and Immigration* (2014) 106, at 115. Ronen, 'The Ties That Bind: Family and Private Life as Bars to the Deportation of Immigrants', 8(2) *International Journal of Law in Context* (2012) 283, at 288.

<sup>8</sup> *Ibid.*, at 114.

<sup>9</sup> Dembour, *supra* note 6, at 507.

<sup>10</sup> Cases involving irregular migrants challenging expulsion as an Art. 8 violation are treated by the Court as cases concerning admission to the host state even if the applicants in question have been resident for many years. For reasons of space, this article will not engage with the case law on the admission of migrants who had not yet entered the intended host state at the time of the proceedings before the Court, although they raise many of the same issues under Art. 8 as irregular migrant expulsion cases.

<sup>11</sup> ECtHR, *Slivenko v. Latvia*, Appl. no. 48321/99, Judgment of 9 October 2003, para. 94. In the two Grand Chamber rulings made concerning the deportation of long-term lawfully resident migrants following criminal convictions, the Court also focused on family life. See ECtHR, *Üner v. The Netherlands*, Appl. no. 46410/99, Judgment of 18 October 2006, para. 61; ECtHR, *Maslov v. Austria*, Appl. no. 1638/03, Judgment of 23 June 2008, para. 50. Similarly, Ronen has noted that the Court's rhetoric gives greater weight to family life as grounds for prohibiting deportation. Ronen, *supra* note 7, at 286.

Following an examination in section 4 of the largely unrealized protection potential of the private life limb of Article 8 in migration cases, the article concludes by highlighting the way in which the Court could shift its approach in cases involving migrants to ensure a more robust consideration and protection of their Article 8 rights.

## 2 State Sovereignty and Immigration Control

State powers of immigration control are a key element of state sovereignty. State sovereignty is a complex concept that may be defined, at the risk of oversimplification, as the ‘more-or-less plenary competence’ of states,<sup>12</sup> which includes the right to control human mobility across international borders.<sup>13</sup> The wide recognition of such a right is reflected in the case law of the ECtHR.<sup>14</sup> In the landmark case of *Abdulaziz v. United Kingdom*, which set out a number of principles calibrated to the advantage of states that continue to underpin the approach in Article 8 migration cases, the Court included what might be termed its sovereignty proviso.<sup>15</sup> In what has become a standard refrain in its migration cases, the Court held that ‘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’.<sup>16</sup> This has been modified in subsequent rulings to include the right to control the entry, residence and expulsion of non-citizens.<sup>17</sup> The Court’s recourse to this tenet has been characterized as the Strasbourg reversal by Dembour,<sup>18</sup> who points to the incongruity of a human rights reasoning that gives pride of place to the principle of state control, a prerogative that neither affirms human rights nor is to be found in the text of the ECHR.<sup>19</sup>

It is uncontroversial, however, to claim that states’ powers of immigration control are not absolute.<sup>20</sup> This is evident from the very wording of the Court’s sovereignty proviso, which makes states’ right to control immigration subject to their treaty obligations.

<sup>12</sup> J. Crawford, *The Creation of States in International Law* (2nd edn, 2007), at 32.

<sup>13</sup> Perruchoud, ‘State Sovereignty and Freedom of Movement’, in B. Opeskin, R. Perruchoud and J. Redpath-Cross (eds), *Foundations of International Migration Law* (2012) 123, at 124.

<sup>14</sup> The prevalence of the recognition does not, however, mean that it is based on unimpeachably sound legal foundations. See B. Schotel, *On the Right of Exclusion* (2012), at 27–36.

<sup>15</sup> *Abdulaziz, Cabales & Balkandali v. United Kingdom*, Appl. nos 9214/80, 9473/81 and 9474/81, Judgment of 28 May 1985, paras 67–68.

<sup>16</sup> *Ibid.*, para. 67.

<sup>17</sup> See, e.g., ECtHR, *Moustaquim v. Belgium*, Appl. no. 12313/86, Judgment of 18 February 1991, para. 43.

<sup>18</sup> Dembour, *supra* note 6, at 4. The term ‘state control principle’ is borrowed from Dembour.

<sup>19</sup> *Ibid.*, at 4. This point has also been made, albeit with less sustained critical comment in, *inter alia*, Spijkerboer, ‘Structural Instability: Strasbourg Case Law on Children’s Family Reunion’, 11 *EJML* (2009) 271, at 286.

<sup>20</sup> Sohn and Buergenthal, ‘The Movement of Persons across Borders’, 23 *Studies in Transnational Legal Policy* (1992) 1. Some obvious examples of limits to the way in which states may exercise their powers of immigration control include the prohibition on collective expulsion and the principle of *non-refoulement*, which are codified in a range of international and regional instruments.

The most well-known example of such a treaty obligation in the context of the ECHR is the Article 3 prohibition of extradition or expulsion to states where individuals may face a real risk of torture or inhuman or degrading treatment or punishment. It would be a mistake, however, to think that this is the only right that must be respected *vis-à-vis* migrants. By virtue of Article 1 of the ECHR, contracting states are required to secure the Convention rights to everyone within their jurisdiction. Thus, migrants who have come to be present in the territory of a Council of Europe member state can invoke their Convention rights against their host state. The conferral of rights by such presence is seen, for example, in Court judgments finding that expulsion of migrants sometimes violates their Article 8 rights to respect for family and private life.<sup>21</sup>

While the ECtHR's Article 8 migration case law might be criticized with good reason for inconsistency, it has recognized from the very outset that states' migration law and policy may fall within the scope of Article 8.<sup>22</sup> The invidious application of the concept of family to migrant and non-migrant applicants, however, threatens to denude this recognition of its protection potential and also runs the risk of falling foul of the Convention prohibition of non-discrimination enshrined in Article 14. The resolution of the tension between states' obligations to protect migrants' human rights and states' sovereign right to control immigration<sup>23</sup> in favour of the latter betrays the Court's conception of migrants as aliens subject to state control, rather than just human beings,<sup>24</sup> with their Convention rights being relegated to the status of exceptions to the rule of states' right to exercise immigration control.<sup>25</sup> The Court should provide a clear justification of its differential treatment of migrant and non-migrant applicants in this regard and, in the absence of such justification, must be challenged on the position it has adopted.

### 3 Family Life

#### *A The Narrow Definition of Family Life in Article 8 Migration Cases*

The ECtHR has held that whether or not there is 'family life' between individuals is essentially a question of fact depending upon the existence in practice of close personal ties.<sup>26</sup> The flexibility that this formulation facilitates has seen the Court, and the now-dissolved Commission, find that in non-migration cases, at the very minimum,

<sup>21</sup> See, e.g., the cases cited in notes 4, 17, 29.

<sup>22</sup> *Abdulaziz*, *supra* note 15, para. 60. *Abdulaziz* is the first migration case in which the Court delivered a judgment on the merits.

<sup>23</sup> For insightful discussions of the knotty issues thrown up by the clash of state sovereignty and migration, see Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention', 25(4) *International Migration Review* (1991) 737; Dauvergne, 'Irregular Migration, State Sovereignty and the Rule of Law', in V. Chetail and C. Bauloz (eds), *Research Handbook on International Law and Migration* (2014) 75.

<sup>24</sup> Dembour, *supra* note 6, at 5.

<sup>25</sup> *Ibid.*, at 119.

<sup>26</sup> ECtHR, *K. & T. v. Finland*, Appl. no. 25702/94, Judgment of 12 July 2001, para. 150.

family life for the purposes of Article 8 extends beyond the parent(s) and minor child(ren) configuration to encompass ties between near relatives such as grandparents and grandchildren.<sup>27</sup> When it comes to migration cases, however, the Court has been largely consistent in taking a restrictive view of the relationships that constitute family life for the purposes of benefiting from Article 8 protection.<sup>28</sup> This view consists in conceptualizing the family for the purposes of Article 8 as comprising parents and their dependent, minor children. The relationships in such a family configuration enjoy Article 8 protection regardless of whether the parents are married or whether the parent(s) and minor child(ren) live together. This is true of both migration and non-migration cases.<sup>29</sup> When it comes to migrant applicants, other relationships, such as those between adult siblings or between parents and their adult children, may attract Article 8 protection depending on the circumstances of the particular case, but, in principle, relationships between adult migrants do not enjoy such protection ‘without evidence of further elements of dependency, involving more than the normal, emotional ties’.<sup>30</sup>

There is, however, one discrete strand of expulsion cases that represents an exception to the migrant nuclear family rule. The ECtHR explicitly stated in *Maslov v. Austria* that it accepts that the relationship of young adults with their parents and other close family members constitutes family life where those young adults have not yet founded a family of their own.<sup>31</sup> This practice, though arguably a flexible and commonsense approach

<sup>27</sup> ECtHR, *Marckx v. Belgium*, Appl. no. 6833/74, Judgment of 13 June 1979, para. 45; *X. v. Switzerland*, Appl. no. 8924/80, Judgment of 10 March 1981; ECtHR, *Scozzari & Giunta v. Italy*, Appl. nos 39221/98 and 41963/98, Judgment of 13 July 2000, para. 221.

<sup>28</sup> For a brief discussion of the ‘strict line’ taken in cases concerning migrants, see U. Kilkelly, *The Child and the European Convention on Human Rights* (1999), at 217. The restrictive definition of family life employed by the Court in migration cases, however, is not confined exclusively to such cases. See, e.g., ECtHR, *Emonet v. Switzerland*, Appl. no. 39051/03, Judgment of 13 December 2007, which concerned the adoption of a disabled 30-year-old Swiss citizen by her biological mother’s partner.

<sup>29</sup> ECtHR, *Berrehab v. The Netherlands*, Appl. no. 10730/84, Judgment of 21 June 1988, para. 21; ECtHR, *L. v. The Netherlands*, Appl. no. 45582/99, Judgment of 1 June 2004, paras 35–36. For a brief discussion of the Court’s default presumption of family life between parents and minor children, see Spijkerboer, *supra* note 19, at 289–290.

<sup>30</sup> For early findings to this effect by the Commission, see the cases cited in Villiger, ‘Expulsion and the Right to Respect for Private and Family Life (Article 8 of the Convention): An Introduction to the Commission’s Case-Law’, in F. Matscher and H. Petzold (eds), *Protecting Human Rights: The European Dimension* (1988) 657, at 658–659. Other examples include *S. & S. v. United Kingdom*, Appl. no. 10375/83, Judgment of 10 December 1983, at 198; *Family X. v. United Kingdom*, Appl. no. 9492/81, Judgment of 14 July 1982, at 232–235; ECtHR, *Kwakye-Nti & Duffie v. Les Pays-Bas*, Appl. no. 31519/96, Judgment of 7 November 2000 (French only); ECtHR, *Ezzouhdi v. France*, Appl. no. 47160/99, Judgment of 13 February 2001, para. 34 (French only); ECtHR, *Javeed v. The Netherlands*, Appl. no. 47390/99, Decision of 3 July 2001. This belies Thym’s assertion that the ECtHR ‘has always defended a wide understanding of family life’. Thym, *supra* note 7, at 113. When it first began accepting migration cases in the 1980s, the Court followed the Commission’s practice of conceptualizing migrant families as nuclear families of parents and minor, dependent children, taking a broader view only in relation to young adult migrants who had not yet founded a family of their own.

<sup>31</sup> *Maslov*, *supra* note 11, para. 62. This practice began with *Moustaquim*, *supra* note 17, and has been employed in, *inter alia*, ECtHR, *Bousarra v. France*, Appl. no. 25672/07, Judgment of 23 September 2010 (French only).

that recognizes that the strength of family bonds do not undergo automatic attenuation upon attainment of the age of majority, has caused confusion among academic commentators,<sup>32</sup> leading, for example, to the misperception that the Court at one point used to take a broad view of what constituted family life in migration cases.<sup>33</sup> In an obvious corollary to the statement in *Maslov*, the Court in expulsion cases involving young adult applicants who have established a nuclear family of their own does not accept that ties between them and their parents or siblings attract Article 8 protection without additional elements of dependence.<sup>34</sup> Confusion concerning the ECtHR's definition of family life and the distinction between private and family life in migration cases, however, is understandable, given the lack of clarity that so often characterizes the Court's discussion of family life and private life in some of the many dozens of deportation cases it has heard.<sup>35</sup>

The ramifications of the ECtHR's approach to the family and private life limbs of Article 8 in migration cases are exemplified by *Slivenko v. Latvia*.<sup>36</sup> The first case concerning expulsion to be heard by the Grand Chamber, it underlines both the limitability of the right to respect for family life and the potential of the right to respect for private life to be deployed as a bar to deportation. The case concerned the expulsion from Latvia to Russia of Tatjana and Nikolay Slivenko and their Latvian-born daughter, following the restoration of Latvian independence in 1991, in accordance with a 1994 treaty between Latvia and Russia that required Russian officers to leave Latvia with their families.<sup>37</sup> Reiterating

<sup>32</sup> E.g., the claim that in relation to migrant applicants the 'Court does not wish to define "family life" in narrow terms' is not borne out by careful review of this strand of its case law. See P. Boeles *et al.*, *European Migration Law* (2nd edn, 2014), at 204.

<sup>33</sup> Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?', 57 *International and Comparative Law Quarterly* (2008) 87, at 88, 90; Thym, *supra* note 7, at 113, 116. E.g., Thym cites ECtHR, *Nasri v. France*, Appl. no. 19465/92, Judgment of 13 July 1995, as the first example of the application by the Court of its wide understanding of family life in an expulsion case, in support of a flexibility on the part of the Court that is to be found only in dissenting opinions in more recent cases. *Nasri* is better understood as an example of a case where the relationship between adults attracted Art. 8 protection due to the existence of further elements of dependency beyond the normal, emotional ties; the applicant was a deaf and mute analphabet who was 'capable of achieving a minimum psychological and social equilibrium only within his family'. The case cannot be interpreted as a deviation from the Court's general practice of narrowly defining family life in migration cases. Thym, *supra* note 7, at 113. Thym is also incorrect to identify *Nasri* as the first expulsion case in which the Court found family life to exist in the case of an adult applicant with no spouse or children of his own. This was in fact *Moustaquim*, *supra* note 17. Thym, *supra* note 7, at 106, identifies *Moustaquim* as the first case where the Court qualified the deportation of a migrant as a violation of his right to family life. This was in fact *Berrehab*, *supra* note 29.

<sup>34</sup> ECtHR, *Onur v. United Kingdom*, Appl. no. 27319/07, Judgment of 17 February 2009; ECtHR, *A.W. Khan v. United Kingdom*, Appl. no. 47486/06, Judgment of 12 January 2010. In *Khan*, the 34-year-old applicant's relationship with his mother and two brothers, with whom he had lived for most of his life, did not constitute family life, although the Court accepted that their relationship 'clearly entails an additional degree of dependence which results from the relative ill-health of all of the parties'. Nonetheless, cohabitation and ill-health did not give rise to 'a sufficient degree of dependence to result in the existence of family life' (paras 32, 43).

<sup>35</sup> The Grand Chamber in *Üner*, e.g., did not expressly locate the adult applicant's relationship with his parents and siblings in either the realm of private life or family life. *Üner*, *supra* note 11.

<sup>36</sup> *Slivenko*, *supra* note 11.

<sup>37</sup> *Ibid.*, paras 22, 30.

that the Court's expulsion case law normally limits family life to the core family,<sup>38</sup> the Grand Chamber found that the Slivenkos' 'enforced migration' from Latvia did not interfere with their family life since they had been deported as a whole and could continue an effective family life in Russia.<sup>39</sup> Indeed, the 1994 treaty obliged Russia to allow entry and residence of the whole family and so did not interfere with the family unit.<sup>40</sup> Tatjana's links with her elderly parents who were living in Latvia could not be viewed through the lens of family life as they were adults who neither belonged to the core family nor had been shown to have been dependent members of the applicants' family. The applicants' links with Mrs Slivenko's elderly parents, however, would be taken into consideration as part of the examination of the applicants' private life.

*Üner v. The Netherlands* also reveals how family life can be eviscerated of its potential to act as a bar to deportation.<sup>41</sup> The Grand Chamber found that there had been interference with both limbs of Article 8, but it chose to focus on the family life aspect.<sup>42</sup> The judgment illustrates the way in which the ECtHR, though finding the existence of, and interference with, the right to respect for family life, makes a judgment as to the quality and nature of the family life in question so as more easily to find, arguably, that the interference does not amount to violation. The Court noted that it could not overlook that Ziya Üner 'lived with his partner and first-born son for a relatively short period only, that he saw fit to put an end to the cohabitation, and that he never lived together with his second son', leading it to endorse the Chamber's finding that deportation did not have the same impact on their family life as it would have had 'if they had been living together as a family for a much longer time'.<sup>43</sup> Thus, although the nuclear family may be protected by Article 8 of the ECHR *ratione materiae*, independent of the length of its existence,<sup>44</sup> the strength of that protection may be undermined by the Court's assessment of the quality and character of the family life in question.

<sup>38</sup> *Ibid.*, para. 94. This approach is consistent with the position taken by the Court, and, indeed, the Commission, in earlier decisions. See the cases cited in note 30 above. For this reason, Thym's characterization of the judgment in *Slivenko* as a reversal of prior case law, a re-conceptualization of the understanding of family life and a departure from the 'original wide understanding of family life' is unsustainable. Thym, 'Respect for Private and Family Life', *supra* note 33, at 91. Ronen also remarks that in *Slivenko* 'the Court chose to delineate the right to family life narrowly', arguably implying that such a course of action was somehow out of step with the Court's established practice in its migration case law. Ronen, *supra* note 7, at 288.

<sup>39</sup> *Slivenko*, *supra* note 11, para. 97.

<sup>40</sup> *Ibid.*, para. 116.

<sup>41</sup> *Üner*, *supra* note 11, para. 58.

<sup>42</sup> *Ibid.*, para. 61.

<sup>43</sup> *Ibid.*, para. 62. Similarly, the Court in *Onur*, while accepting the existence of family between the applicant and his eldest child, found that the disruptive effect of the applicant's deportation on the young girl's life 'is unlikely to have had the same impact as it would if the applicant and his daughter had been living together as a family'. *Onur*, *supra* note 34, para. 58. In a similar vein, the Court found in *Joseph Grant* that, while the applicant enjoyed family life with his daughter in the United Kingdom, his deportation to Jamaica was unlikely to have the same impact as it would if he and his daughter had been living together as a family. ECtHR, *Joseph Grant v. United Kingdom*, Appl. no. 10606/07, Judgment of 8 January 2009, para. 40.

<sup>44</sup> Thym, 'Respect for Private and Family Life', *supra* note 33, at 93.



The narrow definition of family life in migration cases been criticized both from within and without the ECtHR. In a separate opinion annexed to *Slivenko*, Judge Kovler argued that it meant the Court was failing to take account of the lived reality of contemporary European families in the member states of the Council of Europe, with the tradition of the 'extended family' so central a feature of life in some European countries that it enjoys constitutional recognition.<sup>45</sup> Similarly, in *Shevanova v. Latvia*, Judge Spielmann took issue with the 'unduly restrictive' interpretation of family life applied in migration cases since its articulation in *Slivenko*, which, in his view, impoverishes the notion of family life as distinct from the broader notion of family life sketched by the Court in non-migration cases.<sup>46</sup>

The Court's restrictive view of the family for the purposes of Article 8 in migration cases has been powerfully critiqued by Lourdes Peroni who has drawn attention to the fact that it privileges a particular cultural view that may in practice disadvantage some family lifestyles and, therefore, carries 'negative egalitarian implications'.<sup>47</sup> Thus, however one may speculate as to the intention behind it, the insistence on the nuclear family approach in migration cases is out of step with the pluralist societies and cultural diversity of the member states of the Council of Europe. Furthermore, it may also lay the Court open to the accusation that this strand of its case law falls foul of the non-discrimination provision in Article 14 of the Convention not only on the grounds that it disadvantages migrant applicants as distinct from non-migrant applicants but also because it discriminates, in particular, against migrants whose social and cultural backgrounds mean that their understanding and practice of family life do not hew to the Strasbourg Court's conceptualization of family life that prevails in migration cases.

The views of Peroni and Judges Kovler and Spielmann were recently echoed in a dissenting opinion in *Senchishak v. Finland*, where the narrow definition of family life was deployed to the detriment of the irregular migrant applicant. Marina Senchishak, a sexagenarian Russian citizen, entered Finland in 2008 on a 30-day visa to join her daughter, who was a Finnish citizen and who had been resident in Finland since 1988. Marina, a widow, had suffered a stroke in 2006, leaving her right side paralyzed.<sup>48</sup> Her request for a residence permit in Finland on the basis of family ties with her daughter

<sup>45</sup> Judge Kovler criticizes the restriction of Art. 8 family life protection in *Slivenko* to the notion of core family for departing from earlier case law, specifically *Marckx*, *supra* note 27, and *Sozzari & Giunta*, *supra* note 27. As I have shown, however, it is largely consistent with the approach taken by the Commission and Court in migration cases.

<sup>46</sup> ECtHR, *Shevanova v. Latvia*, Appl. no. 58822/00, Judgment of 15 June 2006, partly concurring with the opinion of Judge Spielmann (paras 2–5, 8, 9). It is interesting to note that Judge Spielmann, like Judge Kovler in *Slivenko*, observes that the restrictive notion of family life is in line in the specific sphere of migration with the case law established in *Slivenko*. One wonders whether the judges' omission to mention the earlier decisions establishing the restrictive notion of family life, implicitly dating it to the more recent 2003 Grand Chamber ruling in *Slivenko*, is an attempt at undermining the authenticity and authority of the restrictive approach to family life.

<sup>47</sup> Peroni, 'Challenging Culturally Dominant Conceptions in Human Rights Law: The Cases of Property and Family', (4)2 *Human Rights and International Legal Discourse* (2010) 241, at 260–264.

<sup>48</sup> ECtHR, *Senchishak v. Finland*, Appl. no. 5049/12, Judgment of 18 November 2014, paras 7–10.

was refused in 2009, and her removal ordered.<sup>49</sup> While mother and daughter had lived in different countries for 20 years, Marina argued that during her five years in Finland she had had a close family relationship with her daughter and her family and that in Russian culture grandparents were family members who needed protection, it being the adult children's responsibility to take care of their parents.<sup>50</sup>

The ECtHR, however, was not satisfied that Marina's relationship with her daughter involved an additional element of dependence beyond the normal, emotional ties. Paramount importance seems to have been attached to the applicant's irregular stay in Finland, which guided the Court in finding an absence of family life within the meaning of Article 8. Noting the 20-year putative interruption in the family life between the applicant and her daughter, the Court found that a stay of five years in Finland did not create a relationship that could amount to 'family life' within the meaning of Article 8.<sup>51</sup> In relation to the issue of dependency, the Court noted that even if:

the applicant is dependent on outside help in order to cope with her daily life, this does not mean that she is necessarily dependent on her daughter who lives in Finland, or that care in Finland is the only option. As mentioned earlier, there are both private and public care institutions in Russia, and it is also possible to hire external help.<sup>52</sup>

Application in other cases of this approach would make it almost impossible to establish dependency. How often will it be the case that an applicant's child is the only individual who can help a dependent adult parent 'to cope with her daily life'?

The logic-defying finding that cohabitation for five years of an ailing, elderly widowed mother with her daughter did not create a relationship sufficiently strong to constitute family life reveals the ease with which the ECtHR can make a finding of non-existence of family life, rendering a complaint under Article 8 inadmissible and relieving the Court of the need to engage in evaluating the relative merits of the claims made by the parties to the dispute: because family life is found not to exist, the deportation requires no justification under Article 8(2). It is difficult to understand how the view of the dissenting judges did not find favour with the majority. Chiming with the applicant's claim that in Russian culture grandparents are family members who need protection, Judges Bianku and Kalaydjieva noted that the notion of 'core family' and the level of emotional ties 'between parents and separated adult children vary across the cultures and traditions of Europe as well as among individuals living in various countries'.<sup>53</sup> Crossing international borders and spending a long time apart does not sever the bonds between parents and children.

## **B The Future of Family Life in Migration Cases**

How then can we expect the ECtHR's definition of family life in migration cases to evolve in the future? The call by Judges Spielmann and Kovler over 10 years ago for the Court to embrace a broader definition of family life in migration cases has recently been

<sup>49</sup> *Ibid.*, paras 11, 20.

<sup>50</sup> *Ibid.*, para. 53.

<sup>51</sup> *Ibid.*, paras 56–57.

<sup>52</sup> *Ibid.*, para. 57.

<sup>53</sup> *Ibid.*, para. 53.

repeated, not only in the dissenting opinion annexed to *Senchishak* but also in separate, minority opinions in two cases concerning asylum seekers. In *A.S. v. Switzerland*, a Syrian citizen who had entered Switzerland from Italy, claiming asylum in the former country in February 2013, sought to resist return to Italy in accordance with the Dublin Regulation<sup>54</sup> by appealing to Article 8 protection of his relationship with his sisters who had been living in Switzerland respectively since 2006 and January 2012.<sup>55</sup> In rejecting the applicant's claim that removal to Italy would violate Article 8, the Court made no concrete finding as to whether additional elements of dependence between the applicant and his sisters created family life for the purposes of Article 8.

In a joint concurring opinion, however, Judges Sajó, Vučinić and Lemmens accepted that the applicant and his sisters 'had an effective family life in Syria, before they each left for Switzerland. In this regard, we are mindful of the fact that there may be different conceptions of what constitutes a "family" in the various parts of the world'. In stark contrast to the majority finding in *Senchishak*, the three judges found that the relationship between the three adult siblings constituted family life upon reunification in Switzerland, the fact that they were the only members of the family living in Switzerland being something 'which should normally lead to a strengthening of the ties between them'. The fact that the applicant spent most of his time with his siblings and their families, who provided him with the emotional support to recover from the trauma caused by detention in Syria, was found by the three judges to constitute 'additional elements illustrative of the existence of family life'.<sup>56</sup> The judges joined the majority in finding no violation of Article 8, however, on the basis that the applicant's ties with his sisters were not so strong as to require his continued presence in Switzerland.<sup>57</sup> He had lived far apart from his sisters for a number of years and had not shown that he would suffer in an unacceptable way from a further separation.

An even more open approach to the concept of family life in the migration context was articulated in the separate opinion of Judge Nicolaou in *Z.H. and R.H. v. Switzerland*, which again concerned an appeal against return to Italy in accordance with the Dublin Regulation.<sup>58</sup> Judge Nicolaou noted that the meaning and extent of 'family life' for the purposes of the Convention is not easily defined, arguing that existing case law merely illustrates the kind of relationships that give rise to family life for the purposes of Article 8, with the concept itself being 'both broad and open-ended'.

Such views as are discernible in the aforementioned dissenting opinions, coupled with the broader concept of family life employed in non-migration cases, provide fertile ground for the ECtHR to cultivate a wider definition of family life in migration cases in line with its practice of treating the Convention as a living instrument to be interpreted in light of present-day conditions.<sup>59</sup> But is such a development desirable?

<sup>54</sup> Council Regulation 604/2013, OJ 2013 L 180/31.

<sup>55</sup> *A.S. v. Switzerland*, Appl. no. 39350/13, Judgment of 30 June 2015, paras 5, 6, 39.

<sup>56</sup> *Ibid.*, para. 2, Joint Concurring Opinion of Judges Sajó, Vučinić and Lemmens.

<sup>57</sup> *Ibid.*, para. 3.

<sup>58</sup> ECtHR, *Z.H. & R.H. v. Switzerland*, Appl. no. 60119/12, Judgment of 8 December 2015.

<sup>59</sup> Mowbray, 'The Creativity of the European Court of Human Rights', 5(1) *Human Rights Law Review* (HRLR) (2005) 57; *Marckx*, *supra* note 27, para. 41.

Does the Court's narrow definition of family life in migration cases matter? Daniel Thym argues that it does not 'translate into a diminution of human rights protection' since it is complemented by 'autonomous' protection of private life, which, in his view, provides a suitable lens for consideration of wider social relations beyond the nuclear family.<sup>60</sup> Whether, in practice, the private life limb provides such protection as to prevent deportation is however, as we shall see, open to question.

## 4 Private Life

In practical terms, migrant applicants are unlikely to be troubled by the reasoning employed by the Strasbourg judges as long as the outcome is in their favour. Given that Article 8 constitutes a single human right with one set of justificatory requirements for state interference with private or family life alike, can we take for granted that family ties that do not come within the concept of the nuclear family will be taken into account by the Court in assessing whether the migrant applicant enjoys such private life in the host state as would be violated by deportation?<sup>61</sup> Or, given the Court's demonstrable preference for examining the family life limb of Article 8 in migration cases,<sup>62</sup> is it possible that private life is taken less seriously by the Court and, therefore, attracts even less robust protection than the family life limb of Article 8?<sup>63</sup>

The ECtHR has evinced a marked reluctance to engage with the private life limb of Article 8 in migration cases; its applicability in such cases being nonetheless evident from an early stage. In *Moustaquim v. Belgium*, which concerned a citizen of Morocco who had moved to Belgium with his family when he was one year old, the Court had found that deportation in June 1984 of the then 20-year-old applicant for crimes committed as an adolescent violated his right to family life and so found it unnecessary to consider whether it also breached his right to respect for private life.<sup>64</sup> The same finding was made a year later in *Beldjoudi v. France*.<sup>65</sup> In a concurring opinion, however, Judge Martens expressed regret that the decision had not been based on an interference with the right to respect for private life.<sup>66</sup> Specifying such a basis would have created greater legal certainty as all 'integrated aliens' threatened with expulsion have a private life but not all are married.<sup>67</sup>

Subsequent rulings in deportation cases in the 1990s were accompanied by separate opinions making a similar call for the private life of applicants to be taken into

<sup>60</sup> Thym, *supra* note 7, at 115, 116.

<sup>61</sup> *Ibid.*, at 115; ECtHR, *A.A. v. United Kingdom*, Appl. no. 8000/08, Judgment of 20 September 2011, para. 49.

<sup>62</sup> *Slivenko*, *supra* note 11.

<sup>63</sup> Ronen, *supra* note 7, argues that the Court views the violation of respect for family life as being graver than the violation of respect for private life.

<sup>64</sup> *Moustaquim*, *supra* note 17, para. 47.

<sup>65</sup> ECtHR, *Beldjoudi v. France*, Appl. no. 12083/86, Judgment of 26 March 1992, para. 80.

<sup>66</sup> *Ibid.*, para. 1, Concurring Opinion of Judge Martens.

<sup>67</sup> *Ibid.*, paras 2–3.

consideration,<sup>68</sup> until the ECtHR finally engaged substantively with both the family life and private life of the applicant in *C. v. Belgium*.<sup>69</sup> The Court found that, as well as the existence of family life, the applicant had a private life in the host state, evidenced by his social ties, education and employment in Belgium.<sup>70</sup> It was held, however, that deportation did not violate Article 8. C. has been identified as paving the way for the recognition of private life as a free-standing protection against deportation, 'regardless of the extent to which the applicant had family connections'.<sup>71</sup> The use of the private life limb of Article 8 as a standalone protection against expulsion did not occur immediately, however. Indeed, in some cases that immediately followed *C.*, the Court referred to both the private life and family life of the applicants, finding simply that there had, or had not been, a violation of Article 8 without expressly stating under which head the finding of violation or non-violation was being made.<sup>72</sup>

The first use of the private life limb of Article 8 as a standalone bar to deportation came in the *Slivenko* ruling in the Grand Chamber in 2003 in which, as noted earlier, it had been found that the enforced migration of the family unit to Russia did not interfere with their right to respect for family life.<sup>73</sup> The Court, however, did find that, despite the respondent government's claim of non-integration in Latvia,<sup>74</sup> the applicants' right to respect for private life had been interfered with as they had been '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'.<sup>75</sup> The Grand Chamber held by 11 votes to 6 that this interference violated Article 8. Deportation had been a disproportionate means of achieving the legitimate aim of protecting national security since there was no allegation that they presented any danger to such security.<sup>76</sup> Latvia had overstepped its margin of appreciation and failed to strike a fair balance between the interests of the state and the applicants under Article 8 since implementation of the scheme for withdrawal of foreign troops and their families did not include the possibility of examining the individual circumstances of persons whose removal was sought.<sup>77</sup> Subsequent cases

<sup>68</sup> See, e.g., the Concurring Opinion of Judge Wildhaber in *Nasri*, *supra* note 33, who found the invocation of the right to respect for family life without any reference to private life to be 'artificial', arguing that it would be more realistic to look at 'the whole social fabric which is important to the applicant, and the family is only part of the entire context, albeit an essential one'. This view was echoed in the partly dissenting and strongly pro-migrant opinion of Judge Morenilla in the same case who noted that private life is a more general concept, of which family life is one element.

<sup>69</sup> ECtHR, *C. v. Belgium*, Appl. no. 21794/93, Judgment of 27 June 1996, paras 6–7. The case has therefore been identified as marking an 'important change' in this line of case law. Ronen, *supra* note 7, at 286.

<sup>70</sup> *Ibid.*, para. 25.

<sup>71</sup> Ronen, *supra* note 7, at 286.

<sup>72</sup> E.g., ECtHR, *El Boujaidi v. France*, Appl. no. 25613/94, Judgment of 26 September 1997; *Ezzouhdi*, *supra* note 30.

<sup>73</sup> See section 3A above.

<sup>74</sup> *Slivenko*, *supra* note 11, para. 88.

<sup>75</sup> *Ibid.*, para. 96.

<sup>76</sup> *Ibid.*, paras 121, 122, 126, 127.

<sup>77</sup> *Ibid.*, paras 122, 128.

taken against Latvia that presented a similar factual matrix also saw the Court employ the private life limb of Article 8 as a bar to deportation.<sup>78</sup>

*Slivenko* is an important case if only for the visibility and influence lent to it by its Grand Chamber status. Outside of the discrete category of cases taken against Latvia by formerly lawful long-term residents, its impact is less clear. In the two Grand Chamber judgments on the merits concerning expulsion that immediately followed *Slivenko–Üner* and *Maslov–Slivenko* was only cited along with other cases in reference to states' margin of appreciation and the proportionality test.<sup>79</sup> Both *Üner* and *Maslov* did contain explicit discussion of what constitutes both family life and private life,<sup>80</sup> with the Court noting in both cases that, regardless of the existence of a 'family life' within the meaning of Article 8, the expulsion of a settled migrant constitutes interference with the right to respect for private life.<sup>81</sup> The focus of the Grand Chamber in both cases, however, was on whether the interference violated the right to respect for family life.<sup>82</sup>

The absence of any substantive reference to *Slivenko* in both *Üner* and *Maslov* may be due to the fact that in the two latter cases the applicants were found to have family life with which deportation interfered. In *Üner*, however, since the ECtHR found that deportation did not violate the right to respect for family life, it might have been expected to then undertake a separate examination of the applicant's right to respect for private life, his private life ties to the Netherlands being demonstrably thick. While the Court routinely notes that it depends on the circumstances of a particular case as to whether it is appropriate to focus on the 'family life' rather than the 'private life' aspect,<sup>83</sup> there seems to be no identifiable barrier to examining both, as indeed occurred in *Slivenko*. Was it perhaps the palpable injustice done to the applicants in *Slivenko*

<sup>78</sup> E.g., ECtHR, *Kaftailova v. Latvia*, Appl. no. 59643/00, Judgment of 22 June 2006; *Shevanova*, *supra* note 46.

<sup>79</sup> *Üner*, *supra* note 11, para. 59; *Maslov*, *supra* note 11, para. 63. Steinorth states that the *Üner* judgment is the first time the ECtHR recognized that the expulsion of long-term migrants may constitute a violation of Art. 8, even in the absence of an established family life in the host state. Steinorth, 'Üner v. the Netherlands: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family Life', 8(1) *HRLR* (2008) 185, at 193. This ignores the rulings in *Shevanova*, *supra* note 46, and *Kaftailova*, *supra* note 78, both delivered more than three months ahead of the Grand Chamber ruling in *Üner*, where the Court found a violation of Art. 8 on the basis of private life as the applicants did not enjoy family life within the meaning of Art. 8 as their respective family ties were with adult, non-dependent children.

<sup>80</sup> *Maslov*, *supra* note 11, paras 62, 63; *Üner*, *supra* note 11, paras 59, 62.

<sup>81</sup> *Üner*, *supra* note 11, para. 59; *Maslov*, *supra* note 11, para. 63.

<sup>82</sup> In *Üner*, *supra* note 11, para. 61 the Court expressly stated that while the impugned measures interfered with the applicant's right to respect for private life, it would pay 'special attention' to his right to respect for family life. In *Maslov*, *supra* note 11, para. 50, it was argued on behalf of the applicant that the impugned measures 'first and foremost' affected his family life. The artificial nature of the separation of the private and family life limbs is underlined by the fact that in ascertaining whether interference with the right to respect for family life is proportionate, the Court attaches significant weight to private life factors. See, e.g., *Üner*, para. 14, for discussion of the applicant's conduct while in prison and *Maslov*, paras 77–85, for discussion of the nature and seriousness of the offences committed by the applicant. While these may be characterized as private life factors, it is of course necessary for them to be evaluated with a view to assessing the threat an individual migrant may pose to public order in the host state.

<sup>83</sup> E.g., *Üner*, *supra* note 11, para. 59; *Maslov*, *supra* note 11, para. 63; *Omur*, *supra* note 34, para. 46.

that galvanized the Court to engage substantively with both of the relevant limbs of Article 8? Or is the discrepancy explained by the fact that *Üner* and *Maslov* involved the deportation of settled migrants convicted of criminal offences, whereas *Slivenko* concerned long-term migrants whose deportation was effected not only in the absence of the commission of any crime on their part but also largely on account of reasons that were beyond their control? A positive answer to the latter question means that *Slivenko*, *Üner* and *Maslov* would be better viewed as authorities for different strands of expulsion case law.

If such a neat dichotomy obtained, it has been disturbed by the ECtHR's recent use of the private life limb of Article 8 as a bar to deportation in cases concerning criminal migrants. *A.W. Khan v. United Kingdom* appears to be the first such case.<sup>84</sup> After being sentenced to seven years of imprisonment for attempted importation of 2.5 kilograms of heroin, the applicant was released early from prison in April 2006 because of good conduct and, shortly after release, was notified of a decision to deport him from the United Kingdom (UK).<sup>85</sup> The Court accepted that deportation would interfere with both the private life and family life of the applicant, but it focused on the former.<sup>86</sup> In reaching its finding of violation, the Court had particular regard to the applicant's entry at the age of three to the UK, his lack of ties to Pakistan and correspondingly strong ties to the UK and his good behaviour since his release from prison in 2006.<sup>87</sup> Treating Abdul Khan's relationship with his ailing mother and two brothers as an element of his private life, the Court noted that his deportation 'would likely cause greater difficulties than would otherwise be the case'.<sup>88</sup>

The private life limb of Article 8 was also used as a standalone bar to deportation in *A.A. v. United Kingdom*, which concerned a citizen of Nigeria who had been living in the UK since his arrival at the age of 13 to join his mother.<sup>89</sup> Following his conviction at the age of 15 for involvement in the rape of a 13-year-old girl, the applicant was sentenced to four years of detention.<sup>90</sup> Before early release for good behaviour, he had been served with a deportation order.<sup>91</sup> While the Court noted that its case law 'would tend to suggest' that as a single, childless adult the applicant enjoyed a family life with his mother,<sup>92</sup> it found that it was not necessary to decide this question since Article 8 also protects private life with which expulsion will always interfere in the case of settled migrants.<sup>93</sup> A further factor making it unnecessary to decide the question of

<sup>84</sup> *Khan*, *supra* note 34.

<sup>85</sup> *Ibid.*, paras 7–8.

<sup>86</sup> *Ibid.*, para. 36.

<sup>87</sup> *Ibid.*, para. 50.

<sup>88</sup> *Ibid.*, para. 43.

<sup>89</sup> *A.A.*, *supra* note 61.

<sup>90</sup> The Court noted that the applicant had committed just a single offence (*ibid.*, para. 55).

<sup>91</sup> *Ibid.*, paras 7–9, 14.

<sup>92</sup> *Ibid.*, para. 49.

<sup>93</sup> The Court's non-decision regarding family life might be read as an effort to avoid contradicting the finding of the immigration judge who had found that, while the applicant enjoyed private life in the United Kingdom, he had not established the existence of family life (see *ibid.*, para. 21).

the existence of family life was the fact that assessment of the proportionality of a deportation requires examination of the same factors regardless of whether private life or family life is engaged.<sup>94</sup> The Court ultimately found that deportation would violate Article 8 given the applicant's ties to, and length of time spent in, the UK as well as the passage of an appreciable period since the commission of the offence – while still a minor – during which his conduct had been exemplary.<sup>95</sup> If, however, the ECtHR had found no violation of the right to respect for private life, would it then have gone on to examine the complaint under the family life limb?

In *Butt v. Norway*, uniquely for an irregular migrant expulsion case, the ECtHR found that the applicants enjoyed both family life and private life in Norway. Private life was found to exist on the basis of the applicants' strong personal and social attachment to Norway evidenced by their upbringing and education in Norway, their mastery of Norwegian and their social network in the country.<sup>96</sup> This decision provides signally important confirmation that irregular migrants can enjoy private life within the host state for the purposes of Article 8. Nonetheless, despite the Court's use of the private life limb of Article 8 as a bar to deportation in *A.W. Khan, A.A.* and, at least partially, *Butt*, there is so far little to indicate that the Court might be willing to embrace private life more actively as a standalone protection against expulsion. With the exception of *Butt*, the focus in all of the cases concerning removal of irregular migrants has been on the applicants' family life.<sup>97</sup> This reflects the general pattern in expulsion cases concerning migrants convicted of a criminal offence such as *Üner* and *Maslov*. There is therefore little to suggest that an active future awaits the private life limb in migration cases.

## 5 Conclusion

It seems safe to conclude that the restrictive definition of family life employed in migration cases may 'translate into a diminution of human rights protection' for migrants since the protection potential of private life usually remains dormant.<sup>98</sup> That which at first glance might be diagnosed as an innocuous distinction in the ECtHR's approach

<sup>94</sup> *Ibid.*, para. 49.

<sup>95</sup> *Ibid.*, paras 63–64, 68.

<sup>96</sup> ECtHR, *Butt v. Norway*, Appl. no. 47017/09, Judgment of 4 December 2012, paras 64–70, 76.

<sup>97</sup> The jurisprudence generated by those affected by the collapse of communist super-state structures must be viewed as distinct from cases relating to expulsion of irregular migrants as the former category concerns individuals who often have been born and raised in the state in question and whose entry or stay and establishment of family life cannot in any way be said to have been accompanied by an awareness that their continued stay was precarious. It cannot be said in relation to the applicants in, e.g., *Slivenko* that they could not, or should not, have entertained a legitimate expectation of continuing their life in the respective host state. This is worth noting as the Court has repeatedly held that, where family life was created at a time when the persons involved were aware that the immigration status of one of them was precarious, exceptional circumstances will be required to substantiate a violation of Art. 8. This principle was first articulated in *Abdulaziz*, *supra* note 15, para. 68.

<sup>98</sup> See Thym, *supra* note 7, at 115–116, for the opposite view.



to family life for the purposes of Article 8 in migration and non-migration cases may in fact prove to be insidious. This process whereby the protection of migrants' Article 8 rights is being whittled down might be viewed as a two-stage exercise. First, by adopting a narrow definition of family life, the Court ensures that relationships with relatives who may 'play a considerable part' in family life are not taken into consideration in evaluating the proportionality of deportation, making it more likely that such removal will not violate the right to respect for family life.<sup>99</sup> Then, if deportation is not found to violate the right to family life, the right to respect for private life – into the realm of which all other relationships have been displaced – is not considered. As a result of this approach, irregular migrant applicants like Marina Senchishak, who have no nuclear family, may have their Article 8 complaint deemed inadmissible, and the state will not be required to justify the expulsion.

*Senchishak* illustrates how a narrow definition of family life, coupled with the routine failure to give substantive consideration to private life, will result in expulsion cases falling outside the scope of Article 8. Given the influence of the Court's decisions in such matters on interpretation and application of the Convention at the domestic level, this may have untold repercussions, preventing the enjoyment of Article 8 rights in contracting states through dismissal by the domestic courts and findings of inadmissibility by the ECtHR. The consequence of the Court's approach in Article 8 migration cases is all the more far-reaching in light of the obligation on the European Union to accede to the ECHR<sup>100</sup> and the designation by the Charter of Fundamental Rights of the European Union and its case law as setting out the meaning, scope and content of Charter rights which correspond to rights guaranteed by the ECHR.<sup>101</sup> This means that when national courts and the Court of Justice of the European Union apply the Charter rights in question, such as Article 7, which corresponds to Article 8 of the ECHR, they will look to the case law of the ECtHR to ascertain the minimum scope and content of those rights.<sup>102</sup>

The deficiencies in the Court's application of Article 8 in migration cases are tied up with what might be generously characterized as the flexibility it has evinced in dealing with family life and private life in cases concerning migrant applicants. This flexibility, however, has begot unpredictability and confusion. Of course, there may be wholly legitimate reasons as to why the ECtHR generally takes an either/or approach

<sup>99</sup> *Marckx*, *supra* note 27, para. 45.

<sup>100</sup> Treaty on the European Union, OJ 2010 C 83/13, Art. 6(2), consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2010 C 83/01.

<sup>101</sup> Charter of Fundamental Rights of the European Union, OJ 2012 C 326/02, Art. 52(3).

<sup>102</sup> The conferral of binding legal force on the Charter and obligation on the European Union to accede to the ECHR under the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, OJ 2007 C 306, has spawned a burgeoning body of academic commentary. See, e.g., Groussot and Gill-Pedro, 'Old and New Human Rights in Europe: The Scope of EU Rights versus That of ECHR rights', in E. Brems and J. Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2013) 232. On the more specific question of the impact of these developments on migrants' rights, see, e.g., Weiss, 'Family Reunification at the Interface of EU Law and the European Convention on Human Rights', in R. Plender (ed.), *Issues in International Migration Law* (2015) 120.

to the family and private life limbs of Article 8 in such cases. The general preference for the family life limb may, rather than reflecting a fundamental reluctance to rely on the private life limb, simply be a product of judicial economy. We do not know, however, because the Court has not told us, providing only the oracular explanation that it depends on the circumstances of a particular case as to whether it is appropriate to focus on the ‘family life’ rather than the ‘private life’ aspect.

It is possible for the ECtHR to clarify its reasons for favouring the family life over the private life limb and to both arrest and reverse the diminution of human rights protection sketched above. The dynamic potential of Article 8,<sup>103</sup> and the Court’s readiness to modify earlier interpretations,<sup>104</sup> coupled with its existing case law and the interpretive tools at its disposal,<sup>105</sup> provide it with the capacity to move in a more pro-migrant direction. Given the principle that human rights should be interpreted widely,<sup>106</sup> and the acceptance in the Court’s case law that the exceptions provided for in Article 8(2) should be construed narrowly,<sup>107</sup> its toolbox contains all of the implements necessary to allow it to reverse the Strasbourg reversal and unlock the Convention’s potential for migrants. One possible way of doing this would be to take onboard views of the type expressed in the separate opinions of Judges Morenilla and Wildhaber in *Nasri v. France* to the effect that, as private life is a more general concept of which family life is one element, it is more realistic in expulsion cases to look at ‘the whole social fabric which is important to the applicant’.<sup>108</sup> This would require the Court to take as its

<sup>103</sup> Demonstrated recently by the finding in ECtHR, *Oliari & Others v. Italy*, Appl. nos. 18766/11 and 36030/11, Judgment of 21 July 2015, that Italy’s failure to provide a specific legal framework for the recognition and protection of same-sex unions violated Art. 8 and by the finding of a violation of Art. 14 taken in conjunction with Art. 8 in ECtHR, *Pajić v. Croatia*, Appl. no. 68453/13, Judgment of 23 February 2016, where the immigration legislation of the respondent state had reserved to opposite-sex couples the possibility of applying for a residence permit for family reunification. See also Feldman, ‘The Developing Scope of Article 8 of the European Convention on Human Rights’, 3 *European Human Rights Law Review* (1997) 265; Burbergs, ‘How the Right to Respect for Private and Family Life, Home and Correspondence Became the Nursery in Which New Rights Are Born: Article 8 EHCR’, in Brems and Gerards, *supra* note 102, 315.

<sup>104</sup> Mowbray, ‘An Examination of the European Court of Human Rights’ Approach to Overruling Its Previous Case Law’, 9(2) *HRLR* (2009) 179.

<sup>105</sup> See, e.g., Mowbray, *supra* note 59; G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007).

<sup>106</sup> For a recent defence of wide interpretation in the context of the ECHR, see van der Schyf, ‘Interpreting the Protection Guaranteed by Two-Stage Rights in the European Convention on Human Rights: The Case for Wide Interpretation’, in Brems and Gerards, *supra* note 102, 65. For the argument that narrow interpretation would contribute to reducing the Court’s case load, see Gerards, ‘The Scope of ECHR Rights and Institutional Concerns: The Relationship between Proliferation of Rights and the Case Load of the ECtHR’, in Brems and Gerards, *supra* note 102, 84. A useful discussion of the competing arguments in favour of broad and narrow interpretation is provided in Gerards and Senden, ‘The Structure of Fundamental Rights and the European Court of Human Rights’, 7 *International Journal of Constitutional Law* (2009) 619, at 625–629.

<sup>107</sup> ECtHR, *Société Colas Est & Others v. France*, Appl. no. 37971/97, Judgment of 16 April 2002, para. 47; ECtHR, *Keegan v. United Kingdom*, Appl. no. 28867/03, Judgment of 18 July 2006, para. 31; ECtHR, *Vasquez v. Switzerland*, Appl. no. 1785/08, Judgment of 26 November 2013, para. 39.

<sup>108</sup> *Nasri*, *supra* note 33. Partly Dissenting Opinion of Judge Morenilla and Concurring Opinion of Judge Wildhaber.

starting point an examination of the private life limb of Article 8 of which family life would, if present, constitute a key element.

Alternatively, however, if the ECtHR is wedded to a preference for the family life limb of Article 8, it should heed the calls from within its ranks to adopt the broader definition of family life employed in much of its non-migration case law where it has held that respect for family life obliges states to act in a manner calculated to allow family ties to develop normally.<sup>109</sup> This would see the Court pay more meaningful attention to the right of family members to enjoy each other's company<sup>110</sup> rather than, to all intents and purposes, placing the emphasis on states' right to regulate migrants' movement and residence.<sup>111</sup> It would behove the Court to adopt one of these two approaches not just for the sake of the clarity and consistency of its case law but also to ensure that it retains credibility and the ability to rebut the allegation that it is a human rights court that is at pains not to upset states when delivering judgment on complaints brought by migrant applicants.<sup>112</sup>

<sup>109</sup> *Marckx*, *supra* note 27, para. 45.

<sup>110</sup> The Court has held in non-migration cases that the mutual enjoyment by parent and child of each other's company is a fundamental principle of family life protected by Art. 8. See ECtHR, *Penchevi v. Bulgaria*, Appl. no. 77818/12, Judgment of 10 February 2015, para. 53; ECtHR, *Karrer v. Romania*, Appl. no. 16965/10, Judgment of 21 February 2012, para. 37. In the context of adoption and child abduction, the Court has noted that states must enable ties between children and parents to be developed (*Emonet*, *supra* note 28, paras 64, 66); that the best interests of the child entails that family ties 'may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations' (*Neulinger & Shuruk v. Switzerland*, Appl. no. 41615/07, Judgment of 6 July 2010, para. 136) and that separation of parent and child can over time can have 'irremediable consequences' for their relationship (*Macready v. the Czech Republic*, Appl. nos 4824/06 and 15512/08, Judgment of 22 April 2010, para. 62).

<sup>111</sup> The seeds of such an approach were perhaps evident in *Berrehab*, *supra* note 29, para. 28 where the Court accepted that the Convention does not in principle prohibit states from regulating migrants' entry and length of stay. This articulation of the state control principle is different in tone from most other rulings in expulsion cases where the principle is usually stated in terms more deferential to states.

<sup>112</sup> *Dembour*, *supra* note 6, at 507.