Beskyttelsen af udlændinges privat- og familieliv efter Den Europæiske Menneskerettighedskonvention og FN's konventioner

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Udlændingestyrelsen
Flygtningenævnet
Udlændingenævnet

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Udlændingestyrelsen, Flygtningenævnet og Udlændingenævnet har udarbejdet et fælles notat og en fælles database vedrørende Den Europæiske Menneskerettighedskonventions (EMRK) artikel 8 og den hertil hørende praksis fra Den Europæiske Menneskerettighedsdomstol (EMD)/Kommissionen samt FN's konventioner og den hertil hørende praksis fra FN's komitéer. Notatet beskriver menneskerettighedsorganernes praksis og indeholder links til de relevante afgørelser, som er hentet fra EMD's database HUDOC og FN-komitéernes databaser.

Adgang til HUDOC kan findes her: HUDOC

Adgang til FN komitéernes databaser kan findes her:

FN's Menneskerettighedskomité

FN's Børnekomité

FN's Handicapkomité

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Indholdsfortegnelse

1. Baggrund for udarbejdelse af notatet

Ved lov nr. 174 af 27. februar 2019 om ændring af udlændingeloven, integrationsloven, repatrieringsloven og forskellige andre love (Videre adgang til inddragelse af opholdstilladelser for flygtninge, loft over antallet af familiesammenføringer, skærpet straf for overtrædelse af indrejseforbud og overtrædelse af opholds-, underretnings- og meldepligt, ydelsesnedsættelse for forsørgere m.v.) blev udlændingelovens bestemmelser om nægtelse af forlængelse og inddragelse af opholdstilladelse ændret. Det gælder herefter, at opholdstilladelse til alle flygtninge alene meddeles med henblik på midlertidigt ophold, og at nægtelse af forlængelse/inddragelse af en opholdstilladelse til flygtninge og familiesammenførte til flygtninge alene skal undlades, hvis dette vil være i strid med Danmarks internationale forpligtelser.

Det fremgår af lovforslag nr. L 140, fremsat den 15. januar 2019, almindelige bemærkninger, afsnit 1, at:

"Aftalen på udlændingeområdet indeholder en ny tilgang til udlændinge- og integrationsområdet med fokus på midlertidighed og hjemsendelse, der sender et klart signal om, at flygtninges ophold i Danmark er midlertidigt, og at Danmark har både viljen og evne til at agere hurtigt og effektivt, når grundlaget for den enkeltes opholdstilladelse ikke længere er til stede. Med aftalen styrkes muligheden for at inddrage flygtninges og familiesammenførte til flygtninges opholdstilladelser og sende dem hjem, så snart det er muligt, markant."

Om den styrkede mulighed for at inddrage flygtninges og familiesammenførte til flygtninges opholdstilladelser anføres det videre, at:

"Der foreslås endvidere indsat en ny bestemmelse i udlændingeloven, hvorefter inddragelse af en opholdstilladelse til flygtningen og familiesammenførte til flygtninge alene skal undlades, hvis dette vil være i strid med Danmarks internationale forpligtelser.[…]

Formålet med ændringerne er at tydeliggøre, at opholdstilladelser til alle flygtninge fremover alene skal meddeles med henblik på midlertidigt ophold, og at gøre det klart, at udlændingemyndighederne fremover skal inddrage eller nægte af forlænge en opholdstilladelse, medmindre det vil være i strid med Danmarks internationale forpligtelser."

Det fremgår endvidere af lovforslag nr. L 140, almindelige bemærkninger, afsnit 2.3.2., at:

"For at udlændingemyndighederne også fremover skal inddrage eller nægte at forlænge en opholdstilladelse, medmindre det vil være i strid med Danmarks internationale forpligtelser, forudsættes det, at udlændingemyndighederne løbende følger med i praksis fra navnlig EMD og tilpasser sin praksis i overensstemmelse hermed.

Udlændingemyndighederne vil løbende følge udviklingen i retspraksis fra EMD og andre lignende internationale organer og forudsættes i den forbindelse at udarbejde et notat, der løbende holdes opdateret i overensstemmelse med ny praksis på området.

Udlændingemyndighederne forventes således at følge, udarbejde og løbende opdatere et dynamisk notat over relevant praksis til brug for behandling af sager om inddragelse efter den foreslåede bestemmelse i udlændingelovens § 19 a.

Notatet forudsættes offentliggjort på udlændingemyndighedernes hjemmeside."

Nærværende notat er udarbejdet i samarbejde mellem Udlændingenævnet, Flygtningenævnet og Udlændingestyrelsen og vil løbende blive opdateret med praksis fra Den Europæiske Menneskerettighedsdomstol (i det følgende benævnt EMD) og FN's komitéer.

2. Den Europæiske Menneskerettighedskonvention – introduktion og grundprincipper

Hverken FN's Flygtningekonvention eller Den Europæiske Menneskerettighedskonvention (i det følgende EMRK) forpligter positivt staterne til at give ikke-statsborgere ret til at etablere sig på statens territorium. Begge konventioner begrænser imidlertid i væsentligt omfang staternes adgang til at nægte at forlænge, eller inddrage en allerede meddelt opholdstilladelse.

2.1. EMRKs ikrafttræden, statens forpligtelser og klageadgang

EMRK blev underskrevet i Rom den 4. november 1950 af 12 europæiske lande, heriblandt Danmark. EMRK trådte i kraft den 3. september 1953. I Danmark er EMRK gennemført i dansk lovgivning ved lov nr. 285 af 29. april 1992 om Den Europæiske Menneskerettighedskonvention. Loven er senere blevet ændret. Den gældende lovtekst findes i *lovbekendtgørelse nr. 750 af 19. oktober 1998*.

De stater, der har underskrevet EMRK, har forpligtet sig til at respektere visse grundlæggende menneskerettigheder over for enhver person, og EMRK giver mulighed for, at man som person eller organisation kan klage over staten til EMD i Strasbourg, hvis man er af den opfattelse, at offentlige myndigheder har krænket beskyttede rettigheder eller ikke har sikret beskyttede rettigheder.

Før den 28. november 1998, hvor den tidligere 11. tillægsprotokol trådte i kraft, blev klagerne først behandlet af Menneskerettighedskommissionen, der tog stilling til, om klagen skulle tillades adgang for EMD (admitteres). Hvis Kommissionen vurderede, at klagen skulle tillades adgang til EMD, blev der først udarbejdet en rapport, hvorefter sagen kunne overgå til behandling i EMD. Den tidligere domstol og kommission er nu afløst af én domstol, der behandler klagerne fra de modtages til de afsluttes.

EMRK indeholder to klagemuligheder. For det første kan en deltagerstat klage til EMD, hvis den finder, at en anden deltagerstat overtræder EMRK (mellemstatslige klager). Den anden og mere benyttede klageadgang består i, at enkeltpersoner eller ikke-statslige organisationer eller grupper af enkeltpersoner kan klage direkte til EMD over en deltagerstat, hvis det menes, at staten har overtrådt grundlæggende menneskerettigheder (den individuelle klageadgang).

2.2. Klagebetingelser – den individuelle klageadgang

For at EMD kan behandle en klage indgivet af en privatperson eller en organisation, skal en række betingelser af såvel processuel som materiel art være opfyldt. Nedenfor følger en kort beskrivelse af de mest grundlæggende betingelser.

2.2.1. Klageren skal være offer for en krænkelse

Det fremgår af EMRK artikel 34, at EMD kan modtage klager fra personer, ikke-statslige organisationer eller grupper af enkeltpersoner, der hævder at være blevet krænket i de rettigheder, der er anerkendt ved denne

konvention eller de dertil knyttede protokoller. Som udgangspunkt er det derfor ikke muligt at klage over lovgivning eller myndighedernes praksis, hvis man ikke direkte berøres heraf. Man berøres imidlertid direkte, hvis man for eksempel dømmes i en straffesag eller udvises af udlændingemyndighederne i strid med EMRK. I så fald opfylder man betingelsen om at være offer.

EMD har fastslået, at en person, der har fået nægtet forlænget eller inddraget sit opholdsgrundlag af en medlemsstat, opfylder betingelsen om at være offer.

2.2.2. Staten skal være overtræder af EMRK

EMD kan kun behandle klager over staters overtrædelser af EMRK og tillægsprotokollerne. EMD behandler derfor kun klager over handlinger eller undladelser, som staten er ansvarlig for. Staten er ansvarlig for alle offentlige myndigheders handlinger, herunder domstole, politiet og udlændingemyndigheder. Dette følger af EMRK artikel 34, hvoraf det fremgår, at der kan indbringes klager over de kontraherende parter i EMRK. De kontraherende parter er, jf. artikel 1, de stater, som har tiltrådt EMRK.

EMD kan ikke behandle klager over privatpersoner, organisationer eller foreninger. I visse situationer kan EMD dog behandle klagen, selvom det er en privatpersons handlinger, der er den direkte årsag til klagen. Efter EMRK har staten nemlig en vis pligt til at gribe ind over for private virksomheder eller personers behandling af andre mennesker.

2.2.3. Alle nationale retsmidler skal være udtømt

I henhold til artikel 35 i EMRK kan EMD kun behandle en sag, når alle nationale retsmidler er udtømt. Det betyder, at klageren skal have udnyttet alle muligheder for at få sagen behandlet af de nationale myndigheder. Herved sikres, at staten har haft mulighed for selv at rette op på eventuelle overtrædelser af menneskerettighederne, inden EMD behandler sagen.

Ønsker man at klage over en beslutning om nægtelse af forlængelse eller inddragelse af en opholdstilladelse, bortfald af en opholdstilladelse eller afslag på en ansøgning om opholdstilladelse, skal man således afvente udfaldet af sagens endelige afgørelse i Flygtningenævnet eller – såfremt der er tale om en afgørelse fra Udlændingestyrelsen, der er stadfæstet af Udlændingenævnet – udfaldet af sagen ved de nationale domstole, inden man klager til EMD.

2.2.4. Klagen skal være indgivet senest 4 måneder efter, at alle nationale retsmidler er udtømt

I henhold til artikel 35, stk. 1, i EMRK kan EMD kun behandle en sag, såfremt denne er anlagt senest 4 måneder efter, at de nationale retsmidler er udtømt. Er tidsfristen overskredet, skal EMD som udgangspunkt afvise at behandle klagen.

2.2.5. Klagen må ikke være åbenbart grundløs

EMD behandler ikke en klage, hvis klagen findes åbenbart grundløs, jf. EMRK artikel 35, stk. 3, litra a. En klage er åbenbart grundløs, hvis der ikke er oplysninger i klagen, som tyder på, at EMRK er blevet overtrådt. Langt de fleste klager afvises som åbenbart grundløse.

2.2.6. Klagen må ikke være anonym

EMD behandler ikke anonyme klager. Dette følger af EMRK artikel 35, stk. 2, litra a.

2.2.7. Klagen må ikke have været behandlet ved internationale klageorganer tidligere

Det følger af EMRK artikel 35, stk. 2, litra b, at EMD ikke behandler en sag, hvis sagens indhold i det væsentligste er identisk med en anden sag, som tidligere har været behandlet af EMD eller andre internationale organer eller komitéer, såfremt den nye sag ikke indeholder nye relevante oplysninger.

Der kan henvises til følgende sag:

- M.J. v. AZERBAIJAN (2024)

2.3. Virkningen af indgivelsen af en klage/afsigelsen af en dom

EMD er ikke en appelinstans for nationale afgørelser og kan ikke tilsidesætte eller ændre afgørelser, som er truffet af de nationale myndigheder. En klage til EMD har derfor heller ikke opsættende virkning.

Klageren kan dog anmode EMD om at rette henvendelse til staten og anbefale, at de nationale myndigheder for eksempel undlader at effektuere en afgørelse, indtil EMD har afsagt en dom i klagesagen. I praksis følger staterne som hovedregel sådanne henstillinger. Dette var dog ikke tilfældet i sagen *Mamatkulov og Askarov mod Tyrkiet (2005)*, hvor Tyrkiet udleverede klagerne til Usbekistan, selvom EMD i medfør af procesreglementets regel 39 om foreløbige foranstaltninger (interim measures) havde anmodet de tyrkiske myndigheder om at udsætte udleveringen indtil videre. EMD udtalte (præmis 128-129):

"128. The Court reiterates that by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34 of the Convention.

129. Having regard to the material before it, the Court concludes that, by failing to comply with the interim measures indicated under Rule 39 of the Rules of Court, Turkey is in breach of its obligations under Article 34 of the Convention."

Hvis EMD dømmer staten for at have overtrådt EMRK, har staten pligt til at rette op på krænkelsen. Det er op til staten at bestemme, hvordan den kan leve op til EMRKs krav efter at være blevet dømt af EMD. En beslutning om at udsende en person fra landet kan for eksempel ændres af de nationale myndigheder, så personen i stedet får en opholdstilladelse.

Når EMD har dømt staten for en overtrædelse af EMRK, overvåger Europarådets Ministerkomité, om staten følger dommen. Staten er endvidere forpligtet til at underrette Ministerkomitéen om, hvilke tiltag den har iværksat for at efterleve dommen indenfor en fastsat frist.

2.4. EMDs anvendelse af foreløbige foranstaltninger, jf. EMD's procesreglement regel 39

Det følger af regel 39 i EMD's procesreglement, at det kammer, der behandler en klage, efter anmodning kan komme med tilkendegivelser om foreløbige foranstaltninger, hvis EMD vurderer, at sådanne bør træffes af hensyn til parterne eller en hensigtsmæssig behandling af klagesagen. Procesreglementet angiver ikke

nærmere, hvornår hensynet til parternes interesse eller behandlingen af klagesagen taler for, at EMD kommer med tilkendegivelser om foreløbige foranstaltninger.

I praksis opstår spørgsmålet om foreløbige foranstaltninger navnlig i sager om udvisning, udsendelse eller udlevering af udlændinge, og anmodninger om anvendelsen af regel 39 vedrører som oftest sager om retten til liv, retten til ikke at blive udsat for tortur eller umenneskelig behandling og ses kun undtagelsesvis benyttet i sager om retten til respekt for privat- og familieliv (EMRK artikel 2, 3 samt 8).

EMD har i sager, hvor det er blevet gjort gældende, at der er en risiko for uoprettelig skade, hvad angår klagerens adgang til at nyde beskyttelse efter en af EMRKs kernebestemmelser, udtalt, at formålet med foreløbige foranstaltninger er at opretholde status quo, indtil EMD har taget stilling til foranstaltningens berettigelse. Foreløbige foranstaltninger skal således sikre den fortsatte tilstedeværelse af den genstand, der er emne for anmodningen, således at der ikke sker uoprettelig skade. Foreløbige foranstaltninger sikrer således en reel og effektiv klageadgang efter artikel 34 ved at sikre sagens genstand. EMD har videre udtalt, at foreløbige foranstaltninger tjener det formål at undgå situationer, som ville forhindre EMD i at undersøge sagen korrekt, og at sikre klageren den praktiske og effektive udnyttelse af de påberåbte konventionsrettigheder. Tilkendegivelser om foreløbige foranstaltninger tjener således ikke kun til, at der kan gennemføres en effektiv undersøgelse af klagen, men også til at sikre, at EMRKs beskyttelse af klageren er effektiv. (se *Mamatkulov og Askarov mod Tyrkiet (2005)*, præmis 108 og 125, og *Aoulmi mod Frankrig (2006)*, præmis 103 og 107-108).

EMD's anvendelse af regel 39 har således karakter af et foreløbigt processuelt retsmiddel. Der er med anvendelse af bestemmelsen ikke taget stilling til, om der i den konkrete sag foreligger en krænkelse af EMRK. Fra EMD's praksis vedrørende EMRK artikel 8 er der således flere eksempler på anvendelse af regel 39 i sager vedrørende udenlandske statsborgere, hvor EMD efterfølgende har udtalt, at en fjernelse af opholdsgrundlaget ikke ville udgøre en krænkelse af EMRK. Som eksempler på anvendelse af midlertidige foranstaltninger kan nævnes:

Amrollahi v. Denmark (2002), præmis 5, hvor EMD anvendte regel 39 i en situation, hvor EMD vurderede, at det var i parternes interesse, at pågældendes udvisning ikke blev effektueret, ligesom det skønnedes nødvendigt for at sikre en fortsat effektiv behandling af sagen ved EMD.

Klageren var af byretten blevet idømt fængselsstraf for narkokriminalitet og var blevet udvist for bestandig fra Danmark. Klageren havde fire år forinden indledt et forhold med en dansk statsborger, som han blev gift med året efter udvisningsdommen, og parret fik to børn sammen, som på tidspunktet for EMD's behandling af sagen var henholdsvis et og seks år gamle.

EMD anvendte i dette tilfælde regel 39 efter de nationale myndigheders afgørelse for at sikre, at klagerens udvisning ikke ville resultere i en adskillelse af klageren fra hans ægtefælle og børn, inden EMD havde vurderet, om der var tale om en krænkelse af artikel 8 (retten til familieliv).

"5. The Court decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to expel the applicant pending the Court's decision."

2.5. Det relevante tidspunkt for EMD's vurdering

Da der forløber nogen tid fra afsigelsen af den endelige nationale afgørelse og indtil EMD's behandling af sagen, vil der i den mellemliggende periode kunne være indtrådt ændringer i klagerens personlige forhold. I en række domme vedrørende udvisning af kriminelle udlændinge har EMD forholdt sig til spørgsmålet om, hvorvidt vurderingen af, om klageren havde et privat- og familieliv i artikel 8's forstand, skulle ske på baggrund af klagerens situation på tidspunktet for den endelige nationale afgørelse om udvisning og effektueringen heraf, eller om der skulle tages hensyn til omstændigheder indtruffet i klagerens liv efter dette tidspunkt.

I sagen *Bouchelkia v. France (1997)* udtalte EMD sig i præmis 38, 39 samt 41, om det relevante tidspunkt for vurderingen af klagerens privat- og familieliv i tilfælde af, at klagerens udvisning var blevet effektueret.

"38. As before the Commission, it was not contested by the Government that there had been an interference in the applicant's private and family life considered as a whole. Nevertheless, they argued before the Court that at the time the deportation order was executed, Mr Bouchelkia, a young single adult with no children, did not have a family life within the meaning of the Convention and only developed one after his illegal return to France. His companion, who had become his wife in March 1996, must have been aware that he was in France unlawfully; the applicant was not entitled now to rely on a situation created in disregard of the law. At the material time, the interference in the applicant's private life was therefore minor, regard being had to the circumstances justifying it.

39. Mr Bouchelkia argued that when considering his family life account had to be taken of his close relatives as well as of the family he had established with his wife. He had arrived in France at the age of 2 and, until his imprisonment, had lived with his mother, stepfather, four brothers and sisters and five stepbrothers and stepsisters born of his mother's remarriage. His relationship with his mother had remained particularly close even during his imprisonment and forced stay in Algeria. With the exception of his elder brother, all his brothers and sisters had French nationality. He had returned to France illegally with the sole objective of being reunited with the woman who had been his companion since 1986, with whom he had had a child in 1993 and whom he had married in 1996. His family life had been established unlawfully - but openly and with the knowledge of the authorities. In the applicant's submission, respect for private and family life had to extend also to his wife and daughter, both of whom had French nationality and could not follow him to Algeria because of the current situation in that country.

[…]

41. The Court notes that the deportation order was made on 11 June 1990 and executed on 9 July 1990. It is with regard to the position at that time that the question whether the applicant had a private and family life within the meaning of Article 8 of the Convention (art. 8) falls to be considered. Mr Bouchelkia was at that point single and had no children. He only started his own family after the deportation order was made, thereby consolidating his family ties in France. At the time, he was still living with his original family and, since the age of 2, had lived in France where he had his main private and family ties. Like the Commission, the Court considers that the applicant's deportation in 1990 amounted to an interference with his right to respect for his private and family life."

EMD fandt i den konkrete sag, at der ikke var sket en krænkelse af EMRK artikel 8, og udtalte i præmis 52, at:

"The authorities could legitimately consider that the applicant's deportation was, at that time, necessary for the prevention of disorder or crime. The fact that, after the deportation order was made and while he was an illegal immigrant, he built up a new family life does not justify finding, a posteriori, that the deportation order made and executed in 1990 was not necessary."

I sagen *Kaya v. Germany (2007)* blev de nationale myndigheders afgørelse om udvisning af klageren på baggrund af kriminalitet endelig i marts 2001, hvorefter klageren blev udsendt i april 2001. Klageren giftede sig i 2002 i sit hjemland med en kvinde, som havde opholdstilladelse i det samme land, som klageren var blevet udvist fra. I 2003 fik parret et barn sammen, mens klageren stadig boede i sit hjemland.

EMD behandlede sagen i 2007, og udtalte i præmis 57, at:

"The question whether the applicant also enjoyed family life within the meaning of Article 8 has to be determined with regard to the position at the time the exclusion order became final. The question as to when the expulsion order became final has to be determined by applying the domestic law. According to the domestic law, the complaint to the Federal Constitutional Court is devised as an extraordinary remedy which does not prevent the contested decision from becoming final. It follows that the expulsion order became final on 7 March 2001 when the Baden-Württemberg Administrative Court of Appeal refused to grant the applicant leave to appeal. The Court's task is thus to state whether or not the domestic authorities had complied with their obligation to respect the applicant's private and family life at that particular moment, leaving aside circumstances which only came into being after the authorities took their decision. At that time, the applicant had not yet founded a family of his own, as he married in May 2002 and his child was born subsequently."

Om klagerens stiftelse af familieliv, efter hans udvisning var blevet endelig i marts 2001, udtalte EMD i præmis 67, at:

"As the Court has to determine the proportionality of the domestic decisions in the light of the position when the expulsion order became final in March 2001 (see, mutatis mutandis, El Boujaïdi, cited above, § 33, and the further references in paragraph 57, above), the applicant cannot plead his relationship with his German wife, whom he married only after deportation to Turkey, and to their subsequently born child."

EMD udtalte endvidere i præmis 70, at:

"The Court appreciates that the expulsion order imposed on the applicant had a serious impact on his private life and on the relationship with his parents. However, having regard to all circumstances of the case, and in particular to the seriousness of the applicant's offences, which cannot be trivialised as mere examples of juvenile delinquency, the Court does not consider that the respondent State assigned too much weight to its own interest when it decided to impose that measure."

EMD fandt i den konkrete sag, at der ikke var sket en krænkelse af artikel 8.

Tilsvarende udtalte EMD i sagen *Maslov v. Austria (2008)* i præmis 61:

"It reiterates that the question whether the applicant had a family life within the meaning of Article 8 must be determined in the light of the position when the exclusion order became final."

I *Maslov-sagen* blev de nationale myndigheders afgørelse om udvisning på baggrund af kriminalitet endelig i november 2002. Klageren blev derefter udsendt i december 2003. EMD behandlede sagen i 2008.

EMD udtalte i præmis 62, at:

"The applicant was a minor when the exclusion order was imposed. He had reached the age of majority, namely 18 years, when the exclusion order became final in November 2002 following the Constitutional Court's decision, but he was still living with his parents. In any case, the Court has accepted in a number of cases concerning young adults who had not yet founded a family of their own that their relationship with their parents and other close family members also constituted 'family life' (see Bouchelkia v. France, 29 January 1997*, § 41, Reports 1997-I;* El Boujaïdi*, cited above, § 33; and Ezzouhdi, cited above, § 26)."*

EMD fandt i den konkrete sag, at der var sket en krænkelse af artikel 8, og udtalte i præmis 100, at:

"Having regard to the foregoing considerations, in particular the – with one exception – non-violent nature of the offences committed when a minor and the State's duty to facilitate his reintegration into society, the length of the applicant's lawful residence in Austria, his family, social and linguistic ties with Austria and the lack of proven ties with his country of origin, the Court finds that the imposition of an exclusion order, even of a limited duration, was disproportionate to the legitimate aim pursued, 'the prevention of disorder or crime'. It was therefore not 'necessary in a democratic society'."

EMD har i en senere sag fraveget den ovennævnte praksis, hvor vurderingen af klagerens personlige forhold skal foretages ud fra, hvorledes de var på tidspunktet, hvor den nationale afgørelse blev endelig. I denne sag var klagerens udvisning endelig på tidspunktet for EMD´s behandling af sagen, men endnu ikke effektuereret:

I sagen *A.A. v. the United Kingdom (2011)* var klagerens udvisning ikke blevet effektueret, modsat sagerne *Kaya v. Germany (2007)* og *Maslov v. Austria (2008)*. EMD udtalte i præmis 67:

"[…] The Court recalls that according to its established case-law under Article 3 of the Convention, the existence of a risk faced by an applicant in the country to which he is to be expelled is assessed by reference to the facts which were known or ought to have been known at the time of the expulsion; in cases where the applicant has not yet been deported, the risk is assessed at the time of the proceedings before the Court. The Court sees no reason to take a different approach to the assessment of the proportionality of a deportation under Article 8 of the Convention and points out in this regard that its task is to assess the compatibility with the Convention of the applicant's actual expulsion and not of the final expulsion order. […].

Any other approach would render the protection of the Convention theoretical and illusory by allowing Contracting States to expel applicants months, even years, after a final order had been made notwithstanding the fact that such expulsion would be disproportionate having regard to subsequent developments. […]"

2.6. EMRKs eksterritoriale virkning

I henhold til EMRKs artikel 1 er deltagerstaterne forpligtet til at sikre enhver person under deres jurisdiktion de rettigheder og friheder, som er indeholdt i EMRK.

Staternes forpligtelse består således uanset personens nationalitet, så længe denne person er under medlemsstatens jurisdiktion.

En medlemsstat ifalder som udgangspunkt ikke ansvar for krænkelser af EMRK, såfremt disse krænkelser er begået af enten andre medlemsstater eller tredjelande.

EMD har dog i sin praksis fastlagt, at

- En medlemsstat kan blive holdt indirekte ansvarlig for krænkelser begået af andre medlemslande eller tredjelande på medlemsstatens område, hvis disse krænkelser er foregået med den pågældende medlemsstats viden og accept, og ligeledes hvis der er ydet bistand til disse handlinger.
- En medlemsstat kan blive holdt indirekte ansvarlig for krænkelser af EMRKs bestemmelser, såfremt medlemsstaten udsætter en person for en reel risiko for at dennes rettigheder bliver krænket i et land udenfor statens jurisdiktion. Dette er navnlig relevant i forhold til EMRKs artikel 2, 3, 5 og 6.

Der kan for en nærmere gennemgang henvises til Jon Fridrik Kjølbro i *"Den Europæiske Menneskerettighedskonvention for praktikere" (2017)*, side 47ff.

2.7. EMD's fortolkningsprincipper

EMD har ved flere lejligheder gjort klart, at EMRK som international traktat adskiller sig fra andre internationale traktater, idet andre internationale traktater har karakter af kontrakter mellem staterne og ikke på samme måde som EMRK er indgået for at beskytte individuelle rettigheder. I sagen *Soering mod UK (1989)* udtalte EMD i præmis 87 følgende:

"In interpreting the Convention, regards must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms […]. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective […]."

Netop princippet om EMRK's effektivitet og praktiske brugbarhed har ofte fået EMD til at anlægge en progressiv og aktiv fortolkning. Fokus har i mindre grad været på formalia og processuelle regler og i højere grad på, hvilke friheder og forhold den konkrete bestemmelse i EMRK har til hensigt at beskytte.

De standarder for menneskerettighedsbeskyttelsen, der er indeholdt i EMRK, er ikke statiske, men afspejler ændringerne i deltagerstaternes samfund. EMD benytter således en dynamisk fortolkningsstil, og den lader sig inspirere af samtiden og ikke datidens samfundsopfattelse. I sagen *Tyrer mod UK (1978)*, hvor EMD skulle vurdere, hvorvidt fysisk afstraffelse af ungdomskriminelle udgjorde nedværdigende behandling i henhold til artikel 3, udtalte EMD bl.a., følgende:

"the Convention is a living instrument which […] must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the development and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field."

I adskillige af EMRKs bestemmelser forbeholdes deltagerstaterne en ret til at gøre indgreb i den beskyttede rettighed eller frihed, hvis et sådant indgreb er nødvendigt bl.a. for at beskytte andres rettigheder eller den offentlige orden, herunder den nationale sikkerhed. Når EMD behandler en sag omhandlende en af disse

bestemmelser, skal EMD søge at belyse, hvorvidt der i de nationale myndigheders afgørelse er fundet en passende balance mellem samfundets legitime behov for at regulere individers adfærd og pågældende individs ret til at nyde den pågældende rettighed eller frihed. Denne afvejning kaldes en proportionalitetsafvejning.

Finder EMD, at de nationale myndigheder ikke har foretaget en sådan korrekt proportionalitetsafvejning, vil der foreligge en krænkelse af den relevante artikel i EMRK.

Der henvises i øvrigt til afsnit 3.3.3.

Har medlemsstaterne på den anden side foretaget en indgående prøvelse af sagen og i afvejningen inddraget og vurderet alle relevante hensyn, er EMD i overensstemmelse med subsidiaritetsprincippet tilbageholdende med at foretage sin egen prøvelse. EMD indrømmer medlemsstaterne en såkaldt skønsmargin (margin of appreciation) i den praktiske anvendelse af EMRKs bestemmelser og i proportionalitetsafvejningen, når den pågældende medlemsstat i afvejningen har inddraget og vurderet alle relevante hensyn. Det indebærer, at EMD ikke foretager en tilbundsgående prøvelse af den af medlemsstaten foretagne afvejning i den enkelte sag.

Omfanget af skønsmarginen i den enkelte sag afgøres på baggrund af en vurdering af karakteren af indgrebet og den rettighed, der foretages indgreb i. Således vil medlemsstaterne typisk indrømmes en videre skønsmargin i sager, hvor indgrebet er begrundet i moralske vurderinger og politiske prioriteringer i det pågældende land og en snævrere skønsmargin i sager, hvor indgrebet påvirker grundlæggende aspekter af individets liv.

I sagen *Abdulaziz, Cabales and Balkandali v. the United Kingdom (1985)*, udtalte EMD i præmis 67:

"The Court recalls that, although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life (see the above-mentioned Marckx judgment, Series A no. 31, p. 15, para. 31). However, especially as far as those positive obligations are concerned, the notion of "respect" is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (see, amongst other authorities, mutatis mutandis, the above-mentioned 'Belgian Linguistic' judgment, Series A no. 6, p. 32, para. 5; the National Union of Belgian Police judgment of 27 October 1975, Series A no. 19, p. 18, para. 39; the above-mentioned Marckx judgment, Series A no. 31, p. 15, para. 31; and the Rasmussen judgment of 28 November 1984, Series A no. 87, p. 15, para. 40). In particular, in the area now under consideration, the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved. Moreover, the Court cannot ignore that the present case is concerned not only with family life but also with immigration and 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."

Enkelte af EMRKs rettigheder, herunder artikel 3, er imidlertid af så fundamental karakter, at de ikke undergives en proportionalitetstest, og staterne ikke indrømmes nogen skønsmargin.

Der henvises i øvrigt til afsnit 3.3.3.4.

3. EMRK artikel 8 – retten til individets privatliv og familieliv

Ordlyden i EMRK's artikel 8 er som følger:

Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and 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 and morals, or for the protection of the rights and freedoms of others.

Den danske ordlyd er som følger:

Artikel 8

Ret til respekt for privatliv og familieliv

1. Enhver har ret til respekt for sit privatliv og familieliv, sit hjem og sin korrespondance.
2. Ingen offentlig myndighed må gøre indgreb i udøvelsen af denne ret, medmindre det sker i overensstemmelse med loven og er nødvendigt i et demokratisk samfund af hensyn til den nationale sikkerhed, den offentlige tryghed eller landets økonomiske velfærd, for at forebygge uro eller forbrydelse, for at beskytte sundheden eller sædeligheden eller for at beskytte andres rettigheder og friheder.

Udgangspunktet er således, at staten ikke må foretage indgreb i individets ret til at udøve sit privat- eller familieliv, jf. artikel 8, stk. 1.

Artikel 8 er imidlertid ikke en absolut rettighed, og i stk. 2 oplistes de betingelser, der skal være opfyldt, for at staten kan foretage et indgreb i retten:

- Indgrebet skal være hjemlet i den nationale lovgivning,
- Indgrebet skal varetage et eller flere af de i stk. 2 nævnte formål, og
- Indgrebet skal være nødvendigt i et demokratisk samfund for at opnå det eller de pågældende formål.

Undtagelsesbestemmelserne behandles nærmere under punkt 2.3.

Der henvises endvidere til følgende litteratur:

- Jon Fridrik Kjølbro: "Den Europæiske Menneskerettighedskonvention – for praktikere", 4. udgave, 2017
- Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence, udgivet af Den Europæiske Menneskerettighedsdomstol på

Europarådets hjemmeside www.coe.int som del af serien "Guides on the Convention", senest opdateret den 31. august 2019 (i det følgende "Guiden")

- Protecting the right to respect for private and family life under the European Convention on Human Rights af Ivana Roagna, udgivet af Europarådet på Europarådets hjemmeside www.coe.int under Council of Europe human rights handbooks i 2012 (i det følgende "Handbook")

3.1. Anvendelsesområdet

For at EMRK artikel 8 kan finde anvendelse, opstilles følgende krav:

- Forholdet skal falde under anvendelsesområdet for artikel 8
- Der skal være en forbindelse mellem statens handling (eller undladelse af handling) og den rettighed, som klageren anser for krænket.

Er et af de to ovenstående forhold ikke opfyldt, falder handlingen (eller undladelsen) udenfor artikel 8's anvendelsesområde, og der foreligger ikke en krænkelse af bestemmelsen.

Anvendelsesområdet for artikel 8 er defineret bredt. Grundlæggende beskytter artikel 8, stk. 1, retten til *privatliv, familieliv, hjem og korrespondance*.

I *"Guiden"*, afsnit II A 1, nævnes afgørelserne *Botta v. Italy (1998)* og *Gillberg v. Sweden (2012)* som eksempler på forhold, der ikke falder under artikel 8's anvendelsesområde.

I sagen *Botta v. Italy (1998)* blev Italien indklaget for EMD, idet klageren hævdede, at Italien var ansvarlig for, at en række ejere af private badehoteller ikke havde efterlevet et lovkrav om, at der skulle installeres handikapvenlige bade- og toiletfaciliteter, ligesom der skulle anlægges ramper, således at handikappede kunne få adgang til badestrandene. Klageren, som selv var handikappet, anførte for EMD, at manglende handikapfaciliteter krænkede hans ret til respekt for hans privatliv.

EMD udtalte i præmis 35:

"[…] the Court held, that the right asserted concerned interpersonal relations of such broad and indeterminate scope that there could be no conceivable direct link between the measures the State was being urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life."

I *Gillberg v. Sweden (2012)* var klageren forsker på et statsligt universitet. Han blev fundet skyldig i at have destruereret dokumenter, som han var blevet pålagt at udlevere til tredjepart, og som indeholdt oplysninger om et projekt, han arbejdede på. Han anførte, at dommen havde krænket hans privatliv, idet hans ære og omdømme var blevet skadet. Han anførte endvidere, at dommen havde skadet hans moralske og psykiske integritet, og at han havde haft et økonomisk tab, da han var blevet fyret på grund af dommen.

EMD udtalte i præmis 73:

"Furthermore, even if the applicant's allegation that he was dismissed by the Norwegian Institute of Public Health is an established fact, the Court notes that the applicant failed to show that there was any causal link between the conviction and the dismissal."

Modsat de to første sager sås det i sagen *Jankauskas v. Lithuania (no. 2) (2017)* i præmis 69-70, at forholdet faldt under anvendelsesområdet af artikel 8. Der var i denne sag tale om en person, som på grund af en tidligere dom for kriminalitet ikke kunne opnå autorisation som advokat. EMD udtalte i denne forbindelse:

"69. […] the decision to dismiss the applicant from the list of trainee advocates had an impact on his professional activities and thus on his private life […]

70. […] the Court will proceed on the assumption that the applicant's dismissal as a trainee advocate constituted an interference with his right to respect for his private life."

3.2. Udgangspunktet – indholdet i EMRK artikel 8, stk. 1

Forbuddet mod indgreb i artikel 8, stk. 1, aktiveres først, når det er påvist, at forholdet er omfattet af en eller flere af følgende anvendelsesområder:

- Respekt for klagers privatliv
- Respekt for klagers familieliv
- Respekt for klagers hjem
- Respekt for klagers korrespondance

Sager vedrørende udlændinges ophold i Danmark vil kunne rejse spørgsmål om indgreb i retten til respekt for privat- og/eller familieliv. Spørgsmål om indgreb i retten til respekt for hjem og korrespondance vil ikke blive behandlet i nærværende notat.

For så vidt angår medlemsstaternes forpligtelser i medfør af EMRK artikel 8 til at tillade en udlænding ophold i medlemsstaten på baggrund af den pågældendes privat- og/eller familieliv, har EMD blandt andet i præmis 100 i sagen *Jeunesse v. the Netherlands (2014)* udtalt:

"The present case concerns essentially a refusal to allow the applicant to reside in the Netherlands on the basis of her family life in the Netherlands. It has not been disputed that there is family life within the meaning of Article 8 of the Convention between the applicant and her husband and their three children. As to the question of compliance with this provision, the Court reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. The Convention does not guarantee the right of a foreign national to enter or to reside in a particular country […]"

I samme sag udtalte EMD i præmis 107:

"Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country

of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion."

Uafhængigt af, om der i en sag findes at foreligge et familieliv som omfattet af artikel 8, stk. 1, kan en udlændings forhold i opholdsstaten udgøre et privatliv omfattet af bestemmelsen. I sagen *A.A. v. the United Kingdom (2011)* i præmis 49 udtalte EMD:

"An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having 'family life'. However, it is not necessary to decide the question given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of 'private life' within the meaning of Article 8. Thus, regardless of the existence or otherwise of a 'family life', the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on 'family life' rather than 'private life', it observes that in practice the factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged."

3.3. Undtagelsesbestemmelsen i EMRK artikel 8, stk. 2

EMRK artikel 8, stk. 1, kan alene fraviges, hvis betingelserne i artikel 8, stk. 2, er opfyldt:

- Indgrebet skal have hjemmel i lov (legalitetsprincippet)
- Indgrebet skal varetage et eller flere af de i bestemmelsen nævnte formål og
- Indgrebet skal være nødvendigt i et demokratisk samfund for at opnå det eller de pågældende formål

Da undtagelsesbestemmelsen giver medlemsstaten ret til at foretage et indgreb i en konventionsrettighed, skal bestemmelsen fortolkes indskrænkende, ligesom oplistningen af de hensyn, som kan begrunde et sådant indgreb, er udtømmende og skal fortolkes indskrænkende.

Af "Handbook", side 36, fremgår:

"Since the derogatory clause enables restrictions to the rights guaranteed by the Convention, its field of application must be strictly marked off. The Court, therefore, adopts a narrow approach: the exceptions form a closed list, whose interpretation must be rigorous."

Der henvises samme sted til EMD's praksis i sagen *Sidiropoulos and others v. Greece (*1998).

I præmis 37 anførte den indklagede stat:

"The Government submitted that the interference in question pursued several aims: the maintenance of national security, the prevention of disorder and the upholding of Greece's cultural traditions and historical and cultural symbols."

EMD udtalte i præmis 38, at:

"The Court is not persuaded that the last of those aims may constitute one of the legitimate aims set out in Article 11 § 2. Exceptions to freedom of association must be narrowly interpreted, such that the enumeration of them is strictly exhaustive and the definition of them necessarily restrictive."

Der kan for en nærmere gennemgang henvises til Jon Fridrik Kjølbro i *"Den Europæiske Menneskerettighedskonvention for praktikere" (2017)*, side 755-772.

Betingelserne, som skal være opfyldt, for at et indgreb ikke er en krænkelse af den beskyttede rettighed, gennemgås i det følgende.

3.3.1. Legalitetsprincippet (Det udvidede legalitetsprincip)

Det fremgår af bestemmelsen i EMRK artikel 8, stk. 2, at der foreligger en krænkelse, hvis indgrebet ikke har hjemmel i national lovgivning. EMD har dog fortolket hjemmelsbegrebet udvidende, således at det indeholder tre delelementer, som alle skal være opfyldt:

- Der skal være hjemmel i den nationale lovgivning
- Hjemlen skal være offentligt tilgængelig
- Hjemlen skal være skrevet på en måde, så det er muligt for individet at forudse sin retsstilling

Finder EMD, at et af kravene ikke er opfyldt, vil det medføre, at legalitetsprincippet ikke er opfyldt, og at der vil foreligge en krænkelse af bestemmelsen.

I sagen *Amann v. Switzerland (2000)* fandt EMD, at det konkrete indgreb ikke opfyldte kravet om at være legitimeret i national lovgivning.

I præmis 55 udtalte EMD:

"The Court reiterates that the phrase 'in accordance with the law' implies conditions which go beyond the existence of a legal basis in domestic law and requires that the legal basis be 'accessible' and 'foreseeable'."

Om kravet om mulighed for at kunne forudsige sin retsstilling udtalte EMD i præmis 56:

"According to the Court's established case-law, a rule is 'foreseeable' if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct."

EMD fremhævede i præmis 58, hvorfor legalitetsprincippet ikke var opfyldt i den konkrete sag:

"The Court points out first of all that Article 1 of the Federal Council's Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor's Office, according to which the federal police 'shall provide an investigation and information service in the interests of the Confederation's internal and external security', including by means of 'surveillance' measures, contains no indication as to the persons concerned by such measures, the circumstances in which they may be ordered, the means to be employed or the procedures to be observed. That rule cannot therefore be considered to be sufficiently clear and detailed to afford appropriate protection against interference by the authorities with the applicant's right to respect for his private life and correspondence."

3.3.2. De opregnede hensyn (legitime formål)

Det fremgår samtidig af bestemmelsen i artikel 8, stk. 2, at indgrebet skal være foretaget under hensyn til et legitimt formål, som kan henføres til:

- Den nationale sikkerhed
- Den offentlige tryghed
- Landets økonomiske velfærd
- Forebygge uro eller forbrydelse
- Beskytte sundheden eller sædeligheden
- Beskytte andres rettigheder og friheder

Det fremgår af Jon Fridrik Kjølbros bog *"Den Europæiske Menneskerettighedskonvention for praktikere" (2017)*, side 765, at ovenstående formål er en udtømmende opremsning. Nationalstaten kan således ikke påberåbe sig et hensyn, som ikke er oplistet i artikel 8, stk. 2. Et indgreb i en beskyttet rettighed, som ikke er begrundet i et af de ovenstående legitime formål, vil udgøre en krænkelse af EMRK.

Det fremgår videre af side 766, at hensynene skal fortolkes indskrænkende. Dog er disse hensyn så bredt formuleret, at de i praksis dækker de fleste tilfælde, hvor der kan være behov for et indgreb i individets rettigheder efter EMRK artikel 8.

Nedenfor er nævnt nogle eksempler fra EMD's praksis vedrørende anvendelsen af de forskellige legitime hensyn i sager vedrørende udsendelse[1] af udlændinge. Det bemærkes i den forbindelse, at EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse af udlændinge i vidt omfang vedrører sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

3.3.2.1. Forebygge forbrydelse

Medlemsstaterne har i sager vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udvisning af kriminelle udlændinge ofte henvist til, at indgrebet forfølger hensynet at forebygge uro eller forbrydelse. EMD har i flere af disse sager vurderet betydningen af den forløbne tid mellem dommen for den begåede kriminalitet og afgørelsen om inddragelse af opholdstilladelsen og har samtidig inddraget klagerens opførsel under sin afsoning og efter sin løsladelse til vurderingen af, hvorvidt der fortsat var grundlag for et indgreb af hensyn til forebyggelse af uro eller forbrydelse:

I sagen *Sezen v. the Netherlands* (2006) udtalte EMD i præmis 44:

[1] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

"At the time the first applicant was arrested, i.e. on 31 July 1992, he had been residing lawfully in the Netherlands for less than one and a half years, having been granted a residence permit in February 1991. Applying the 'sliding scale' principle, the authorities of the respondent State attached weight to this undeniably short duration of the first applicant's lawful stay in the Netherlands before he committed the offence. It is nevertheless to be noted that, following his conviction on 20 January 1993, it was not until more than four years later, namely on 5 June 1997, that the decision was taken to refuse the first applicant continued residence. Following his early release from prison in April 1995, the first applicant had thus been allowed to build up even closer ties with the Netherlands for a further two years. In addition, it appears that the first applicant has not re-offended and that he has been gainfully employed ever since his release from prison."

EMD fandt i den konkrete sag, at der var sket en krænkelse af artikel 8.

I sagen *Üner v. the Netherlands (2006)*, udtalte EMD derimod i præmis 66:

"Finally, the Court notes that the applicant also complained of the fact that after his conviction a period of three years elapsed before the authorities decided to withdraw his residence permit and impose an exclusion order. The Government have explained this delay with reference to domestic law and practice in this area. The Court considers that it does not have to take a stance on this issue, but notes that the applicant was still serving his sentence when the impugned measures were taken (contrast Sezen v. the Netherlands, no. 50252/99, §§ 44 and 48, 31 January 2006). *Moreover, in adopting the latter measures, the authorities addressed all relevant considerations militating for or against the denial of residence and use of an exclusion order."*

3.3.2.2. Forebygge uro

I nogle sager vedrørende udsendelse fra Letland af tidligere sovjetstatsborgere har EMD fundet, at indgrebet i klagernes ret til privat- og/eller familieliv var møntet på at sikre overholdelse af udlændingelovgivningen og derfor forfulgte et legitimt hensyn, nemlig hensynet til forebyggelse af uro. I alle de tre nedennævnte sager blev kammerets afgørelse henvist til Storkammeret, og i alle tre sager slettede Storkammeret sagen af sagslisten for så vidt angår artikel 8-spørgsmålet, da klagerne på tidspunktet for Storkammerets behandling havde fået legaliseret eller havde mulighed for at legalisere deres ophold i Letland og dermed ikke var i risiko for at blive udsendt. Storkammeret har således i ingen af de tre sager forholdt sig til artikel 8-vurderingen, herunder kammerets anvendelse af det legitime hensyn.

I sagen *Sisojeva a.o. v. Latvia (2007)*, traf Storkammeret i sin dom af 15. januar 2007 afgørelse om at slette klagen af sagslisten for så vidt angår artikel 8-spørgsmålet under henvisning til EMRK artikel 37, stk. 1, litra b, idet klagerne havde mulighed for at lovliggøre deres ophold i Letland og derfor ikke var i risiko for at blive udsendt.

Klagerne – et ægtepar og deres fælles barn – var sovjetiske statsborgere af russisk oprindelse. Den anden klager havde været udsendt til Letland som medlem af USSR's væbnede styrker og havde ligesom den første klager opholdt sig i landet, siden de var ca. 20 år gamle. Datteren var født i Letland, og familien var blevet i landet, efter at faren var færdig med at tjene i hæren. Efter opløsningen af USSR, blev klagerne statsløse. Klagerne søgte og opnåede at blive indføjet i registret over indbyggere i Letland. Efterfølgende blev der truffet afgørelse om at slette deres navne fra registret, idet klagerne havde opnået sovjetpas og ladet sig bo-

pælsregistrere i Rusland, og klagerne blev pålagt at betale en administrativ bøde for overtrædelse af pasreglerne. Klagerne – hvoraf faren og datteren i mellemtiden havde opnået russisk statsborgerskab – gjorde over for de lettiske myndigheder gældende, at de havde ret til permanent opholdstilladelse i henhold til den russisk-lettiske aftale og loven om ikke-statsborgere. The Senate of the Supreme Court fandt, at det forhold, at klagerne i hemmelighed havde fået udstedt pas og ladet sig bopælsregistrere i to forskellige lande samt havde undladt at vedlægge de andre pas og givet urigtige oplysninger til myndighederne i forbindelse med ansøgning om lovliggørelse af deres ophold, udgjorde en alvorlig krænkelse af den lettiske udlændingelovgivning. Klagernes ansøgning om opholdstilladelse blev i 2000 afvist, og klagerne blev bedt om at forlade landet. I 2003 sendte Direktoratet et brev til klagerne om proceduren for lovliggørelse af deres ophold i Letland. Endvidere beordrede Direktoratet, at den første klager blev indskrevet i registret over indbyggere som "statsløs" og udstyret med ID gyldig for to år, samt at de to andre klagere blev meddelt midlertidig opholdstilladelse gyldig for 1½ år. Lovliggørelse af de to andre klageres ophold var dog afhængigt af lovliggørelsen af den første klagers ophold. Ingen af klagerne efterkom anvisningen med henblik på at opnå opholdstilladelse. Klagerne gjorde gældende at have krav på permanent opholdstilladelse.

Under *sagen for kammeret* gjorde medlemsstaten vedrørende det legitime hensyn blandt andet gældende:

"78. Even assuming that the removal of the applicants' names from the register of residents had amounted to an interference with the exercise of their rights under Article 8 of the Convention, such interference was in line with the requirements of the second paragraph of that Article. The measure complained of had been 'in accordance with the law', and it had pursued a 'legitimate aim', namely the protection of public safety and public order. Equally, given that the second applicant had been a member of the Soviet armed forces – which had been hostile to Latvian independence and democracy – national security had also been a consideration."

I forhold til afvisningen af at meddele den første klager status som "permanent resident non-citizen" eller meddele de to andre klagere permanent opholdstilladelse, gjorde medlemsstaten videre gældende:

"84. Even assuming that there had been such interference, the Government took the view that, like the removal of the applicants from the register of residents, it had been compatible with Article 8 § 2 of the Convention. The alleged interference had been 'in accordance with the law', had pursued 'legitimate aims' (the protection of national security and public safety) and, in the absence of any appearance of arbitrary conduct, had been proportionate to those aims."

EMD udtalte i *kammerafgørelsen af 16. juni 2005* i præmis 106-110:

"106. With reference first of all to the 'lawfulness' of the measure for the purposes of Article 8 § 2 of the Convention, the Court agrees with the Government's assertion that the interference was 'in accordance with the law' (in this instance section 1 (1) of the Non-Citizens Act and section 35 of the former Aliens Act). Equally, in view of the fact that the measure was designed to ensure compliance with immigration laws, the Court accepts that it pursued a 'legitimate aim', namely 'to prevent disorder'.

107. As to whether the impugned measure was 'necessary in a democratic society', that is, proportionate to the legitimate aim pursued, the Court notes that the applicants have spent all, or almost all, of their lives in Latvia. Although they are not of Latvian origin, the fact remains that they have developed personal, social and economic ties strong enough for them to be regarded as sufficiently well integrated in Latvian society, even if, as the Government maintain, there are gaps in their knowledge of Latvian (see the Slivenko judgment

cited above, § 124). Similarly, although the second and third applicants have Russian nationality and had an officially registered residence in Russia, none of the three applicants appears to have developed personal ties in that country comparable to those they have established in Latvia (ibid., § 125).

108. In these circumstances the Court considers that, in terms of the conditions imposed on the applicants in order to have their position regularised, only reasons of a particularly serious nature could justify refusal. The Court has been unable to discern any such reasons in the instant case. While it recognises the right of each State to take effective steps to ensure compliance with its immigration laws, it considers that a measure of the kind imposed on the applicants could be considered to be proportionate only if the applicants had acted in a particularly dangerous manner. In that connection the Court reiterates that most of the similar cases it has examined under Article 8 of the Convention have related to situations in which the applicants had been deported after being convicted of serious criminal offences. In the instant case, however, the applicants received only a modest fine which was not classified as a criminal penalty under Latvian law (see paragraph 18 above).

109. The Court further notes that regularisation of the second and third applicants' status depends on that of the first applicant (see paragraphs 35 and 87-90 above). In other words, if the first applicant does not take advantage of the opportunity offered to her to regularise her stay, the situation of the other two applicants will remain unchanged. The Court considers that, in making the ability of these two applicants to lead a normal private life contingent on circumstances beyond their control, the domestic authorities who, admittedly, enjoy a margin of appreciation, have not taken the measures that could have been reasonably required of them.

110. Accordingly, taking all the circumstances into account, and in particular the long period of insecurity and legal uncertainty which the applicants have undergone in Latvia, the Court considers that the Latvian authorities exceeded the margin of appreciation enjoyed by the Contracting States in this sphere, and did not strike a fair balance between the legitimate aim of preventing disorder and the applicants' interest in having their rights under Article 8 protected. It is therefore unable to find that the interference complained of was 'necessary in a democratic society'."

I sagen *Shevanova v. Latvia (2006)*, hvor klageren havde afgivet urigtige oplysninger for at opnå opholdstilladelse, udtalte EMD i kammerafgørelsen:

"74. The Court further considers that the right of the State to control the entry and residence of non-nationals within its territory presupposes that it may take dissuasive measures against persons who have broken the law on immigration. Consequently, the decision to deport the applicant pursued at least one of the aims cited by the Government, namely that of preventing disorder."

I sagen *Kaftailova v. Latvia (2006)*, hvor klageren ikke havde foretaget gyldig bopælsregistrering, udtalte EMD i kammerafgørelsen:

"66. With regard first of all to the lawfulness of the interference, the Court acknowledges that it was 'in accordance with the law' (in this case sections 23(1), 35 and 38 of the former Aliens Act and the decision of the Supreme Council of 10 June 1992 on the arrangements for entry into force and application of that Act). Similarly, given the fact that the interference is or was designed to ensure compliance with the immigration laws, the Court accepts that it pursued a 'legitimate aim', namely the 'prevention of disorder'."

3.3.2.3. Landets økonomiske velfærd

Medlemsstaterne har i sager vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med afbrydelse af udlændinges mulighed for fortsat ophold i medlemsstaten henvist til, at indgrebet forfølger hensynet til landets økonomiske velfærd. I disse sager kan indgrebet have form af et afslag på at meddele opholdstilladelse (hvis klageren aldrig har haft eller på det relevante tidspunkt ikke har lovligt ophold) eller af en inddragelse af en tidligere meddelt opholdstilladelse (hvis klageren har opnået opholdstilladelsen ved svig eller de forudsætninger, som lå til grund for opholdstilladelsen, ikke længere er til stede). EMD har i flere af de sager, hvor klageren ikke har haft en opholdstilladelse eller har opnået opholdstilladelsen ved svig, henvist til, at immigrationskontrol og sikring af overholdelse af medlemsstatens immigrationslovgivning er legitime hensyn til varetagelse af landets økonomiske velfærd. I (de få) sager om inddragelse af opholdstilladelse af andre grunde end svig har hensynet til landets økonomiske velfærd været begrundet konkret i enten situationen i medlemsstaten på det omhandlede tidspunkt eller klagerens egne forhold.

I de nedenfor nævnte sager havde klageren opholdt sig i medlemsstaten uden opholdstilladelse og havde etableret familie- og/eller privatliv under disse omstændigheder:

I sagen *Rodrigues Da Silva and Hoogkamer v. the Netherlands (2006)* havde klageren aldrig haft lovligt ophold i opholdslandet.

EMD udtalte i præmis 43 og 44:

"43 […] The Court reiterates that persons who, without complying with the regulations in force, confront the authorities of a Contracting State with their presence in the country as a fait accompli do not, in general, have any entitlement to expect that a right of residence will be conferred upon them (see Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003). Nevertheless, the Court finds relevant that in the present case the Government indicated that lawful residence in the Netherlands would have been possible on the basis of the fact that the first applicant and Mr Hoogkamer had a lasting relationship between June 1994 and January 1997 (see paragraph 34 above). Although there is no doubt that a serious reproach may be made of the first applicant's cavalier attitude to Dutch immigration rules, this case should be distinguished from others in which the Court considered that the persons concerned could not at any time have reasonably expected to be able to continue family life in the host country (see, for example, Solomon, *cited above).*

44. 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. Indeed, by attaching such paramount importance to this latter element, the authorities may be considered to have indulged in excessive formalism."

I sagen *Konstatinov v. the Netherlands (2007)* havde klageren ligeledes aldrig haft lovligt ophold i opholdslandet.

EMD udtalte i præmis 50, 51 og 53:

"50. In principle, the Court does not consider unreasonable a requirement that an alien having achieved a settled status in a Contracting State and who seeks family reunion there must demonstrate that he/she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought. As to the question whether such a requirement was reasonable in the instant case, the Court considers that it has not been demonstrated that, between 1990 and 1998, Mr G. has in fact ever complied with the minimum income requirement or at least made any efforts to comply with this requirement whereas the applicant's claim that he is incapacitated for work has remained wholly unsubstantiated.

51. The Court further notes that, between 4 September 1992 and 8 November 2005, the applicant has amassed various convictions of criminal offences attracting a prison sentence of three years or more, thus rendering her immigration status in the Netherlands even more precarious as this entailed the risk of an exclusion order being imposed, which risk eventually materialised. On this point the Court reiterates that, where the admission of aliens is concerned, Contracting States are in principle entitled to expel an alien convicted of criminal offences (see Üner v. the Netherlands [GC], no. 46410/99, § 54, ECHR 2006-...).

[…]

53. The foregoing considerations are sufficient to enable the Court to conclude that it cannot be said that the Netherlands authorities have failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration and public expenditure and in the prevention of disorder or crime on the other. Consequently, there has been no violation of the applicant's right to respect for her rights guaranteed by Article 8 of the Convention."

I sagen *Nnyanzi v. the United Kingdom (2008)* var klagerens ansøgning om asyl blevet afvist, hvorefter opholdslandet gjorde tiltag med henblik på, at klageren skulle forlade landet.

Medlemsstaten gjorde i præmis 71 gældende, at:

"[…] Even assuming that the applicant had established private life in the United Kingdom and that it had been interfered with, such interference was in accordance with the law, pursued a legitimate aim, namely the maintenance and enforcement of immigration control, inter alia, for the preservation of the economic well-being of the country, the protection of health and morals and the protection of the rights and freedoms of others and was proportionate in the circumstances."

I præmis 76 udtalte EMD, at:

"The Court does not consider it necessary to determine whether the applicant's accountancy studies, involvement with her church and friendship of unspecified duration with a man during her stay of almost ten years in the United Kingdom constitute private life within the meaning of Article 8 § 1 of the Convention. Even assuming this to be the case, it finds that her proposed removal to Uganda is "in accordance with the law" and is motivated by a legitimate aim, namely the maintenance and enforcement of immigration control. […]"

Sagen *Nacic and others v. Sweden (2012)* omhandler en familie, som indrejste sammen og søgte om asyl. Familien bestod af to forældre og deres to sønner. Den ældste søn blev meddelt opholdstilladelse på baggrund af hans helbred, mens de tre andre personer fik afslag på asyl. Sønnen, som fik opholdstilladelse, var på dette tidspunkt fyldt 18 år.

EMD udtalte i præmis 79, at*:*

"[…]The Court further accepts that the legitimate aim pursued was to ensure an effective implementation of immigration control and hence to preserve the economic well-being of Sweden, within the meaning of paragraph 2 of Article 8."

I sagen *Jeunesse v. the Netherlands (2014)* var klageren indrejst i opholdslandet på et visum fra en tidligere hollandsk koloni og havde giftet sig med en statsborger i opholdslandet. Hun blev i landet efter udløbet af sit visum og fik med sin ægtefælle tre børn, som alle var statsborgere i opholdslandet. Klageren søgte flere gange om opholdstilladelse, hvilket hver gang blev afslået, da klageren som udgangspunkt skulle søge fra hjemlandet. Efter 16 års ophold blev klageren forsøgt udsendt fra opholdslandet under henvisning til, at hun ikke havde et lovligt opholdsgrundlag. Børnene var på tidspunktet for Storkammerets afgørelse 14, knap ni og knap fire år. EMD udtalte i præmis 121, at:

"The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. 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."

Som anført vedrørte de fem ovennævnte sager således personer, som havde opholdt sig i længere tid i medlemsstaterne uden opholdstilladelse.

I *Rodrigues Da Silva and Hoogkamer* henviste EMD direkte til landets økonomiske velfærd som det legitime hensyn i forbindelse med klagerens ikke-lovlige ophold, mens EMD i *Konstatinov* indledningsvis konstaterede, at det hverken generelt eller i den konkrete sag er urimeligt at kræve, at en fastboende udlænding, som søger familiesammenføring, *"[…] demonstrate[s] that he/she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members […]"*, og at det i den konkrete sag ikke var dokumenteret, at klageren *"has in fact ever complied with the minimum income requirement or at least made any efforts to comply with this requirement whereas the applicant's claim that he is incapacitated for work has remained wholly unsubstantiated".*

Herefter har EMD i *Konstatinov* angivet, at det legitime hensyn var medlemsstatens interesse i "*controlling immigration and public expenditure and in the prevention of disorder or crime"* (som følge af den kvindelige klagers kriminalitet, se dommens præmis 51 ovenfor).

I sagen *Nnyanzi* havde medlemsstaten som legitimt hensyn blandt andet henvist til "*maintenance and enforcement of immigration control, inter alia, for the preservation of the economic well-being of the country*",

og EMD bekræftede, at indgrebet "*is motivated by a legitimate aim, namely the maintenance and enforcement of immigration control".*

I *Nacic* sammenkoblede EMD direkte hensynet til at sikre en effektiv implementering af immigrationskontrol med landets økonomiske velfærd, idet EMD anførte, at "*the legitimate aim pursued was to ensure an effective implementation of immigration control and hence to preserve the economic well-being of Sweden"* [understreget her].

I *Jeunesse* henviste EMD til hensynet til "*the public order interests of the respondent Government in controlling immigration"*. EMD udtalte dog, at selvom der var tale om et legitimt hensyn, kunne dette hensyn i den konkrete sag ikke "*be regarded as sufficient justification for refusing the applicant residence in the Netherlands".*

I sagen *Osman v. Denmark (2011)* havde klageren tidligere haft opholdstilladelse i medlemsstaten. Opholdstilladelsen var imidlertid bortfaldet, efter at klagerens forældre havde sendt hende på en længerevarende genopdragelsesrejse til familiens tidligere opholdsland. Klageren var efter at være fyldt 18 år genindrejst i medlemsstaten, hvor hun ikke længere havde lovligt ophold. EMD fandt, at medlemsstatens afslag på at meddele klageren opholdstilladelse på ny udgjorde et indgreb i klagerens familie- og privatliv, og udtalte i præmis 58, at:

"It is not in dispute that the impugned measure had a basis in domestic law, namely sections 17 and 9 subsection 1 (ii), and pursued the legitimate aim of immigration control."

I nedenstående to sager var klagerens opholdstilladelse i medlemsstaten blevet inddraget/nægtet forlænget som følge af den pågældendes skilsmisse fra ægtefællen, som havde statsborgerskab/permanent opholdstilladelse i medlemsstaten. Begge sager vedrørte klagerens ret til familieliv med et fællesbarn i medlemsstaten:

I afgørelsen *Berrehab. v. the Netherlands (1988)*, præmis 26 udtalte EMD:

"The Court has reached the same conclusion. It points out, however, that the legitimate aim pursued was the preservation of the country's economic well-being within the meaning of paragraph 2 of Article 8 (art. 8-2) rather than the prevention of disorder: the Government were in fact concerned, because of the population density, to regulate the labour market."

I sagen *Ciliz v. the Netherlands (2000)* gjorde medlemsstaten i præmis 53 gældende:

"The respondent Government asserted that the present case should be distinguished from the case of Berrehab v. the Netherlands (judgment of 21 June 1988, Series A no. 138), with which the Commission had sought to compare it, on two clear grounds. In the first place, the interest of the economic well-being of the country carried more weight in the instant case in view of the fact that the applicant had been in receipt of welfare benefits on expiry of the one year period which he had been granted to find employment. Furthermore, the applicant had only irregularly made financial contributions to the care and upbringing of his son. Mr Berrehab, on the other hand, had been gainfully employed and was bearing part of the costs of his daughter's care and upbringing (ibid., pp. 8-9, §§ 8 and 9)."

I præmis 65 udtalte EMD:

"In the Court's view, the impugned measure was aimed at the preservation of the economic well-being of the country and thus served a legitimate aim within the meaning of the second paragraph of Article 8."

I begge sager var det legitime hensyn således landets økonomiske velfærd, i *Berrehab* begrundet med hensynet til at regulere arbejdsmarkedet i lyset af befolkningstætheden og i *Ciliz* begrundet i klagerens økonomiske forhold. I begge sager fandt EMD dog, at indgrebet ikke var proportionalt med det forfulgte hensyn.

I sagen *Hasanbasic v. Switzerland (2013)* var den mandlige klagers opholdstilladelse i opholdslandet blevet annulleret, idet han over for de nationale myndigheder havde tilkendegivet, at han ville rejse tilbage til sit hjemland med henblik på permanent at bosætte sig der. Klageren genindrejste dog fire måneder senere i opholdslandet, hvorefter hans ægtefælle, som stadig opholdt sig i opholdslandet, indgav en ansøgning om ny opholdstilladelse på baggrund af familiesammenføring. EMD har kategoriseret sagen *som refusal to renew residence visa*, hvorfor den er medtaget i tilknytning til de to ovenstående sager.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor det komplette *legal summary* er indsat nedenfor i afsnit 4.2.1.5. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

Efter i præmis 51 og 52 at have fastslået, at indgrebet var i overensstemmelse med loven og forfulgte et eller flere af de legitime hensyn, gennemgik EMD i præmis 53-56 de generelle principper, som var relevante i den konkrete sag for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund.

I præmis 57-63 gennemgik EMD anvendelsen af disse principper i den konkrete sag og udtalte i præmis 57-59 (uofficiel dansk oversættelse):

"57. Domstolen bemærker indledningsvist, at de to klagere længe har boet lovligt i Schweiz. Den mandlige klager ankom til Schweiz i 1986, den kvindelige klager ankom allerede i 1969. Varigheden af deres ophold udgør således på det tidspunkt, hvor Forbundsdomstolen afsagde sin dom i 2009, henholdsvis 23 og 40 år. Den kvindelige klager har endvidere haft en etableringstilladelse i Schweiz siden 1979, og dermed en tilladelse af en mere stabil karakter end en almindelig opholdstilladelse. Det er i øvrigt ikke bestridt, at Schweiz i en lang periode har været centrum for klagernes privat- og familieliv.

Domstolen konstaterer ligeledes, at klagerne har opholdt sig uafbrudt i Schweiz, bortset fra i en periode på fire måneder fra mellem august og december 2004, efter at de nationale myndigheder havde afvist den kvindelige klagers anmodning om familiesammenføring (ovenstående præmis 14). Den foreliggende sag adskiller sig på dette punkt væsentligt fra sagen Gezginci (nævnt ovenfor, præmis 69 og 70), hvori klager gentagne gange tog til udlandet i længerevarende perioder.

Domstolen vurderer under disse omstændigheder, at det tilkommer de nationale myndigheder på en overbevisende måde og ved hjælp af relevante og tilstrækkelige årsager at bevise, at der eksisterer et samfundsmæssigt bydende nødvendigt behov for at udvise den pågældende person, og navnlig, at denne foranstaltning står i forhold til det forfulgte legitime mål.

58. Med hensyn til først den mandlige klagers lovstridige adfærd henviser Domstolen til, at klager flere gange mellem 1995 og 2002 er dømt, herunder idømt bøder, der ikke overstiger beløb på 400 CHF, og en fængselsdom på 17 dage (i alt) for overtrædelse af færdselsloven og for krænkelse af husfreden. Domstolen bemærker, lige som klagerne, at disse forseelser ikke vejer tungt, og den konkluderer heraf, at det vil være passende at vurdere forseelserne ud fra en retfærdig afvejning. Domstolen finder det i øvrigt vigtigt, at klager ikke har begået nye forseelser siden 2002. Henset til ovenstående kan klager ikke anses for at udgøre en fare eller trussel for sikkerheden eller den schweiziske offentlige orden.

59. Det, der forekommer at have spillet en væsentlig rolle i de nationale instansers afvejning af interesserne, er opbygningen af den store gæld samt de betydelige beløb, som klagerne har modtaget i offentlig bistand fra 1994 til 2001 samt fra 2003 til 2008 (jf., mutatis mutandis, Gezginci, nævnt ovenfor, præmis 73). Det samlede beløb udgør 333.000 CHF (ca. 277.500 EUR). Idet der henvises til, at ophavsmændene til Konventionen udtrykkeligt har taget højde for landets økonomiske velvære som et legitimt mål for berettigelse af et indgreb i udøvelsen af retten til respekt for privat- og familielivet (jf. f.eks. Miailhe mod Frankrig (nr. 1), 25. februar 1993, præmis 33, serie A nr. 256-C; Hatton m.fl. mod Det Forenede Kongerige [Storkammeret], nr. 36022/97, præmis 121, EMD 2003-VIII; Mubilanzila Mayeka og Kaniki Mitunga mod Belgien, nr. 13178/03, præmis 79, EMD 2006-XI; Mengesha Kimfe mod Schweiz, nr. 24404/05, præmis 66, 29. juli 2010; Agraw mod Schweiz, nr. 3295/06, præmis 49, 29. juli 2010, og Orlić mod Kroatien, nr. 48833/07, præmis 62, 21. juni 2011), i modsætning til de rettigheder, der er beskyttet i medfør af Konventionens artikel 9-11, vurderer Domstolen, at de schweiziske myndigheder kunne tage højde for klagernes gæld og afhængighed af offentlig bistand, såfremt denne afhængighed måtte have indflydelse på landets økonomiske velvære. Domstolen vurderer ikke desto mindre, at disse forhold kun udgør et aspekt blandt flere, som Domstolen skal tage højde for."

I præmis 60-65 gennemgik EMD klagernes øvrige tilknytning til opholdslandet og hjemlandet, hvorefter EMD i præmis 66-67 udtalte (uofficiel dansk oversættelse):

"66. Domstolen vedgår henset til ovenstående, at landets økonomiske velfærd ganske vist kan tjene som et legitimt mål i forbindelse med en afvisning af at forny en opholdstilladelse. Denne årsag skal ikke desto mindre vurderes ud fra en retfærdig afvejning og i lyset af samtlige omstændigheder i sagen. Domstolen vurderer imidlertid ud fra den betydelige varighed af klagernes ophold i Schweiz og deres ubestridte sociale integration i landet, at den anfægtede foranstaltning ikke var berettiget ud fra et bydende nødvendigt samfundsmæssigt behov og ikke stod i forhold til de påberåbte legitime formål. Den indklagede stat har følgelig overskredet sin skønsmargen i den foreliggende sag.

67. Der er følgelig sket en krænkelse af Konventionens artikel 8."

I nogle sager var klagerens opholdstilladelse i medlemsstaten blevet inddraget som følge af, at opholdstilladelsen var opnået ved svig. Begge de to nedenfor nævnte sager vedrørte klagerens ret til familieliv i medlemsstaten:

I sagen *Nunez v. Norway (2011)* havde klageren opnået sin opholdstilladelse på baggrund af svig. Da opholdstilladelsen blev inddraget, havde hun opholdt sig i opholdslandet, fra hun var 21, til hun var 26 år, i alt 5 år, og havde stiftet familie i opholdslandet ved at gifte sig og få børn.

EMD udtalte i præmis 71:

"By way of a preliminary observation the Court takes note of the rationale of the Norwegian legislator in authorising the imposition of expulsion with a re-entry ban as an administrative sanction (see paragraph 50 of the Supreme Court's judgment quoted at paragraph 23 above). Whilst such offences could normally also lead to criminal liability, it was deemed advantageous in the interest of procedural economy to authorise expulsion even in the absence of a criminal conviction. Since it would be impossible for the authorities to exercise effective control of all immigrants' entry into and stay in Norway, to a great extent the system would have to be based on trust that the immigration law be respected by those to which it applied, notably the expectation that foreign nationals provide correct information when applying for residence. If serious or repeated violations of the immigration law were to be met with impunity, it would undermine the public's respect for that law. Since an application for a residence permit would be rejected in the event of failure to meet the conditions for residence, a refusal of such an application would not in itself constitute a sanction for the provision of false information. Therefore, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act. In the Court's view, a scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention. Against this background, the applicant's argument to the effect that the public interest in an expulsion would be preponderant only in instances where the person concerned has been convicted of a criminal offence, be it serious or not, must be rejected (see Darren Omoregie and Others v. Norway*, no. 265/07, § 67, 31 July 2008;* Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001)."

I sagen *Antwi and others v. Norway (2012)* havde den ene klager opnået sin opholdstilladelse på baggrund af svig. Klageren var i opholdslandet blevet gift og havde fået et barn. Syv år efter indrejsen fik opholdslandet kendskab til hans reelle identitet, og året efter blev han udvist fra opholdslandet.

EMD udtalte i præmis 90 og 102:

"In applying the above principles to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Nunez, cited above, § 71, and Darren Omoregie and Others v. Norway, no. 265/07, § 67, 31 July 2008; see also Kaya v. the Netherlands (dec.) no 44947/98*, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Nunez and Darren Omoregie and Others, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Nunez, cited above, § 73).*

[…]

102. Also, the duration of the immigration authorities' processing of the matter was not so long as to give reason to question whether the impugned measure fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures (compare Nunez, cited above, § 82). On the contrary, in October 2005, only a few months after the discovery of the first applicant's fraud in July 2005, he was put on notice that he might be expelled from Norway. In May 2006 the Directorate ordered his expulsion and prohibition on re-entry and gave him until 24 July 2006 to leave the country."

I hverken *Nunez* eller *Antwi* fremgår det således direkte, hvilket af de legitime hensyn indgrebene forfølger, men i begge domme henviser EMD til hensynet til, at muligheden for at foretage administrativ udvisning i sager om svig udgjorde "*an important means of general deterrence against gross or repeated violations of the Immigration Act*."

3.3.2.4. Den nationale sikkerhed

Letland har i nogle sager vedrørende indgreb i retten til privatliv i forbindelse med inddragelse af russiske familiers opholdstilladelser henvist til, at indgrebet forfulgte hensynet til den nationale sikkerhed.

I sagen *Slivenko v. Latvia (2003)* var klagerne, som var af russisk oprindelse, blevet udsendt fra Letland under henvisning til, at de var familiemedlemmer til en russisk militærperson og derfor forpligtede til at forlade Letland i forbindelse med tilbagetrækningen af de russiske tropper fra Letland som følge af landets opnåelse af uafhængighed fra USSR. Sagerne vedrørte klagernes privatliv, idet de havde levet hele eller hovedparten af deres liv i Letland. EMD udtalte i præmis 110-112:

"110. The respondent Government submitted that the applicants' removal from Latvia had pursued the legitimate aims of the protection of national security and the prevention of disorder and crime. They emphasised in this connection that the measure had to be seen in the context of the 'eradication of the consequences of the illegal occupation of Latvia by the Soviet Union'. The applicants contested those submissions, none of the above aims having been mentioned in the domestic proceedings concerning their own case, which had been limited to reviewing the lawfulness of their residential status in Latvia. The third party objected to the respondent Government's statement describing the situation of Latvia prior to 1991 as having been illegal under international law.

111. The Court considers that the aim of the particular measures taken in respect of the applicants cannot be dissociated from the wider context of the constitutional and international law arrangements made after Latvia regained its independence in 1991. In this context it is not necessary to deal with the previous situation of Latvia under international law. It is sufficient to note that after the dissolution of the USSR, former Soviet military troops remained in Latvia under Russian jurisdiction, at the time when both Latvia and Russia were independent States. The Court therefore accepts that with the Latvian-Russian treaty on the withdrawal of the Russian troops and the measures for the implementation of this treaty, the Latvian authorities sought to protect the interest of the country's national security.

112. In short, the measures of the applicants' removal can be said to have been imposed in pursuance of the protection of national security, a legitimate aim within the meaning of Article 8 § 2 of the Convention."

Der kan endvidere henvises til sagerne *Kogan a.o. v. Russia (2023),* Mirzoyan v. the Czech Republic (2024) og Trapitsyna and Isaeva v. Hungary (2024).

3.3.3. Nødvendighedsprincippet, herunder proportionalitetsafvejningen

Udover kravet om opfyldelse af det udvidede legalitetsprincip, fremgår det af artikel 8, stk. 2, at indgrebet ydermere skal være nødvendigt i et demokratisk samfund for at opnå et eller flere af de i bestemmelsen opregnede legitime hensyn.

EMD har i sin praksis fastlagt, hvad der ligger i nødvendighedsprincippet. I *Berrehab v. the Nederlands (1988)* udtalte EMD således i præmis 28:

"In determining whether an interference was 'necessary in a democratic society', the Court makes allowance for the margin of appreciation that is left to the Contracting States (see in particular the W v. the United Kingdom judgment of 8 July 1987*, Series A no. 121-A, p. 27, § 60 (b) and (d), and the Olsson judgment of 24 March 1988, Series A no. 130, pp. 31-32, § 67).*

In this connection, it accepts that the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens. According to the Court's established case-law (see, inter alia, the judgments previously cited), however, 'necessity' implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued." [understreget her]

Tilsvarende udtalte EMD i *Üner v. the Nederlands (2006)*, præmis 54:

"The Court reaffirms at the outset that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94, and Boujlifa v. France, 21 October 1997, § 42, Reports of Judgments and Decisions 1997-VI). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see* Dalia v. France, 19 February 1998*, § 52, Reports 1998-I;* Mehemi v. France, 26 September 1997*, § 34, Reports 1997-VI;* Boultif*, cited above, § 46; and* Slivenko v. Latvia [GC], no. 48321/99*, § 113, ECHR 2003-X)."* [understreget her]Af *"Guiden",* punkt 30, fremgår:

"Subsequently, the Court has affirmed that in determining whether the impugned measures were 'necessary in a democratic society', it will consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued."

EMD har i sin praksis vedrørende artikel 8 ofte henvist til, at:

"The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family

reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see Gül v. Switzerland, 19 February 1996, § 38, Reports 1996-I). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles to the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Solomon v. the Netherlands (dec.), no. 44328/98, 5 September 2000)."

Der kan herved blandt andet henvises til sagerne *Rodrigues da Silva and Hoogkamer v. the Netherlands (2006)*, præmis 39, og *Pormes v. the Netherlands (2020)*, præmis 54-56.

EMD har også i sin praksis udtalt sig om betydningen for proportionalitetsafvejningen af, at der er tale om en "settled migrant" frem for en person, der søger om ophold. Der kan herved henvises til præmis 52-53 i Pormes-sagen, hvor EMD udtalte:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105)."

Nødvendighedsprincippet skal være opfyldt, uanset om indgrebet består i, at de nationale myndigheder træffer afgørelse om bortfald, inddragelse eller nægtelse af forlængelse af en opholdstilladelse.

Dette ses anvendt i praksis i blandt andet sagen *Osman v. Denmark (2011)*, hvor klagerens opholdstilladelse i medlemsstaten ansås som bortfaldet som følge af hendes langvarige ophold i familiens tidligere opholdsland Kenya. Klageren, der var somalisk statsborger, havde boet i Kenya fra hun var tre-fire år, indtil hun som syvårig indrejste i opholdslandet som familiesammenført. Hun havde herefter opholdt sig i opholdslandet, indtil hun som 15-årig af forældrene blev sendt tilbage til Kenya. Kort tid før hun fyldte 18 år, kontaktede klageren den danske ambassade i Kenya med henblik på at kunne vende tilbage til sin familie i opholdslandet,

hvilket blev afslået af de danske myndigheder. Hun indrejse herefter som 19-årig i medlemsstaten, hvor hun ikke længere havde lovligt ophold.

EMD udtalte i præmis 65:

"It also reiterates that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in a host country, very serious reasons are required to justify expulsion (see, Maslov v. Austria [GC], quoted above, § 75).

In the present case the applicant was refused restoration of her lapsed residence permit, as opposed to being expelled due to having committed a crime. Nevertheless, it is undisputed that she spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old, that she spoke Danish, that she had received schooling in Denmark until August 2002, and that all her close family remained in Denmark. In these circumstances, the Court also considers that very serious reasons were required to justify the authorities' refusal to restore the applicant's residence permit, when she applied from Kenya in August 2005."

Selve proportionalitetsafvejningen skal foretages mellem de to modsatrettede hensyn:

- Det eller de hensyn, som staten påberåber sig, jf. undtagelsesbestemmelserne i artikel 8, stk. 2, og
- individets ret til respekt for privat- og/eller familielivet, jf. artikel 8, stk. 1.

Afvejningen skal som anført under punkt 2.5 som udgangspunkt foretages på tidspunktet, hvor afgørelsen bliver endelig.

Hvorledes de to modsatrettede hensyn skal vægtes over for hinanden, er afhængigt af de faktuelle omstændigheder i den konkrete sag.

Proportionalitetsprincippet indebærer, at et indgreb skal være egnet til at opnå det ønskede formål, og at indgrebet ikke må gå videre end nødvendigt for at opnå det ønskede formål.

Det fremgår af Jon Fridrik Kjølbros bog *"Den Europæiske Menneskerettighedskonvention for praktikere" (2017)*, side 768, at for at kravet om proportionalitet er opfyldt, skal de anvendte foranstaltninger være *"rimelige og egnede til at opnå det legitime formål".*

Endvidere anføres det samme sted, at der ligeledes er et krav om, at *"der ikke må findes andre og mindre indgribende foranstaltninger, der er egnede til at opfylde det legitime formål."*

EMD har i sin praksis udtalt, at vægtningen af de enkelte elementer i proportionalitetsafvejningen afhænger af de konkrete omstændigheder i hver enkelt sag, se f.eks. *Maslov v. Austria (2008)*, hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

Der skal derefter på den ene side i den samlede afvejning ses på de elementer, som taler for hensynet til klageren, herunder tilknytningen til opholdslandet og tilknytningen til hjemlandet, og på den anden side ses på det eller de af staten påberåbte legitime formål og de faktiske forhold, som ligger til grund for medlemsstatens indgreb.

EMD anvender i sin praksis følgende formulering, se f.eks. *Maslov v. Austria (2008)*, præmis 76:

"Finally, the Court reiterates that national authorities enjoy a certain margin of appreciation when assessing whether an interference with a right protected by Article 8 was necessary in a democratic society and proportionate to the legitimate aim pursued (see Slivenko v. Latvia [GC], no. 48321/99, § 113, ECHR 2003-X, and Berrehab v. the Netherlands, 21 June 1988, § 28, Series A no. 138). However, the Court has consistently held that its task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests on the other (see, among many other authorities, Boultif, cited above, § 47). Thus, the State's margin of appreciation goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (see, mutatis mutandis, Société Colas Est and Others v. France, no. 37971/97, § 47, ECHR 2002-III). The Court is therefore empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8." [understreget her]

Om de proceduremæssige krav indeholdt i artikel 8 udtalte EMD i sagen *N.V. and C.C. v. Malta (2022)* under de generelle principper i præmis 59-60:

"*59. The Court further recalls that whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8. What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of Article 8 (see T.P. and K.M. v. the United Kingdom, cited above, § 72). In conducting its review in the context of Article 8 the Court may also have regard to the length of the local authority's decision-making process and of any related judicial proceedings (see Diamante and Pelliccioni, cited above, § 177, and T.C. v. Italy, no. 54032/18, § 57, 19 May 2022).*

60. In various contexts the Court has also held that there is a positive duty to take measures to facilitate family reunification as soon as reasonably feasible (see, for example, Strand Lobben and Others, cited above, § 205, andAbdi Ibrahim v. Norway [GC], no. 15379/16, § 145, 10 December 2021 and the case-law cited therein)."

Sagen vedrørte en afgørelse truffet af de nationale myndigheder om, at den første klager alene matte være sammen med sit særbarn, der boede hos hende, såfremt den anden klager, med hvem hun var I et fast samlivsforhold, ikke var til stede. Om anvendelsen af de generelle principper i den konkrete sag udtalte EMD i præmis 65-69:

"65. However, the Court considers that the measure was not proportionate, for a plethora of reasons, including the inability to satisfy relevant procedural requirements, some of which have already been identified by the domestic courts […]. In this connection, the Court notes the entire lack of any meaningful involvement of

the second applicant in the decision-making process, as well as the limited involvement of the first applicant in so far as all her requests had been rejected, without giving her the possibility of adducing any evidence, or challenging the Children's Advocate report, the content of which was never shown to her, as well as the lack of reasoning in the Family Court's decisions.

66. In the absence of any such reasoning, and bearing in mind the information available to the Family Court before it issued the decree […], the Court cannot but consider that the Family Court failed to look into whether there had been any real and specific risk for the child and overlooked relevant information brought to its attention (compare Penchevi, cited above, § 69). In setting out the measure (more than two months after J.'s request), it had failed to conduct an in-depth examination of the entire family situation allowing for a balanced and reasonable assessment of the respective interests of each person. Even admitting that by issuing the decree (on 1 October 2015) the Family Court was erring on the side of caution and acting 'speedily' in order to protect E., whose interests were paramount, there seems to be no justification for the inaction during the subsequent years. The Court notes that when the Family Court realised (from the report of the expert psychologist submitted on 25 November 2015) that the order was no longer necessary, it failed to take any action, such as calling on the parties and inviting them to make submissions in order for it to undertake the relevant assessment including a balancing exercise of the interests at play, including the best interest of the child, at that stage. Nor did it take any such action at any later point in time. It thus left in place the order, contrary to the positive obligation of the State to facilitate reunification as soon as reasonably feasible, which the Court considers applied equally in the circumstances of the present case. While the Government insisted on arguing that the applicant could have requested a (or a further) revocation, the Court notes that both domestic courts have already dismissed these arguments […] and the Court finds no reason to alter those findings.

67. Lastly, the Court observes that de jure the decree remained valid for over four years, until the appeal judgment of the Constitutional Court confirming the prior decision to declare the decree null and void. It appears from the testimony of the second applicant in the constitutional redress proceedings that the situation continued in practice until the birth of their child on 4 November 2016 (see paragraph 23 above), and thus de facto it significantly affected the applicants for a little over a year. Nevertheless, the Court is of the view that the fact that, subsequent to that date, the applicants may have breached the order of the Family Court (with or without the agreement of J. and the constitutional jurisdiction's blessing) without consequences, does not mean that the applicants had not suffered of the alleged violation of Article 8 for the entire period until the constitutional redress proceedings came to an end. In the absence of the revocation of the decree by the Family Court, or an interim decision by the constitutional jurisdictions, during such period the applicants could have been subject to any form of sanction or consequence and continued to suffer the anxiety as to whether they would ever be able to reunite legally.

68. In the light of all the foregoing considerations the Court finds that the decision-making process at domestic level was flawed, and the measure constituted a disproportionate interference with the right of each of the applicants to respect for their family life.

69. There has therefore been a violation of Article 8 in respect of both applicants."

Der kan endvidere henvises til sagerne *Kogan a.o. v. Russia (2023)*, Mirzoyan v. the Czech Republic (2024) og Trapitsyna and Isaeva v. Hungary (2024).

Nedenfor gennemgås først i afsnit 3.3.3.1 betydningen af baggrunden for medlemsstatens indgreb og EMD's praksis vedrørende vægtningen heraf i proportionalitetsafvejningen.

Dernæst gennemgås i afsnit 3.3.3.2 de elementer, som indgår i klagerens privat- og/eller familieliv og EMD's praksis vedrørende vægtningen heraf i proportionalitetsafvejningen.

I umiddelbar forlængelse heraf gennemgås i afsnit 3.3.3.3 betydningen af klagerens (manglende) berettigede forventning om fortsat ophold i opholdslandet, og EMD's praksis vedrørende vægtningen af privat- og familielivselementerne i proportionalitetsafvejningen, hvis klageren ikke har haft en sådan berettiget forventning.

I afsnit 3.3.3.4 gennemgås betydningen af indgrebets karakter og varighed og EMD's praksis vedrørende vægtningen heraf i proportionalitetsafvejningen.

Endelig gennemgås i afsnit 3.3.3.5 EMD's praksis vedrørende medlemsstaternes margin of appreciation ved proportionalitetsafvejningen.

3.3.3.1. Betydningen af baggrunden for medlemsstaternes indgreb

EMD har i sin praksis tillagt de påberåbte legitime hensyn forskellig vægt i proportionalitetsafvejningen, alt efter hvilke faktuelle forhold, der har ligget til grund for medlemsstatens indgreb i individets ret til respekt for privat- og/eller familieliv.

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[2] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

I flere sager, hvor klageren har begået alvorlig kriminalitet, såsom drab eller narkokriminalitet, har EMD efter en konkret vurdering tillagt hensynet til forebyggelse af forbrydelse så stor vægt, at EMD har statueret, at en (midlertidig) udvisning af den pågældende ikke udgjorde en krænkelse, selvom klageren havde en meget stærk tilknytning til opholdslandet. Det fremgår endvidere af EMD's praksis, at afvejningen er en anden, såfremt der er tale om mindre alvorlig kriminalitet. Som også anført i *Handbook*, side 86, *"[…] in considering whether the deportation or exclusion order of a criminal offender is compatible with the Convention, due regard will have to be paid to all elements and a fair balance will have to be achieved. The decision, eventually, is very much fact-sensitive."*

I den forbindelse henledes opmærksomheden på, at EMD i sagen *Yildiz v. Austria (2002)* i præmis 45 udtalte:

[2] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

"*Next, the Court will turn to the offences committed by the first applicant, as their gravity is an essential element for assessing the proportionality of the interference with the applicants' family life.*"

Se vedrørende betydningen af psykisk sygdom for vægtningen af den begåede kriminalitet sagen *Savran v. Denmark (2021)*, hvor Storkammeret i præmis 194 udtalte:

"194. In its recent case-law dealing with the expulsion of settled migrants under Article 8 of the Convention (see, for example, paragraph 189 above), the Court has held that serious criminal offences can, assuming that the other Maslov criteria are adequately taken into account by the national courts in an overall balancing of interests, constitute a "very serious reason" such as to justify expulsion. However, the first Maslov criterion, with its reference to the "nature and seriousness" of the offence perpetrated by the applicant, presupposes that the competent criminal court has determined whether the settled migrant suffering from a mental illness has demonstrated by his or her actions the required level of criminal culpability. The fact that his or her criminal culpability was officially recognised at the relevant time as being excluded on account of mental illness at the point in time when the criminal act was perpetrated may have the effect of limiting the weight that can be attached to the first Maslov criterion in the overall balancing of interests required under Article 8 § 2 of the Convention."

Se også sagen *Azzaqui mod Nederlandene (2023)*. I sagen var klageren indrejst i opholdslandet som tiårig. Da han var mellem 15 og 24 år, blev han idømt fængselsstraf for en række lovovertrædelser. Som 24-årig blev han i 1996 idømt to års fængsel for voldtægt, og den nationale domstol fandt, at det skulle tillægges betydning i vurdering af skyldsspørgsmålet, at klageren på gerningstidspunktet led af en personlighedsforstyrrelse med skizotypiske og antisociale karaktertræk og episodiske psykotiske oplevelser. På baggrund af ekspertudtalelser, hvorefter der var en betydelig risiko for ny kriminalitet, blev han af hensyn til "the general safety of persons" i tillæg til sin fængselsstraf idømt retspsykiatrisk behandling. Hans behandlingsdom blev de følgende 20 år løbende fornyet. Klageren udviste god opførsel og blev 20 år efter dommen vurderet egnet til løsladelse fra tilbageholdelsen på betingelse af blandt andet fortsat god opførsel, tilsyn og indkvartering på et bosted, indtil han 22 år efter dommen for voldtægt fik sin opholdstilladelse inddraget under henvisning til, at han på baggrund af den tidligere begåede kriminalitet fandtes at udgøre en trussel for den offentlige orden, ligesom han blev meddelt indrejseforbud i ti år.

EMD udtalte i præmis 48-50 og 54-57:

"48. Where appropriate, other elements relevant to the case, such as, for instance, its medical aspects, should also be taken into account (see Savran, cited above, § 184, with further references), including the availability and accessibility of medical treatment in the country of destination (ibid., §§ 191-92).

49. The Court reiterates that the criterion of the "nature and seriousness of the offence committed by the applicant" is to be considered by reference to the totality of a person's criminal history and the circumstances under which the crime or crimes giving rise to expulsion were committed. Accordingly, under this criterion account must be taken of the nature and the effects of the crime on society as a whole (see Akbulut v. the United Kingdom (dec.), no. 53586/08, § 18, 10 April 2012; Unuane v. the United Kingdom, no. 80343/17, § 87, 24 November 2020, with further references; and Üner, cited above, § 63), the severity of the criminal penalty (see Unuane, § 86, and Azerkane, § 73, both cited above), the risk of reoffending (see Ndidi v. the United Kingdom, no. 41215/14, §§ 29, 78 and 81, 14 September 2017; Levakovic v. Denmark, no. 7841/14, §§ 19 and

44, 23 October 2018; and Azerkane, cited above, §§ 22, 78 and 84), whether the offences were committed as a juvenile or as an adult (see, for example, Maslov, cited above, § 81).

50. In Savran (cited above, §§ 193-96), the Court added that this criterion presupposes that the competent criminal courts have determined whether the settled immigrant suffering from a mental illness had demonstrated by his or her actions the required level of criminal culpability and, taking note of the fact that the applicant in that case was, in the national courts' view, exempt from punishment under domestic criminal law when convicted, held that this may have an impact of limiting the weight that can be attached to this criterion in the overall balancing of interests required under Article 8 § 2 of the Convention. The Court observed that it was not called upon to make general findings in this regard in the case at hand, but only to determine whether the manner in which the national authorities, including the domestic courts, assessed the "nature and seriousness" of the applicant's offence adequately took into account the fact that he was, according to the national authorities, suffering from a serious mental illness at the moment when he perpetrated the act in question.

[…]

54. In determining whether those revocation proceedings were in compliance with Article 8 of the Convention, the Court will assess whether the national authorities, including the domestic courts, applied the relevant criteria established in the Court's case-law, and adequately balanced the interests of the applicant against those of the general public (see paragraph 52 above). In this connection the Court notes at the outset that, on account of his mental condition, the applicant was more vulnerable than an average "settled migrant" facing expulsion (compare Savran, cited above, § 191). The state of his health was required to be taken into account as one of the balancing factors (see paragraph 48 above).

55. As regards the criterion "nature and seriousness of the offence committed by the applicant", the Court notes that the applicant was convicted between 1987 and 1996 of multiple crimes and of rape in 1996 (see paragraphs 6 and 7 above). Those convictions included crimes of a violent and of a sexual nature which can, assuming that the other relevant criteria are adequately taken into account by the national authorities in an overall balancing of interests, constitute a "very serious reason" such as to justify expulsion (see Savran, cited above, § 194).

56. In determining whether the other relevant criteria were adequately taken into account in the present case, the Court cannot overlook the fact that in the criminal proceedings that led to the applicant's last conviction, reports were drawn up by a psychiatrist and a psychologist which revealed that at the time when he had committed that offence, the applicant was suffering from a personality disorder with schizotypal and antisocial traits and episodic psychotic experiences to such an extent that the offence could only be attributed to him to a reduced extent. The Arnhem Regional Court made that conclusion of reduced criminal culpability its own when it convicted the applicant of rape and imposed the TBS order (see paragraph 7 above).

57. The Court observes that the Deputy Minister in the decision revoking the applicant's residence permit, only referred to the seriousness of the multiple crimes that the applicant had committed and the extensions of his TBS order, and noted further that there remained a risk of reoffending and thus a threat to public order (see paragraph 16 above). Upholding those findings, the Regional Court held in its judgment of 6 November 2018 that the Deputy Minister had rightly given "decisive weight" to the serious crimes that had repeatedly

been committed by the applicant (see paragraph 24 above). It follows from the foregoing that neither the Deputy Minister nor the administrative court, when assessing the "nature and seriousness of the applicant's offence", took into account the fact that he was, in the view of the criminal court, suffering from a serious mental illness, which had reduced his criminal culpability, at the moment when he perpetrated the act in question (see Savran, cited above, § 195)."

Herefter udtalte EMD i præmis 60:

"[…]In reaching their conclusion about the existence of a threat to public order in the revocation proceedings, the authorities thus failed to sufficiently consider the applicant's personal circumstances, and particularly the relevant conclusions of the criminal courts, supported as they were by medical evidence (compare Savran, cited above, § 197)."

I flere sager, hvor klageren ikke har haft en opholdstilladelse eller har opnået opholdstilladelsen ved svig, har EMD henvist til hensynet til, at muligheden for at foretage administrativ udvisning udgjorde "*an important means of general deterrence against gross or repeated violations of the Immigration Act"* og har ofte tillagt det vægt, at klageren på intet tidspunkt har haft en berettiget forventning om at kunne udøve sit privat- og/eller familieliv i opholdsstaten.

Der er imidlertid også EMD-praksis vedrørende ulovligt ophold, hvor EMD udtrykkeligt har lagt vægt på, at klageren ikke havde begået egentlig kriminalitet, se f.eks. sagen *Rodrigues da Silva and Hoogkamer v. the Netherlands (2006)*, hvor EMD i præmis 43 udtalte:

"Whilst it does not appear that the first applicant has been convicted of any criminal offences (see Berrehab, cited above, § 29, and Cılız v. the Netherlands, no. 29192/95, § 69, ECHR 2000-VIII), she did not attempt to regularise her stay in the Netherlands until more than three years after first arriving in that country (see paragraphs 9 and 13 above) and her stay there has been illegal throughout. The Court reiterates that persons who, without complying with the regulations in force, confront the authorities of a Contracting State with their presence in the country as a fait accompli do not, in general, have any entitlement to expect that a right of residence will be conferred upon them (see Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003). Nevertheless, the Court finds relevant that in the present case the Government indicated that lawful residence in the Netherlands would have been possible on the basis of the fact that the first applicant and Mr Hoogkamer had a lasting relationship between June 1994 and January 1997 (see paragraph 34 above). Although there is no doubt that a serious reproach may be made of the first applicant's cavalier attitude to Dutch immigration rules, this case should be distinguished from others in which the Court considered that the persons concerned could not at any time have reasonably expected to be able to continue family life in the host country (see, for example, Solomon, cited above).

44. 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. Indeed by attaching such paramount importance to this latter element, the authorities may be considered to have indulged in excessive formalism. The Court concludes that a fair

balance was not struck between the different interests at stake and that, accordingly, there has been a violation of Article 8 of the Convention."

I (de få) sager, hvor klageren har haft opholdstilladelse i medlemsstaten, men denne er inddraget, fordi de forudsætninger, som lå til grund for opholdstilladelsen, ikke længere er til stede, har EMD foretaget en anden afvejning.

EMD har i kammerafgørelsen i sagen *Shevanova v. Latvia (2006)* fremhævet, at klageren i den konkrete sag ikke havde begået egentlig kriminalitet, hvorved sagen adskilte sig fra de fleste af de lignende artikel 8-sager, EMD hidtil havde behandlet, hvor klagerne var blevet udvist på grund af begået kriminalitet:

"77. The Court reiterates that most of the similar applications it has examined to date under Article 8 of the Convention concerned cases in which the alien deported or about to be deported had committed crimes or serious offences (see, among other authorities, the Moustaquim, El Boujaïdi, Dalia and Baghli judgments, cited above; see also Beldjoudi v. France, judgment of 26 March 1992, Series A no. 234-A; Nasri v. France, judgment of 13 July 1995, Series A no. 320-B; Boughanemi v. France, judgment of 24 April 1996, Reports 1996-II; Bouchelkia v. France, judgment of 29 January 1997, Reports 1997-I; Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI; Boujlifa v. France, judgment of 21 October 1997, Reports 1997-VI; and Ezzouhdi v. France, no. 47160/99, 13 February 2001). In some of these cases, the Court found that there had been a violation of Article 8 of the Convention notwithstanding the seriousness of the applicants' criminal convictions. In the present case, on the other hand, the actions of which the applicant was accused did not constitute a criminal offence in the strict sense, but merely a regulatory offence attracting a relatively small fine – which, moreover, was never enforced.

78. In sum, and having weighed up on the one hand the seriousness of the actions of which the applicant was accused and, on the other, the severity of the measure taken against her, the Court concludes that the Latvian authorities exceeded the margin of appreciation left to the Contracting States in this sphere and did not strike a fair balance between the legitimate aim of preventing disorder and the applicant's interest in having her right to respect for her private life protected. The Court is therefore unable to find that the interference complained of was "necessary in a democratic society".
Accordingly, there has been a violation of Article 8 of the Convention."

Se også sagen *Berrehab v. the Netherlands (1988)*, hvor EMD i præmis 28-29 blandt andet udtalte:

"28. […] According to the Court's established case-law (see, inter alia, the judgments previously cited), however, "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.

29. Having to ascertain whether this latter condition was satisfied in the instant case, the Court observes, firstly, that its function is not to pass judgment on the Netherlands' immigration and residence policy as such. It has only to examine the interferences complained of, and it must do this not solely from the point of view of immigration and residence, but also with regard to the applicants' mutual interest in continuing their relations. As the Netherlands Court of Cassation also noted (see paragraph 16 above), the legitimate aim pursued has to be weighed against the seriousness of the interference with the applicants' right to respect for their family life.

As to the aim pursued, it must be emphasised that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. […]"

Se endvidere sagen *Ciliz v. the Netherlands (2000)*, hvor EMD i præmis 69 udtalte:

"The Court notes in addition that the applicant was not convicted of any criminal offences warranting his removal from the Netherlands (see the Berrehab judgment cited above, p. 16, § 29)."

Nedenfor gengives eksempler på EMD's proportionalitetsafvejning i sager, hvor klageren har begået alvorlig kriminalitet, herunder gentagen kriminalitet, sager hvor klageren har begået mindre alvorlig kriminalitet, sager hvor klageren har opnået opholdstilladelsen ved svig, sager hvor klageren ikke har haft lovligt ophold i medlemsstaten, sager hvor klageren tidligere har haft lovligt ophold, og sager hvor klageren er blevet meddelt afslag på familiesammenføring.

3.3.3.1.1. Alvorlig kriminalitet

I sagen *El Boujaïdi v. France (1997)* var klageren indrejst i opholdslandet som syvårig. Han blev idømt seks års fængsel og udvist med indrejseforbud for bestandig for narkotikakriminalitet, begået da han var 19 år. Efter at være blevet løsladt da han var 24 år, blev klageren på ny anholdt og idømt et års fængsel for forsøg på røveri og for ikke at være udrejst i overensstemmelse med udvisningen. Klageren blev udsendt, da han var 26 år gammel. På dette tidspunkt boede han sammen med en statsborger i opholdslandet, med hvem han havde fået et barn nogle måneder forud for udsendelsen.

EMD udtalte i præmis 33:

"However, the Court observes that he arrived in France in 1974 at the age of 7 and lived there until 26 August 1993. He received most of his schooling there and worked there for several years. In addition, his parents, his three sisters and his brother – with whom it was not contested that he had remained in contact – live there (see paragraph 7 above). Consequently, the Court is in no doubt that enforcement of the exclusion order amounted to interference with the applicant's right to respect for his private and family life."

Om proportionalitetsvurderingen udtalte EMD i præmis 40:

"The Court's task therefore consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

The Court notes that Mr El Boujaïdi arrived in France at the age of 7 and lived there lawfully from 1974 until 19 June 1991 (the date of his release – see paragraph 13 above). He received most of his education there, he worked there and his parents, his three sisters and his brother live there (see paragraph 7 above).

However, while he asserted that he had no close family in Morocco, he did not claim that he knew no Arabic or that he had never returned to Morocco before the exclusion order was enforced. It also seems that he has never shown any desire to acquire French nationality. Accordingly, even though most of his family and social ties are in France, it has not been established that he has lost all links with his country of origin other than his nationality. In addition, the applicant had a previous conviction – a sentence of thirty months' imprisonment

having been imposed on him by the Annecy Criminal Court for heroin dealing in 1987 – when the Lyons Court of Appeal sentenced him to six years' imprisonment and ordered his permanent exclusion from French territory for drug use and drug trafficking (see paragraphs 10 and 11 above). Once he was released, and at a time when he was unlawfully present in France, he continued to lead a life of crime and committed an attempted robbery (see paragraph 13 above). The seriousness of the offence on account of which the measure in issue was imposed on the applicant and his subsequent conduct count heavily against him."

I præmis 41 udtalte EMD, at der ikke forelå en krænkelse af artikel 8.

I sagen *Dalia v. France (1998)* var klageren blevet dømt for narkokriminalitet og efterfølgende udvist fra opholdslandet.

Om proportionalitetsvurderingen på grund af den alvorlige kriminalitet, udtalte EMD i præmis 54:

"The Court notes further that, as the Government pointed out, the French legislature, in restricting (other than in the exceptional cases provided for in section 28 bis of the Ordinance of 1945) relief from exclusion orders to aliens who had complied with such an order, had wished to remove the benefit of such relief from those who remained in France unlawfully. Applying this rule of procedure – which has a legitimate aim – to the applicant cannot in itself entail a breach of Article 8. In support of her application to have the exclusion order lifted, Mrs Dalia relied mainly on the fact that she was the mother of a French child. The evidence shows that the applicant formed this vital family link when she was in France illegally. She could not be unaware of the resulting insecurity. In the Court's view, this situation, which was created at a time when she was excluded from French territory, cannot therefore be decisive.

Furthermore, the exclusion order made as a result of her conviction was a penalty for dangerous dealing in heroin. In view of the devastating effects of drugs on people's lives, the Court understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge. Irrespective of the sentence passed on her, the fact that Mrs Dalia took part in such trafficking still weighs as heavily in the balance." [understreget her]

EMD fandt i den konkrete sag, at indgrebet ikke havde været uproportionelt, og statuerede, at der ikke var sket en krænkelse af EMRK artikel 8.

I sagen *Balogun v. the United Kingdom (2012)* udtalte EMD I præmis 53:

"As previously stated, very strong reasons are required to justify the deportation of settled migrants. In the case of this particular applicant, moreover, it is not in doubt that his deportation to Nigeria will have a very serious impact on his private life, given his length of residence in the United Kingdom and his limited ties to his country of origin. However, the Court has paid specific regard to the applicant's history of repeated, drugs-related offending and the fact that the majority of his offending was committed when he was an adult, and also to the careful and appropriate consideration that has been given to the applicant's case by the domestic authorities. With these factors in mind, the Court finds that the interference with the applicant's private life caused by his deportation would not be disproportionate in all the circumstances of the case. It therefore follows that his deportation to Nigeria would not amount to a violation of Article 8 of the Convention."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået "manddrab med indirekte hensigt" (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 udtalte EMD om grovheden af den begåede kriminalitet:

"[…] The Court considers that the offence was characterised by a high degree of recklessness and that expert reports could not entirely exclude the possibility that the applicant would engage in a car race again, despite his maturation process. The Court takes into account that the prison sentence of five years and three months bears testimony to the severity of the offence."

Om klagerens personlige forhold udtalte EMD i præmis 45 og 48-52:

"45. As regards the length of the applicant's stay in Switzerland, the Court observes that he arrived in Switzerland in 1989 at the age of nine and lived in Switzerland for more than twenty years. His stay in Switzerland was, thus, of a considerable length of time."

"48. As regards the applicant's family situation, he has been married to his wife since 1999 and it has, explicitly, not been contested by the respondent Government that real and effective family existed between the applicant, his wife and their two children. It has to be noted that the applicant's wife could not know about the offences at issue at the time when she entered into a family relationship with the applicant, as the couple married in 1999 and thus prior to the commission of the offences in 2000. It has to be noted that the applicant, with the exception of the purchase and consumption of marihuana, for which he was fined in 2007, committed the criminal offences prior to the birth of his children.

49. The Court observes that the applicant's wife is a national of 'the former Yugoslav Republic of Macedonia', i.e. of the country to which the applicant was expelled. The applicant's wife, who was born in 1978, lived there until 1990 and knows Albanian and the country's culture. She has relatives there and visits the country every year. The domestic courts considered that she could reintegrate in 'the former Yugoslav Republic of Macedonia' without encountering serious difficulties, despite having lived in Switzerland for the past twenty years. The Court notes that the applicant's wife chose to follow him to Macedonia in 2011 and lived with him there until 2015, despite the fact that she could have remained in Switzerland as a holder of a permanent residence permit and maintained contact with the applicant through visits and means of telecommunication.

50. The Court observes that the couple's children, born in 2001 and in 2005, are likewise the nationals of 'the former Yugoslav Republic of Macedonia'. At the time the expulsion order became binding, the elder child was in primary school, whereas the younger one was in kindergarten. They were, thus, still of an adaptable age. While the Court accepts that the economic living conditions in 'the former Yugoslav Republic of Macedonia' are less favourable than in Switzerland, it also notes that the former is a Contracting State of the Council of Europe. It further accepts that the children knew the country's culture to a certain extent due to visits they

had made together with their mother. While it is not clear to what extent the children knew Albanian, it does not appear arbitrary to accept that the presence of their parents, who both originate from the country, as well as further relatives from their mother's side, would alleviate their difficulties in integrating in 'the former Yugoslav Republic of Macedonia'. Moreover, it has to be noted that the children were not forced to move there, but could have remained in Switzerland with their mother as holders of permanent residence permits and maintained contact with the applicant through visits and means of telecommunication.

51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'."

Endelig lagde EMD i præmis 53 vægt på, at klagerens udvisning ikke var permanent, da hans indrejseforbud var tidsbegrænset, og at han kunne søge om, at det blev suspenderet i kortere perioder:

"Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to 'the former Yugoslav Republic of Macedonia' in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to 'the former Yugoslav Republic of Macedonia' for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time."

I præmis 54 udtalte EMD om proportionalitetsafvejningen:

"The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to 'the former Yugoslav Republic of Macedonia' as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much

weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to 'the former Yugoslav Republic of Macedonia'. The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case."

EMD fandt således, at der ikke var sket en krænkelse af artikel 8 i den konkrete sag.

I sagen *Assem Hassan Ali v. Denmark (2018)* blev klageren udvist på grund af en dom for indsmugling af et kilo kokain til opholdslandet. Han blev idømt fem års fængsel og indrejseforbud for bestandigt. Klageren var tidligere blevet idømt et års fængsel for vold, trusler og narkokriminalitet.

EMD udtalte i præmis 47 om grovheden af den begåede kriminalitet:

"The Court reiterates in this respect that it has held, on many previous occasions, that it understands - in view of the devastating effects drugs have on people's lives - why the authorities show great firmness to those who actively contribute to the spread of this scourge (see, among others, Amrollahi v. Denmark, no. 56811/00, § 37, 11 July 2002; Sezen v. the Netherlands, no. 50252/99, § 43, 31 January 2006; A.W. Khan v. the United Kingdom, no. 47486/06, § 40; 12 January 2010; Samsonnikov v. Estonia, cited above, § 89; Savasci v. Germany (dec.), 45971/08, § 27, 19 March 2013; and Salem v. Denmark, cited above, § 66)."

Om hans personlige forhold udtalte EMD:

"48. The applicant entered Denmark in 1997 when he was 20 years old. By a final High Court judgment of 21 June 2006 he was convicted of, inter alia, drug offences and sentenced to one year's imprisonment. Moreover, subsequent to the serious drug crime committed in 2008, the applicant was fined twice including, on 3 April 2009, for a violation of the Executive Order on Controlled Substances.

49. As to the solidity of social, cultural and family ties with the host country and with the country of destination, the Court observes that during the criminal proceedings leading to the expulsion order, in August 2008 the Immigration Service (Udlændingeservice) stated that the applicant spoke Arabic and only a little Danish. An interpreter had been used during his interview with the Immigration Service. The applicant had never had a job in Denmark. The applicant's parents and siblings remained in Jordan, where the applicant had visited them a couple of years before. However, in the revocation proceedings leading to the High Court's decision of 27 January 2014, the applicant stated that he had broken off contact with his father and his eight siblings in Jordan in 2005. He did not develop this statement further and the Court does not attach any particular weight to this assertion.

50. As to the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life, the Court notes that the applicant's first wife, X, from his marriage in 1997, was a stateless Palestinian woman from Lebanon who had obtained Danish nationality. She and the applicant had three children together, born between 1997 and 2001. They had Danish nationality and their legal status was not affected by the applicant's expulsion order. After the divorce in 2001, the applicant maintained contact with X and his children. During the revocation proceedings in 2013, before the High Court, the applicant submitted that he and X planned to re-marry, but that it had not been decided whether she would follow him to Jordan in case of expulsion. At the relevant time, however, the applicant was serving his prison sentence and facing the implementation of the expulsion order. Thus, he could not have had a justified expectation that he would be able to exercise his right to a family life in Denmark with X. Moreover, there is no

indication that they did remarry either before the applicant was deported on 14 April 2014 or thereafter. Accordingly, the criterion relating to the seriousness of the difficulties which spouse X is likely to encounter in the country to which the applicant is to be expelled does not apply.

51. The applicant's second wife, Y, from his marriage under Islamic law in 2002, was an Iraqi woman of Kurdish origin. They married before the offences at issue were committed. Thus, the criterion of whether the spouse knew about the offence at the time when he or she entered into a family relationship does not come into play in the present case. In respect of their marriage it is noteworthy, though, that they divorced in May 2013, before the District Court's decision of 3 June 2013 to refuse to revoke the expulsion order. Accordingly, the criterion relating to the seriousness of the difficulties which spouse Y is likely to encounter in the country to which the applicant is to be expelled does not apply. Y and the applicant had three children together, born between 2003 and 2009. The children had Danish nationality and their legal status was not affected by the applicant's expulsion order.

52. When in 2009 the applicant was convicted of a serious drug crime, sentenced to five years' imprisonment, and his expulsion ordered, it was a known fact that he had six children. In their judgments of 11 March 2009 and 25 November 2009, respectively, the District Court and the High Court did not expressly state whether they found that the applicant's then wife, Y, and their three children could follow him to Jordan or whether, in any event, a separation of the applicant from his then wife and children could not outweigh the other counterbalancing factors, notably that the applicant had committed a serious drugs crime (see paragraphs 14 and 15 above).

[…]

57. In the present case, when the revocation proceedings were pending before the District Court in 2013, the applicant's children were approximately 14, 12, 11, 9, 8 and 7 years old. They would all remain in Denmark, so no question arose as to 'the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled'. The issue was rather which difficulties they would encounter in Denmark due to the separation from their father. The three eldest children would live with their mother, X, as they had done since their parents divorced in 2001. The eldest son was living part-time in an institution. The three youngest children would live with their mother, Y, as they had done since the applicant was detained in April 2008.

58. Both the District Court and the High Court found unsubstantiated the applicant's allegation that the children's health had deteriorated since the expulsion order was issued in 2009. The applicant's eldest son's medical condition was also known in 2009."

Vedrørende proportionalitetsafvejningen fandt EMD i præmis 63:

"In the light of the above, the Court recognises that the District Court and the High Court carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law, including the applicant's family situation. Moreover, having regard to the gravity of the drugs crime committed by the applicant, the Court finds that the interference was supported by relevant and sufficient reasons, and was proportionate in that a fair balance was struck between the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other hand (see, among many others, Salem v. Denmark, cited above, § 82; Hamesevic v. Denmark (dec.), no. 25748/15, § 43, 16 May 2017; Alam v. Denmark

(dec.), no. 33809/15, § 35, 6 June 2017; and Ndidi v. the United Kingdom, no. 41215/14, § 76, 14 September 2017)."

EMD har i sagen *Otite v. the United Kingdom (2022)* taget stilling til udvisning på baggrund af en dom for økonomisk kriminalitet. Klageren havde over en fireårig periode drevet en dokumentfabrik, hvilket havde involveret et stort antal ofre og betragtelige pengebeløb. Klageren blev idømt fire år og 8 måneders fængsel og udvist for bestandig. Klageren var tidligere blevet dømt for anden ikke-personfarlig kriminalitet.

EMD udtalte i præmis 49 om grovheden af den begåede kriminalitet:

"49. The Court would agree with the Upper Tribunal that the fraud offence committed by the applicant was serious. The Court has tended to consider the seriousness of a crime in the context of the balancing exercise under Article 8 of the Convention not merely by reference to the length of the sentence imposed but rather by reference to the nature and circumstances of the particular criminal offence or offences and their impact on society as a whole. While it has consistently treated crimes of violence and drug-related offences as being at the most serious end of the criminal spectrum (see, for example, Maslov, cited above, § 85; A.W. Khan v. the United Kingdom, no. 47486/06, § 40, 12 January 2010; Dalia v. France, 19 February 1998, § 54, Reports of Judgments and Decisions 1998 I; and Baghli v. France, no. 34374/97, § 48, ECHR 1999 VIII), in Lukic v Germany, no, 25021/08, 20 September 2011 it accepted that multiple convictions for fraud were sufficient to outweigh the interests of a long-term resident alien who had been born in Germany and had spent his childhood and his youth there. Although the applicant in the present case does not have multiple convictions, the offence of which he was convicted was conducted over a four-year period and involved a large number of victims and significant sums of money (see paragraph 8 above). Moreover, while the OASys report, which has not been updated since 2016, suggested that he posed a low risk of serious harm to any group of individuals, it also indicated that the applicant had not recognised the impact and consequences of his offending on the victims, community and wider society and that there was a noticeable risk that the applicant would continue to behave in the way that he did before he was found out (see paragraph 16 above). It did not, as the applicant now asserts (see paragraph 27 above), state that the risk of reoffending was low.

Om hans personlige forhold bemærkede EMD, at klageren ikke havde fremlagt supplerende oplysninger for EMD til støtte for sit anbringende om, at udvisningen ville udgøre et disproportionalt indgreb i hans ret til respekt for hans familie-og privatliv, hvorefter EMD udtalte:

"*47. The applicant first came to the United Kingdom in 2003, when he was thirty-one years old […]. [Oplysninger om tidligere pådømt kriminalitet samt om den aktuelle kriminalitet udeladt her, red.]. Thus, on the basis of the information before the Court, the applicant has spent eleven years at liberty in the United Kingdom, for four of which he was engaged in criminal offending.*

48. The applicant does not appear to have been economically integrated in the United Kingdom. According to the Upper Tribunal, his family's income had been derived from his wife […]. For the four years prior to his incarceration he was involved in a criminal enterprise. It would appear that he has only recently been released from detention […], and he has submitted no evidence to suggest that he has found employment. Moreover, he has submitted no other information to substantiate his integration (see, for example, Külekci v. Austria, no. 30441/09, § 49, 1 June 2017).

[…]

52. In the present case, while the applicant's deportation would undoubtedly be difficult for his wife and children, there is nothing to suggest that their need for his support is particularly acute. His children are now nineteen, seventeen and twelve years old. His eldest daughter has type 1 diabetes, but there is no evidence

to suggest that the applicant's presence in the United Kingdom is important for her physical well-being. According to the evidence before the Upper Tribunal, the children did not have contact with him during the whole period while he was in prison (see paragraph 17 above). Following his custodial sentence he was detained in immigration detention (see paragraph 31 above). It is not known whether he returned to the family home following his release from detention.

53. Even if the applicant has returned to the family home, his wife has family in the United Kingdom and has established ties in the community (see paragraph 12 above). The family, which has already coped with his lengthy absence while in prison and immigration detention, would therefore have a support network in the event of his deportation. In addition, although the Upper Tribunal proceeded on the basis that the applicant's family would not return to Nigeria with him, there is no evidence to suggest that they could not do so. The applicant himself lived in Nigeria for the first thirty-one years of his life (see paragraph 5 above). Although his wife and children are British citizens, his wife is of Nigerian origin and his children would be entitled to Nigerian citizenship through him (see paragraph 12 above). The case is therefore readily distinguishable from that of Unuane, in which the applicant's partner and children had to stay in the United Kingdom as the eldest child was awaiting heart surgery, and the Upper Tribunal had itself acknowledged that they needed the applicant to be there with them to provide support (see Unuane, cited above, § 89).

54. The applicant has not brought forward any arguments which would speak against the possibility of his family visiting him in Nigeria and staying in contact via telephone and the internet (see Salem v. Denmark, no. 77036/11, § 81, 1 December 2016; see also Külekci, cited above, §49). Furthermore, the applicant only left Nigeria when he was thirty-one years old (see paragraph 5 above), and there is no evidence to suggest that he no longer has family, social, cultural and linguistic ties there (see, for example, Külekci, cited above, § 50).

55. Finally, the applicant has not provided the Court with any information about his release, or about his conduct following his release."

Herefter konkluderede EMD i præmis 56-57:

"56. The foregoing considerations are sufficient to enable the Court to conclude that the strength of the applicant's family and private life in the United Kingdom is not such as to outweigh the public interest in his deportation.

57. Accordingly, his deportation would not violate Article 8 of the Convention."

Der kan endvidere henvises til sagen *Loukili v. the Netherlands (2023)*

3.3.3.1.2. Mindre alvorlig kriminalitet

I sagen *Maslov v. Austria (2008)* var klageren indrejst i opholdslandet som seksårig og var blevet udvist på grund af kriminalitet i form af mere end 40 kvalificerede indbrud, nogle i forbindelse med banderelationer, brugstyveri af køretøj og et enkelt tilfælde af vold. Klageren var mindreårig, da han begik disse forhold, og da afgørelsen om udvisning blev endelig. Medlemsstaten havde begrundet udvisningen med hensynet til forebyggelse af uro og forbrydelse. Klageren blev efterfølgende udsendt i en alder af 19 år. Klageren havde på dette tidspunkt ikke stiftet egen familie.

I proportionalitetsafvejningen lagde EMD vægt på klagerens personlige forhold og den begåede kriminalitet.

I præmis 86 udtalte EMD:

"The applicant came to Austria in 1990, at the age of six, and spent the rest of his childhood and youth there. He was lawfully resident in Austria with his parents and siblings and was granted a permanent-settlement permit in March 1999."

I præmis 96 udtalte EMD videre:

"The Court observes that the applicant spent the formative years of his childhood and youth in Austria. He speaks German and received his entire schooling in Austria where all his close family members live. He therefore has his principal social, cultural and family ties in Austria."

Om klagerens tilknytning til sit hjemland udtalte EMD i præmis 97:

"As to the applicant's ties with his country of origin, the Court notes that he has convincingly explained that he did not speak Bulgarian at the time of his expulsion as his family belonged to the Turkish minority in Bulgaria. It was not disputed that he was unable to read or write Cyrillic as he had never gone to school in Bulgaria. It has not been shown, nor even alleged, that he had any other close ties with his country of origin."

Om den begåede kriminalitet udtalte EMD i præmis 81:

"In the Court's view, the decisive feature of the present case is the young age at which the applicant committed the offences and, with one exception, their non-violent nature. This also clearly distinguishes the present case from Boultif and Üner (both cited above) in which violent offences, in the first case robbery and in the second case manslaughter and assault committed by an adult, were the basis for imposing exclusion orders. Looking at the applicant's conduct underlying the convictions, the Court notes that the majority of the offences concerned breaking into vending machines, cars, shops or restaurants and stealing cash and goods. The one violent offence consisted in pushing, kicking and bruising another juvenile. Without underestimating the seriousness of and the damage caused by such acts, the Court considers that they can still be regarded as acts of juvenile delinquency."

Om selve proportionalitetsvurderingen i sager, hvor der var tale om ikke alvorlig kriminalitet, udtalte EMD i præmis 84-85:

"84. In sum, the Court sees little room for justifying an expulsion of a settled migrant on account of mostly non-violent offences committed when a minor (see Moustaquim, cited above, § 44, concerning an applicant who had been convicted of offences committed as a juvenile, namely numerous counts of aggravated theft, one count each of handling stolen goods and destruction of a vehicle, two counts of assault and one count of threatening behaviour, and Jakupovic v. Austria, no. 36757/97, § 27, 6 February 2003, in which the exclusion order was based on two convictions for burglary committed when a minor and where, in addition, the applicant was still a minor when he was expelled).

85. *Conversely, the Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Bouchelkia, cited above, § 51, where the Court found no violation of Article 8 as regards a deportation order made on the basis of the applicant's conviction of aggravated rape committed at the age of 17; in the decisions Hizir Kilic v. Denmark (dec.), no. 20277/05, and Ferhat Kilic v. Denmark (dec.), no. 20730/05, both of 22 January 2007, the Court declared inadmissible the applicants' complaints about*

exclusion orders imposed following their convictions for attempted robbery, aggravated assault and manslaughter committed at the age of 16 and 17 respectively).”

EMD fandt i den konkrete sag, at der var sket en krænkelse af artikel 8, og konkluderede i præmis 100:

”Having regard to the foregoing considerations, in particular the – with one exception – non-violent nature of the offences committed when a minor and the State’s duty to facilitate his reintegration into society, the length of the applicant’s lawful residence in Austria, his family, social and linguistic ties with Austria and the lack of proven ties with his country of origin, the Court finds that the imposition of an exclusion order, even of a limited duration, was disproportionate to the legitimate aim pursued, ‘the prevention of disorder or crime’. It was therefore not ‘necessary in a democratic society’.”

Sagen *Omojudi v. the United Kingdom (2009)* omhandlede en klager, som indrejste i opholdslandet på et studie-visum i en alder af 22 år. Året efter indrejste hans ægtefælle, og parret fik sammen tre børn, som alle blev britiske statsborgere. Fire år efter klagerens indrejse fik han afslag på forlængelse af sit opholdsgrundlag, idet han året forinden var blevet taget med et rejsedokument fra opholdslandet, som han havde opnået ved svig. I forbindelse med nægtelsen af forlængelsen af klagerens opholdsgrundlag blev der udstedt en deportationsordre. Klageren appellerede denne, men appellen blev afvist, og der blev udstedt en ny deportationsordre. Mens appelsagen om udvisning blev behandlet, blev klageren dømt for henholdsvis tyveri og sammensværgelse om at begå bedrag. Han blev idømt fire års fængsel. Samtidigt blev der afsagt dom for andre forhold, hvorved klageren blev idømt fængsel i fem gange 12 måneder, som skulle afsones sideløbende med dommen for tyveri og sammensværgelse.

Efter 13 års ophold søgte klageren om asyl, hvilket blev afslået efter yderligere tre års ophold. To år senere søgte både klageren og hans ægtefælle om regularisering af deres ophold, og begge blev efter yderligere fem år meddelt tidsubegrænset opholdstilladelse. Klageren havde på dette tidspunkt haft 23 års ophold og var 45 år gammel.

Året efter at klageren blev meddelt tidsubegrænset opholdstilladelse, blev han idømt 15 måneders fængsel for seksuelle overgreb. Der blev i forbindelse med straffesagen ikke nedlagt påstand om, at klageren skulle udvises, men året efter blev der udstedt en udvisningsafgørelse, idet opholdslandet ville forebygge uro og forbrydelse. Efter en appelsag blev klageren udsendt til sit hjemland efter 26 års ophold. Hans børn var på dette tidspunkt 20 år, 17 år og 16 år gamle.

Om de kriminelle forhold udtalte EMD i præmis 42, at:

”The Court observes that the applicant's most serious offences were committed in 1989 and 2005. During the sixteen years between these offences, the applicant largely stayed out of trouble (with the exception of a number of driving offences, none of which resulted in a prison sentence). The present case can therefore be distinguished from that of the previously cited case Joseph Grant v. the United Kingdom in a number of respects. First, the applicant in Grant was a habitual offender and there was no prolonged period during which he was out of prison and did not offend. This is clearly not the case for the present applicant. Secondly, Mr Grant committed all of his offences after he had been granted Indefinite Leave to Remain in the United Kingdom. Moreover, deportation was considered at a relatively early stage and while the Secretary of State for the Home Department decided not to deport Mr Grant, it warned him that if in future he came to the adverse attention of the authorities, deportation would again be considered. In the present case the applicant was

granted Indefinite Leave to Remain following his conviction for relatively serious crimes involving deception and dishonesty. The Court attaches considerable weight to the fact that the Secretary of State for the Home Department, who was fully aware of his offending history, granted the applicant Indefinite Leave to Remain in the United Kingdom in 2005. Thirdly, the vast majority of the offences committed by Mr Grant were related to his drug use. There was therefore a history and pattern of offending that was unlikely to end until the underlying problem was addressed. In the present case, however, the applicant's offences were of a completely different nature and there was no indication that they were the result of any 'underlying problem'. In particular, there is no evidence of any pattern of sexual offending."

I præmis 44-48 udtalte EMD:

"44. The Court reiterates that sexual assault is undoubtedly a serious offence, particularly where it also involves a breach of a position of trust. The Court observes, however, that the maximum available sentence for sexual assault was ten years' imprisonment. It is therefore clear that even taking into account the aggravating factor of a breach of a position of trust, the applicant's offence was not at the most serious end of the spectrum of sexual offences.

45. The Court is mindful of the fact that the applicant has lived in the United Kingdom since 1982 and his wife has lived there since 1983. Although they both spent the formative years of their lives in Nigeria, their ties there have significantly weakened and they now have much stronger ties to the United Kingdom. While their residence in the United Kingdom was not always lawful, over the years they made numerous attempts to regularise their position and they were eventually granted Indefinite Leave to Remain in 2005. Their family life began in the United Kingdom before the applicant committed his first criminal offence and at a time when the applicant and his wife had leave to remain. Their children were born in the United Kingdom and are British citizens. Moreover, all three children have always lived in the family home and the family continued to live together as one unit until the applicant's deportation to Nigeria. The applicant's oldest son now has a daughter of his own and prior to his deportation the applicant and his wife were helping him to raise her while he pursued his studies.

46. The Court attaches considerable weight to the solidity of the applicant's family ties in the United Kingdom and the difficulties that his family would face were they to return to Nigeria. The Court accepts that the applicant's wife was also an adult when she left Nigeria and it is therefore likely that she would be able to readjust to life there if she were to return to live with the applicant. She has, however, lived in the United Kingdom for twenty-six years and her ties to the United Kingdom are strong. Her two youngest children were born in the United Kingdom and have lived there their whole lives. They are not of an adaptable age and would likely encounter significant difficulties if they were to relocate to Nigeria. It would be virtually impossible for the oldest child to relocate to Nigeria as he has a young daughter who was born in the United Kingdom. Consequently, the applicant's wife has chosen to remain in the United Kingdom with her children and granddaughter. The applicant's family can, of course, continue to contact him by letter or telephone, and they may also visit him in Nigeria from time to time, but the disruption to their family life should not be underestimated. Although the Immigration Rules do not set a specific period after which revocation would be appropriate, it would appear that the latest the applicant would be able to apply to have the deportation order revoked would be ten years after his deportation.

47. Finally, the Court turns to the conduct of the applicant following the commission of the offence on 1 November 2005. The applicant committed a driving offence during this period, having failed to provide a specimen for analysis. As a consequence, he was banned from driving for three years. The remainder of his conduct is difficult to assess as he spent most of the period from the conviction to his deportation in detention. His criminal sentence came to an end on 1 June 2007, after which he remained in immigration detention until he was granted bail on 25 June 2007. He was detained again on 14 September 2007 and remained in detention until he was deported on 27 April 2008.

48. Having regard to the circumstances of the present case, in particular the strength of the applicant's family ties to the United Kingdom, his length of residence, and the difficulty that his youngest children would face if they were to relocate to Nigeria, the Court finds that the applicant's deportation was not proportionate to the legitimate aim pursued."

I sagen P.J. AND R.J. v. SWITZERLAND (2024) var klageren idømt 20 måneders betinget fængsel for narkotikakriminalitet og udvist med indrejseforbud i fem år. Han havde ægtefælle og to børn på ti og otte år i opholdslandet. EMD udtalte blandt andet:

"50. Having identified the relevant factors, the domestic courts focused their assessment of the first applicant's situation on the nature and gravity of the offence committed. In this regard, the Court notes that, although the first applicant's offence was serious, it was not punished by actual imprisonment but by a suspended conditional sentence (see, by contrast, Veljkovic-Jukic v. Switzerland, no. 59534/14, §§ 6-7, 21 July 2020; K.A. v. Switzerland, no. 62130/15, § 49, 7 July 2020; and Ukaj v. Switzerland, no. 32493/08, § 37, 24 June 2014).

51. However, having established that the degree of culpability was low, the domestic courts merely referred to the fact that the first applicant had confessed from the outset, that he had cooperated with the police and that there was a favourable prognosis as to the risk of recidivism (see, by contrast, Z v. Switzerland, cited above, § 24, where there was a proven risk of recidivism as the applicant had committed an offence of illegal surveillance shortly after completing his probationary period, and Vasquez v. Switzerland, no. 1785/08, § 46, 26 November 2013, where there was a proven risk of recidivism given the applicant's record of difficulties controlling his sexual instincts after his conviction).

52. Moreover, the domestic courts merely mentioned that shortly after the expulsion decision was issued in July 2018, the first applicant found a full-time job, which he kept until he was expelled from Switzerland two years later, and that he had shown good behaviour throughout the period (see paragraph 16 above). The Government implied that such behaviour was to be expected from the first applicant, given that he had received a suspended prison sentence (see paragraph 37 above). However, in their assessment, the domestic courts failed to consider that, while the fear of a suspended sentence turning into an actual prison term might have played a role, the first applicant's overall good behaviour, his ability to secure stable employment shortly after his conviction, and the absence of any subsequent administrative or criminal offenses demonstrated his genuine intention to prove that he was not a danger to public safety. This oversight neglected evidence of the first applicant's rehabilitation and commitment to lawful conduct.

53. The principle of proportionality requires, inter alia, that account be taken of personal conduct and the impact on family life (see paragraph 28 above). The domestic courts did not question the genuineness of his family life or the negative impact that the five-year expulsion would have on it. They argued that the second applicant could either follow him to Bosnia and Herzegovina, where she had good prospects, or remain in Switzerland, making the separation a matter of choice (see paragraphs 10 and 16 above).

54. As for the applicants' daughters, the courts concluded that given their age they could adapt to a new environment in Bosnia and Herzegovina and that their relocation would depend on the second applicant's choice to follow her husband (see Jeunesse v. the Netherlands ([GC], no. 12738/10, § 109, 3 October 2014).

55. In the light of the foregoing, the Court finds that, in imposing and upholding the five-year expulsion, the domestic courts did not satisfactorily apply the Court's case-law mandating a careful balancing of the individual and public interests. The courts failed to give due weight to certain aspects. These include the first applicant's low level of culpability, the fact that his sentence was suspended, his lack of a criminal record, the fact that he no longer posed a threat to public safety, his status as a long-term immigrant and the adverse effect of the expulsion on the members of his family.

56. In the light of the above, the Court considers that there has been a violation of Article 8 of the Convention."

3.3.3.1.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Antwi and others v. Norway (2012)* havde klageren opnået sin opholdstilladelse på baggrund af svig. Klageren var i opholdslandet blevet gift og havde fået et barn. Syv år efter indrejsen fik opholdslandet kendskab til hans reelle identitet, og året efter blev han udvist fra opholdslandet.

Om proportionalitetsvurderingen udtalte EMD i præmis 90:

"In applying the above principles to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Nunez, cited above, § 71, and Darren Omoregie and Others v. Norway, no. 265/07, § 67, 31 July 2008; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Nunez and Darren Omoregie and Others, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Nunez, cited above, § 73)."

I præmis 91 lagde EMD endvidere vægt på:

"Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country."

Om klagerens tilknytning til henholdsvis hjemlandet og opholdslandet udtalte EMD i præmis 92:

"Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country."

EMD udtalte i præmis 105 om den indklagede stats afvejning af de modsat rettede hensyn:

"In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand."

I sagen *Alleleh a.o. v. Norway (2022)* havde den første klager opnået sin opholdstilladelse på baggrund af svig. Klagerens ægtefælle (anden klager) og deres fire børn, som på tidspunktet for dommen var 12, syv, syv og fire år gamle, (tredje – sjette klagere) var alle statsborgere i opholdslandet, ligesom hun selv havde opnået statsborgerskab i opholdslandet. 13 år efter indrejsen i opholdslandet blev myndighederne bekendt med klagerens rette identitet, hvorefter hendes statsborgerskab blev inddraget, og hun blev udvist med indrejseforbud i to år.

Om proportionalitetsvurderingen udtalte EMD i præmis 97-99:

"97. The Court also attaches importance to the Supreme Court's detailed reasoning with regard to its explanation of the weighty immigration policy arguments in favour of the expulsion of the first applicant. The Supreme Court made particular reference to the seriousness of her offences and that a sanction – as had also been emphasised by the legislature in the preparatory work to the Immigration Act (see, in particular, paragraphs 46-48 above) – in the form of expulsion was considered necessary in order to uphold respect for the immigration regulations and deter from future contraventions, that is to say for reasons of general deterrence (see, inter alia, paragraph 60 above). Indeed, as already found by the Court in a number of cases, a scheme of implementation of national immigration law which is based on administrative sanctions in the form of expulsion and a ban on re-entry does not as such raise an issue of failure to comply with Article 8 of the Convention (see, for example, Antwi and Others, cited above, § 90). Thus, the Court has in principle no objections to the Supreme Court's approach in this respect, bearing in mind, at the same time, that any such scheme must be construed and applied in a manner that is compatible with the Convention rights of all involved.

98. The Court furthermore observes that the Oslo City Court and the Borgarting High Court each examined the facts of the case with regard to what an expulsion would entail for each of the applicants, including the children (see paragraphs 26-33 and 36-42 above, respectively). The Borgarting High Court's findings as to the facts of the case, the children's situation included, formed the basis for the Supreme Court's assessment of the case within the scope of the appeal, the appeal having been limited to the High Court's application of the law. In this respect the Supreme Court considered that the proportionality analysis, unlike what had been done by the High Court (see paragraph 35 above), had to be conducted in the light of the Court's case-law according to which an expulsion of a person whose grounds for residence were precarious at the outset would only be disproportionate in "exceptional" circumstances (see, for example, paragraphs 52, 54 and 64 above). Moreover, the Supreme Court concluded that the facts of the case as established by the Borgarting High Court did not support the finding that such "exceptional circumstances" existed. In this connection the Supreme Court emphasised that there was nothing in the lower instances' findings of fact that stood out from what had generally to be assumed to follow from expulsion of one of the parents for a relatively short period (see paragraphs 66 and 71 above).

99. Regarding the Supreme Court's legal starting points under Article 8 of the Convention, the Court notes that the first applicant was not a "settled migrant" in Norway in so far as her stay there was based on repeatedly giving incorrect information over a long period and therefore had never had a valid legal basis. It was for that reason the Supreme Court proceeded on the basis that the expulsion was valid unless "exceptional circumstances" could be identified. Although the Court does not disagree with the Supreme Court regarding this being the starting point, the Court also notes the very particular aspect of the instant case that the sanction imposed on the first applicant impacted as much, if not more, on her family members, notably her children, all being Norwegian nationals who had been born and lived all their lives in Norway. Even if the other family members would follow the first applicant to Djibouti during the period when the ban on re-entry would be in force in order to preserve "family life", they would have to experience a considerable unwanted change in their "private life" in moving to a country with which they had no connection, including as concerned language. This contrasted with the first applicant's own situation, coming from Djibouti, speaking the language, having family there and even having visited there after she had arrived in Norway (see, inter alia, paragraph 26 above). The expulsion imposed on the first applicant to sanction her behaviour could thus, somewhat paradoxically, put an equally heavy if not heavier strain on the other family members. The Court observes in this context – as did the Supreme Court – that the Norwegian Parliament has requested that the Government consider an amendment of the Immigration Act to "make it possible for the immigration administration to supplement the use of expulsion and prohibition of entry with a broader set of sanctions where warranted by special circumstances such as the child's best interests" (see paragraph 57 above)."

Herefter konkluderede EMD i præmis 105-107:

"105. Considering all of the above, the Court accepts that the present case disclosed no exceptional circumstances as such requiring the respondent State to withdraw the expulsion order so as to enable the applicants to maintain and continue to develop family life in Norway. Moreover, the Court accepts that the domestic authorities were faced with a balancing of interests that had to be done in a situation where particularly weighty interests in immigration control supported the first applicant's expulsion while at the same time an expulsion would impose considerable difficulties on the other applicants. The Court also accepts that the domestic authorities, including the Supreme Court, sought to attend to the children's interests in so far they could be reconciled with the public interest reasons in sanctioning the first applicant's behaviour.

106. Therefore, as to the final conclusion that the expulsion was not disproportionate because it did not exceed the standards indicated by the Court in its case-law relevant to the case, the Court does not find that the authorities of the respondent State transgressed their margin of appreciation when, having carefully examined the facts and adequately balanced the interests in issue (see paragraphs 92-93 above), they decided to expel the first applicant and to prohibit her re-entry for two years. Neither are there any other reasons for the Court to substitute its own assessment for that of the competent national authorities, bearing in mind in particular the domestic courts' careful examination.

107. On the basis of the above, the Court concludes that there has been no violation of Article 8 of the Convention."

3.3.3.1.4. Ulovligt ophold

Sagen *Jeunesse v. the Netherlands (2014)* vedrørte en klager, der på intet tidspunkt under sit 16 år lange ophold i Nederlandene– bortset fra en kortvarig visumperiode i begyndelsen af sit ophold – havde haft opholdstilladelse i landet. Storkammeret udtalte i præmis 105:

"As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – albeit in the applicant's case after numerous applications for a residence permit and many years of actual

residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 cannot be transposed automatically to the situation of the applicant. Rather, the question to be examined in the present case is whether, having regard to the circumstances as a whole, the Netherlands authorities were under a duty pursuant to Article 8 to grant her a residence permit, thus enabling her to exercise family life on their territory. The instant case thus concerns not only family life but also immigration. For this reason, the case at hand is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation under Article 8 of the Convention (see Ahmut v. the Netherlands, 28 November 1996, § 63, Reports of Judgments and Decisions 1996-VI). As regards this issue, the Court will have regard to the following principles as stated most recently in the case of Butt v. Norway (no. 47017/09, § 78 with further references, 4 December 2012)."

I forlængelse heraf udtalte EMD om de generelle principper i præmis 106-109:

"106. While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective 'respect' for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.

107. Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Butt v. Norway, cited above, § 78).

108. Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court's well-established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A no. 94, p. 94, § 68; Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998; Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999; M. v. the United Kingdom (dec.), no. 25087/06, 24 June 2008; Rodrigues da Silva and Hoogkamer v. the Netherlands, cited above, § 39; Arvelo Aponte v. the Netherlands, cited above, §§ 57-58; and Butt v. Norway, cited above, § 78).

109. Where children are involved, their best interests must be taken into account (see Tuquabo-Tekle and Others v. the Netherlands, no. 60665/00, § 44, 1 December 2005; mutatis mutandis, Popov v. France, nos.

39472/07 and 39474/07, §§ 139-140, 19 January 2012; Neulinger and Shuruk v. Switzerland, cited above, § 135; and X v. Latvia [GC], no. 27853/09, § 96, ECHR 2013). On this particular point, the Court reiterates 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 (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it."

Vedrørende afvejningen i den konkrete sag udtalte EMD blandt andet (præmis 115-120):

"115. The Court first and foremost takes into consideration the fact that all members of the applicant's family with the exception of herself are Netherlands nationals and that the applicant's spouse and their three children have a right to enjoy their family life with each other in the Netherlands. The Court further notes that the applicant held Netherlands nationality at birth. She subsequently lost her nationality when Suriname became independent. She then became a Surinamese national, not by her own choice but pursuant to Article 3 of the Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality (see paragraph 62 above). Consequently, her position cannot be simply considered to be on a par with that of other potential immigrants who have never held Netherlands nationality.

116. The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for more than sixteen years and that she has no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Netherlands authorities, while she repeatedly submitted residence requests and awaited the outcome of appeals. The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities.

117. Thirdly, the Court accepts, given the common background of the applicant and her husband and the relatively young age of their children, that there would appear to be no insurmountable obstacles for them to settle in Suriname. However, it is likely that the applicant and her family would experience a degree of hardship if they were forced to do so. When assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family.

118. The Court fourthly considers that the impact of the Netherlands authorities' decision on the applicant's three children is another important feature of this case. The Court observes that the best interests of the applicant's children must be taken into account in this balancing exercise (see above § 109). On this particular point, the Court reiterates 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 (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. For that purpose, in cases concerning family reunification, the Court pays particular attention to the circumstances of the minor children concerned,

especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents (see Tuquabo-Tekle and Others v. the Netherlands, cited above, § 44).

119. Noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation. In this connection, the Court observes that the applicant's husband provides for the family by working full-time in a job that includes shift work. He is, consequently, absent from the home on some evenings. The applicant – being the mother and homemaker – is the primary and constant carer of the children who are deeply rooted in the Netherlands of which country – like their father – they are nationals. The materials in the case file do not disclose a direct link between the applicant's children and Suriname, a country where they have never been.

120. In examining whether there were insurmountable obstacles for the applicant and her family to settle in Suriname, the domestic authorities had some regard for the situation of the applicant's children (see paragraphs 23 (under 2.19 and 2.21), 28 and 34 (under 2.4.5) above). However, the Court considers that they fell short of what is required in such cases and it reiterates that national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any such removal in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (see above § 109). The Court is not convinced that actual evidence on such matters was considered and assessed by the domestic authorities. Accordingly, it must conclude that insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit."

Samlet udtaler EMD vedrørende afvejningen i den konkrete sag i præmis 121-122:

"121. The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. 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.

122. The Court, whilst confirming the relevant principles set out above (see paragraphs 106-109), finds that, on the basis of the above considerations (see paragraphs 115-120) and viewing the relevant factors cumulatively, the circumstances of the applicant's case must be regarded as exceptional. Accordingly, the Court concludes that a fair balance has not been struck between the competing interests involved. There has thus been a failure by the Netherlands authorities to secure the applicant's right to respect for her family life as protected by Article 8 of the Convention."

Personer, som enten har eller har haft lovligt ophold i opholdslandet, kan være at betragte som "Settled migrants" og er behandlet nærmere i afsnittene 3.3.3.1.1 – 3.3.3.1.3 og 3.3.3.1.5.

I sagen *Konstatinov v. the Netherlands (2007)* udtalte EMD i præmis 48:

"Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would be precarious from the outset. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8."

I denne sag havde klageren på intet tidspunkt haft lovligt opholdsgrundlag, men havde stiftet familie i opholdslandet ved at gifte sig og få et barn med en statsborger fra opholdslandet.

EMD udtalte i præmis 53:

"The foregoing considerations are sufficient to enable the Court to conclude that it cannot be said that the Netherlands authorities have failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration and public expenditure and in the prevention of disorder or crime on the other. Consequently, there has been no violation of the applicant's right to respect for her rights guaranteed by Article 8 of the Convention."

I sagen *Rodrigues da Silva and Hoogkamer v. the Netherlands (2006)* havde klageren på intet tidspunkt søgt om opholdstilladelse, men havde indledt et familieliv. Klageren havde dog, såfremt hun havde søgt om det, haft mulighed for at opnå en opholdstilladelse. Om den berettigede forventning udtalte EMD i præmis 43:

"Whilst it does not appear that the first applicant has been convicted of any criminal offences (see Berrehab, cited above, § 29, and Cılız v. the Netherlands, no. 29192/95, § 69, ECHR 2000-VIII), she did not attempt to regularise her stay in the Netherlands until more than three years after first arriving in that country (see paragraphs 9 and 13 above) and her stay there has been illegal throughout. The Court reiterates that persons who, without complying with the regulations in force, confront the authorities of a Contracting State with their presence in the country as a fait accompli do not, in general, have any entitlement to expect that a right of residence will be conferred upon them (see Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003). Nevertheless, the Court finds relevant that in the present case the Government indicated that lawful residence in the Netherlands would have been possible on the basis of the fact that the first applicant and Mr Hoogkamer had a lasting relationship between June 1994 and January 1997 (see paragraph 34 above). Although there is no doubt that a serious reproach may be made of the first applicant's cavalier attitude to Dutch immigration rules, this case should be distinguished from others in which the Court considered that the persons concerned could not at any time have reasonably expected to be able to continue family life in the host country (see, for example, Solomon, cited above)."

I den konkrete sag, hvor det også skulle indgå i vurderingen, at klageren havde fået et barn, fandt EMD I præmis 44:

"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. Indeed, by attaching such paramount importance to this latter element, the authorities may be considered to have indulged in excessive formalism."

3.3.3.1.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

Sagen *Jeunesse v. the Netherlands (2014)* vedrørte som anført ovenfor under afsnit 3.3.3.1.4 en klager, der på intet tidspunkt under sit 16 år lange ophold i Nederlandene– bortset fra en kortvarig visumperiode i begyndelsen af sit ophold – havde haft lovligt ophold i landet. Storkammeret fandt imidlertid anledning til i dommen også at udtale sig om retsstillingen for settled migrants:

"104. The instant case may be distinguished from cases concerning "settled migrants" as this notion has been used in the Court's case-law, namely, persons who have already been granted formally a right of residence in a host country. A subsequent withdrawal of that right, for instance because the person concerned has been convicted of a criminal offence, will constitute an interference with his or her right to respect for private and/or family life within the meaning of Article 8. In such cases, the Court will examine whether the interference is justified under the second paragraph of Article 8. In this connection, it will have regard to the various criteria which it has identified in its case-law in order to determine whether a fair balance has been struck between the grounds underlying the authorities' decision to withdraw the right of residence and the Article 8 rights of the individual concerned (see, for instance, Boultif v. Switzerland, no. 54273/00, ECHR 2001-IX; Üner v. the Netherlands [GC], no. 46410/99, ECHR 2006-XII; Maslov v. Austria [GC], no. 1638/03, ECHR 2008; Savasci v. Germany (dec.), no. 45971/08, 19 March 2013; and Udeh v. Switzerland, no. 12020/09, 16 April 2013)."

I sagerne *Slivenko v. Latvia (2003)* og *Sisojeva and others v. Latvia (2007)* har EMD taget stilling til, hvorledes proportionalitetsafvejningen skal foretages i tilfælde, hvor klagerens opholdstilladelse inddrages eller nægtes forlænget, uden at klageren har begået kriminelle forhold.

I sagen *Slivenko v. Latvia (2003)* var klagerne, som var af russisk oprindelse, blevet udsendt fra Letland under henvisning til, at de var familiemedlemmer til en russisk militærperson og derfor forpligtede til at forlade Letland i forbindelse med tilbagetrækningen af de russiske tropper fra Letland som følge af landets opnåelse af uafhængighed fra USSR. Sagerne vedrørte klagernes privatliv, idet de havde levet hele eller hovedparten af deres liv i Letland. Medlemsstaten havde som det legitime hensyn henvist til den nationale sikkerhed.

I præmis 96 udtalte EMD om den ene klagers personlige forhold, at:

"As regards the facts of the present case, the first applicant arrived in Latvia in 1959, when she was only one month old. Until 1999, by which time she was 40 years of age, she continued to live in Latvia. She attended school there, found employment and married. Her daughter, the second applicant, was born in Latvia in 1981 and lived there until the age of 18, when she was compelled to leave the country together with her mother, having just completed her secondary education (see paragraphs 16 and 46 above). It is undisputed that the applicants left Latvia against their own will, as a result of the unsuccessful outcome of the proceedings concerning the legality of their stay in Latvia. They were thus removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being. Furthermore, as a result of the removal, the applicants lost the flat in which they had lived in Riga (see paragraphs 32 and 46 above). In these circumstances, the Court cannot but find that the applicants' removal from Latvia constituted an interference with their 'private life' and their 'home' within the meaning of Article 8 § 1 of the Convention."

EMD udtalte i præmis 112:

"In short, the measures of the applicants' removal can be said to have been imposed in pursuance of the protection of national security, a legitimate aim within the meaning of Article 8 § 2 of the Convention."

Medlemsstaten anførte i præmis 123 om klagernes manglende tilknytning til opholdslandet:

"The respondent Government argued that the applicants had not been sufficiently integrated into Latvian society (see paragraph 88 above). In this connection the Court observes that the applicants have spent virtually all their lives in Latvia (see paragraph 96 above). It is true that the applicants are not of Latvian origin, and that they arrived and lived in Latvia – then part of the USSR – in connection with the service of members of their family (the first applicant's father and her husband) in the Soviet armed forces. However, the applicants also developed personal, social and economic ties in Latvia unrelated to their status as relatives of Soviet (and later Russian) military officers. This is shown by the fact that the applicants did not live in army barracks or any other restricted area, but in a block of flats in which there were also civilians. Nor did they study or work in a military institution. The first applicant was able to find employment in Latvian companies after Latvia regained its independence in 1991."

EMD udtalte herom i præmis 124:

"As regards the respondent Government's argument about the level of the applicants' proficiency in Latvian, the Court observes that, in so far as this is a relevant consideration, it has not been shown that the degree of the applicants' fluency in the language – although the precise level is in dispute – was insufficient for them to lead a normal everyday life in Latvia. In particular, there is no evidence that the level of the applicants' knowledge of Latvian was in any way different from that of other native Russian speakers living in Latvia, including those who were able to obtain the status of 'ex-USSR citizens' in order to remain in Latvia on a permanent basis."

EMD udtalte endvidere i præmis 125 om klagernes tilknytning til hjemlandet:

"Although in 1999 the applicants moved to Russia to join Nikolay Slivenko and eventually obtained Russian citizenship, by that time they had apparently not developed personal, social or economic ties in Russia similar to those they had established in Latvia. In short, the Court finds that at the relevant time the applicants were sufficiently integrated into Latvian society."

Grundet ovenstående forhold fandt EMD i præmis 128:

"Having regard to all the circumstances, the Court considers that the Latvian authorities overstepped the margin of appreciation enjoyed by the Contracting Parties in such a matter, and that they failed to strike a fair balance between the legitimate aim of the protection of national security and the interest of the protection of the applicants' rights under Article 8. Therefore, the applicants' removal from the territory of Latvia cannot be regarded as having been 'necessary in a democratic society'."

Sagen *Sisojeva and others v. Latvia (2005)* omhandlede en familie bestående af far, mor samt deres to børn. Forældrene samt det ene barn klagede til EMD over, at opholdsstaten havde inddraget deres opholdstilladelse under henvisning til, at de på baggrund af en konvention indgået mellem opholdsstaten og den tidligere Sovjetunion ikke havde krav på opholdstilladelse. Opholdsstaten henviste i den forbindelse til, at den ene klager, faren, havde været tilknyttet militæret under den tidligere Sovjetunion, hvorfor klagerne ikke kunne

få legaliseret deres ophold i opholdsstaten. Klagerne havde i denne sag ikke begået kriminelle handlinger under deres ophold i opholdslandet, men havde overtrådt en regulativ forskrift, og var blevet idømt en mindre bøde. EMD lagde dog vægt på, at denne forseelse ikke var at anse som en strafferetlig overtrædelse jf. den nationale lovgivning. Der henvises til afsnit 3.3.2.2 om legitime formål for gennemgang af sagens faktum.

Ved proportionalitetsvurderingen udtalte EMD i præmis 102:

"In the instant case, the Court notes that the first two applicants arrived in Latvia in 1969 and 1968 respectively, that is, at the age of 20 in the case of Svetlana and 22 in the case of Arkady. Since then, they have lived continuously in Latvia. Their daughter, the third applicant, was born in Latvia in 1978 and has always lived there. Accordingly, it is not disputed that during their time in Latvia the applicants have developed the personal, social and economic ties that make up the private life of every human being. Therefore, the Court cannot but find that the measure imposed on the applicants constituted an interference with their 'private life' within the meaning of Article 8 § 1 of the Convention (see the judgment in Slivenko v. Latvia [GC], no. 48321/99, § 96, ECHR 2003-X)."

I præmis 106 udtalte EMD, at det påberåbte hensyn fra statens side var hensynet til at forebygge uro:

"With reference first of all to the "lawfulness" of the measure for the purposes of Article 8 § 2 of the Convention, the Court agrees with the Government's assertion that the interference was "in accordance with the law" (in this instance section 1 (1) of the Non-Citizens Act and section 35 of the former Aliens Act). Equally, in view of the fact that the measure was designed to ensure compliance with immigration laws, the Court accepts that it pursued a 'legitimate aim', namely 'to prevent disorder'."

Om tilknytningen til opholdslandet og dermed proportionalitetsvurderingen udtalte EMD i præmis 107:

"As to whether the impugned measure was 'necessary in a democratic society', that is, proportionate to the legitimate aim pursued, the Court notes that the applicants have spent all, or almost all, of their lives in Latvia. Although they are not of Latvian origin, the fact remains that they have developed personal, social and economic ties strong enough for them to be regarded as sufficiently well integrated in Latvian society, even if, as the Government maintain, there are gaps in their knowledge of Latvian (see the Slivenko judgment cited above, § 124). Similarly, although the second and third applicants have Russian nationality and had an officially registered residence in Russia, none of the three applicants appears to have developed personal ties in that country comparable to those they have established in Latvia (ibid., § 125)."

Da klagerne ikke havde begået nogen overtrædelse af straffeloven, og idet der var tale om en klage over, at klagerne ikke kunne få legaliseret deres ophold i opholdsstaten, udtalte EMD i præmis 108:

"In these circumstances the Court considers that, in terms of the conditions imposed on the applicants in order to have their position regularised, only reasons of a particularly serious nature could justify refusal. The Court has been unable to discern any such reasons in the instant case. While it recognises the right of each State to take effective steps to ensure compliance with its immigration laws, it considers that a measure of the kind imposed on the applicants could be considered to be proportionate only if the applicants had acted in a particularly dangerous manner. In that connection the Court reiterates that most of the similar cases it has examined under Article 8 of the Convention have related to situations in which the applicants had been deported

after being convicted of serious criminal offences. In the instant case, however, the applicants received only a modest fine which was not classified as a criminal penalty under Latvian law (see paragraph 18 above).”

Det bemærkes, at kammerets afgørelse i ovennævnte sag blev henvist til Storkammeret, som slettede sagen af sagslisten for så vidt angår artikel 8-spørgsmålet, da klagerne på tidspunktet for Storkammerets behandling havde mulighed for at legalisere deres ophold i Letland og dermed ikke var i risiko for at blive udsendt. Storkammeret har således ikke i den nævnte sag forholdt sig til artikel 8-vurderingen, herunder kammerets anvendelse eller vægtning af det legitime hensyn.

I sagen *Osman v. Denmark (2011)* ansås klagerens opholdstilladelse i medlemsstaten som bortfaldet som følge af hendes langvarige ophold i familiens tidligere opholdsland Kenya. Klageren, der var somalisk statsborger, havde boet i Kenya fra hun var tre-fire år, indtil hun som syvårig indrejste i opholdslandet som familiesammenført. Hun havde herefter opholdt sig i opholdslandet, indtil hun som 15-årig af forældrene blev sendt tilbage til Kenya. Kort tid før hun fyldte 18 år, kontaktede klageren den danske ambassade i Kenya med henblik på at kunne vende tilbage til sin familie i opholdslandet, hvilket blev afslået af de danske myndigheder. Hun indrejse herefter som 19-årig i medlemsstaten, hvor hun ikke længere havde lovligt ophold.

Ved proportionalitetsvurderingen udtalte EMD i præmis 60 om tilknytningen til Danmark:

”The Court observes that the applicant spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old. She speaks Danish and received schooling in Denmark until August 2002. Her divorced parents and older siblings live in Denmark. The applicant therefore had social, cultural and family ties in Denmark.”

Om tilknytningen til hjemlandet og det tidligere opholdsland, udtalte EMD i præmis 61:

”The applicant also had social, cultural and family ties in Kenya and Somalia. She was born in Somalia and lived there from 1987 to 1991. She resided in Kenya from 1991 to 1995. The applicant spoke Somali. It was unclear whether the applicant had family in Somalia but certain that she had family in Kenya. The applicant returned to Kenya in 2003 and took care of her parental grandmother. Her application in August 2005 to re-enter Denmark was refused but she re-entered the country illegally, apparently in June 2007. The applicant’s father was a recognised refugee from Somalia. He visited Kenya at least twice, namely in 2003 and 2005. The second time he remarried there. There was no indication that the applicant’s mother could not enter Somalia and Kenya.”

Ydermere lagde EMD i præmis 70 vægt på, at klageren ikke frivilligt var udrejst fra Danmark:

”In the present case, the applicant maintained that she had been obliged to leave Denmark to take care of her grandmother at the Hagadera refugee camp for more than two years; that her stay there was involuntary; that she had no means to leave the camp; and that her father’s decision to send her to Kenya had not been in her best interest.”

EMD udtalte i præmis 76 om de nationale myndigheders proportionalitetsvurdering:

”Having regard to all the above circumstances, it cannot be said that the applicant’s interests have sufficiently been taken into account in the authorities’ refusal to reinstate her residence permit in Denmark or that a fair

balance was struck between the applicants' interests on the one hand and the State's interest in controlling immigration on the other."

I sagen *Berrehab. v. the Netherlands (1988)* opnåede klageren en opholdstilladelse på baggrund af ægteskab med en hollandsk statsborger. Parret fik en datter. Da klageren efterfølgende blev skilt fra sin ægtefælle, nægtede de nationale myndigheder at forlænge hans opholdstilladelse, da denne var betinget af et bestående ægteskab. Klageren havde opholdt sig i hjemlandet de første 25 år af sit liv og havde derefter opholdt sig 11 år i opholdslandet. Klagerens datter var på tidspunktet for EMD's afgørelse ni år gammel.

Ved proportionalitetsvurderingen udtalte EMD i præmis 28-29:

"28. In determining whether an interference was 'necessary in a democratic society', the Court makes allowance for the margin of appreciation that is left to the Contracting States (see in particular the W v. the United Kingdom judgment of 8 July 1987, Series A no. 121-A, p. 27, § 60 (b) and (d), and the Olsson judgment of 24 March 1988, Series A no.130, pp. 31-32, § 67).

In this connection, it accepts that the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens. According to the Court's established case-law (see, inter alia, the judgments previously cited), however, 'necessity' implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.

29. Having to ascertain whether this latter condition was satisfied in the instant case, the Court observes, firstly, that its function is not to pass judgment on the Netherlands' immigration and residence policy as such. It has only to examine the interferences complained of, and it must do this not solely from the point of view of immigration and residence, but also with regard to the applicants' mutual interest in continuing their relations. As the Netherlands Court of Cassation also noted (see paragraph 16 above), the legitimate aim pursued has to be weighed against the seriousness of the interference with the applicants' right to respect for their family life.

As to the aim pursued, it must be emphasised that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr. Berrehab already had real family ties there - he had married a Dutch woman, and a child had been born of the marriage.

As to the extent of the interference, it is to be noted that there had been very close ties between Mr. Berrehab and his daughter for several years (see paragraphs 9 and 21 above) and that the refusal of an independent residence permit and the ensuing expulsion threatened to break those ties. That effect of the interferences in issue was the more serious as Rebecca needed to remain in contact with her father, seeing especially that she was very young.

Having regard to these particular circumstances, the Court considers that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society. It thus concludes that there was a violation of Article 8 (art. 8)."

3.3.3.2. Personlige forhold der skal inddrages i vurderingen

EMD har gennem sin praksis oplistet en række elementer, som skal vurderes, når der skal tages stilling til, om et indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse af en udlænding udgør en krænkelse af EMRK artikel 8.

Det bemærkes i den forbindelse, at EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse af udlændinge i vidt omfang vedrører sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet. Som gennemgået i afsnittene 3.3.3.1.1 til 3.3.3.1.5 har baggrunden for medlemsstatens indgreb stor betydning for proportionalitetsafvejningen.

I sagen *Mirzoyan v. the Czech Republic (2024)* var en russisk statsborgers opholdstilladelse (arbejdstilladelse) nægtet forlænget, og han var meddelt afslag på familiesammenføring under henvisning til blandt andet den nationale sikkerhed, men på tidspunktet for EMD's behandling af sagen var der ikke truffet en formel beslutning om udsendelse, og en sådan beslutning ville i givet fald kunne anfægtes. EMD udtalte i præmis 76-80 og 98:

*"**(b) Whether there was an interference with the right to respect for family life***

76. As a matter of well-established international law and subject to their treaty obligations, States have the right to control the entry, residence and expulsion of aliens. The Convention does not guarantee the right of an alien to enter or to reside in a particular country […], nor, as its corollary, entails a general obligation for a State to authorise the residence of a foreign national on its territory […] or issue a particular type of residence permit […]. However, the Court has already acknowledged that in cases concerning "settled migrants", that is to say persons who have already been granted formally a right of residence in a host country, a subsequent withdrawal of that right, for instance because the person concerned has been convicted of a criminal offence, constitutes an interference with his or her right to respect for private and/or family life within the meaning of Article 8. In examining whether the interference in such cases is justified, the Court has regard – as far as they are relevant – to the various criteria which it has identified in its case-law in order to determine whether a fair balance has been struck between the grounds underlying the authorities' decision to withdraw the right of residence and the Article 8 rights of the individual concerned (see, for instance, Boultif v. Switzerland, no. 54273/00, ECHR 2001; Üner v. the Netherlands [GC], no. 46410/99, ECHR 2006; Maslov v. Austria [GC], no. 1638/03, ECHR 2008). The procedural guarantees inherent in Article 8 of the Convention will also vary depending on the context of the case in question (see Saeed, cited above, § 35).

77. In the present case, the Court observes that the applicant has lived and worked in the Czech Republic since 2006 and that in 2009 he was granted a long-term residence permit for business purposes. He can thus be considered a long-term or "settled migrant" who has been allowed to take part in the host country's society, to form relationships and to enjoy a family life there. Indeed, he has lived in the Czech Republic with his wife, an Armenian national, and four children, who were minors for at least part of the proceedings […]; his eldest (his son born in 1993) also lived in the Czech Republic.

78. However, after the validity of the applicant's residence permit for business purposes expired on 25 August 2011, his stay in the country was merely tolerated, on the basis of a legal fiction of residence (see paragraphs

35 and 38 above) which applied as long as the proceedings relating to his application to extend that permit were pending. The final decision not to extend his residence permit issued in 2020 had the effect of terminating the legal basis for his lawful residence in the Czech Republic, since without a valid residence permit or visa he was not authorised to remain there […], which he tried to solve by lodging a new application in June 2020 […]. Although no formal order compelling him to leave the country was issued in the impugned proceedings (compare the domestic-law provisions cited in paragraphs 36 in fine and 37 above pertaining to the annulment of residence permits, which entails an immediate order to leave), it was only a matter of time before he was compelled to leave. Indeed, it was only because and while proceedings relating to his applications for other types of permit were pending […] that the authorities were prevented from ordering him to leave the country, as demonstrated by the order to leave later issued by the Ministry […].

79. It follows from the above that, while no formal decision on expulsion – which could be issued only in the event of non-compliance with an order to leave and which the applicant would be able to challenge – was issued in the instant case, the refusal of the domestic authorities to extend his long-term residence permit for business purposes and not to grant him another one for family purposes deprived him of the legal right to stay in the Czech Republic and made his continued enjoyment of his family life in there uncertain and prone to be interrupted.

80. In line with its established case-law […], the Court therefore considers that the decisions issued in the two sets of proceedings, which it is called upon to review in the present case, interfered with the applicant's right to respect for family life. Nevertheless, since the domestic proceedings leading up to the present application exclusively concerned the issue of whether the applicant was entitled to an extension of a residence permit which has expired, or to be granted another one on different grounds, and since there had been neither an expulsion order nor a withdrawal or revocation of a valid residence permit following a criminal conviction, the criteria developed in the Court's case-law for assessing the compatibility of such measures with Article 8 (see, in particular, Üner, cited above, §§ 57-60; and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of the applicant.

[…]

98. It remains for the Court to examine whether, in the domestic proceedings at issue, the authorities failed, as alleged by the applicant, to properly assess and take into account his existing family ties, to the extent that this deficiency rendered the interference with his Article 8 rights unjustified (see paragraphs 75 and 86 above). The Court reiterates in this regard that, given that he has not been (yet) subject to an expulsion order, the criteria established in this respect by the Court's case-law cannot be transposed automatically to the present case (see paragraph 80 above). In line with his arguments and the approach to be followed in this case (see paragraphs 74 and 75 above), the Court is called upon to examine, in particular, whether, in the proceedings on the residence permit for family purposes, the domestic authorities gave due consideration to his family ties in the country and sufficient weight to the best interests of his children. In so doing, the Court cannot ignore the fact that those interests cannot be decisive in themselves and that they represent only one of a number of factors to be assessed, among which considerations of national security and public order are of significant weight."

Dette afsnit oplister en række af de elementer, som EMD gennem sin praksis (primært om kriminelle udlændinge) har fremhævet som værende nødvendige at inddrage i proportionalitetsafvejningen. Spørgsmålet om, hvordan vægtningen i den samlede proportionalitetsafvejning af disse elementer, som indgår i privat- og/eller familieliv, kan påvirkes, hvis klageren ikke havde en berettiget forventning om at kunne forblive i opholdslandet, er gennemgået nedenfor i afsnit 3.3.3.3.

I sagen *Boultif v. Switzerland (2001)* udtalte EMD i præmis 48:

"The Court has only a limited number of decided cases where the main obstacle to expulsion was that it would entail difficulties for the spouses to stay together and, in particular, for one of them and/or the children to live in the other's country of origin. It is therefore called upon to establish guiding principles in order to examine whether the measure in question was necessary in a democratic society.

In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion."

I sagen *Üner v. the Netherlands (2006)*, præmis 58, anvendte EMD de oplistede kriterier, men præciserede, at der i *Boultif*-dommen lå to implicitte parametre.

"The Court would wish to make explicit two criteria which may already be implicit in those identified in Boultif:

– the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

– the solidity of social, cultural and family ties with the host country and with the country of destination.

As to the first point, the Court notes that this is already reflected in its existing case-law (see, for example, Şen v. the Netherlands, no. 31465/96, § 40, 21 December 2001, and Tuquabo-Tekle and Others v. the Netherlands, no. 60665/00, § 47, 1 December 2005) and is in line with the Committee of Ministers Recommendation Rec(2002)4 on the legal status of persons admitted for family reunification (see paragraph 38 above).

As to the second point, it is to be noted that, although the applicant in Boultif was already an adult when he entered Switzerland, the Court has held the 'Boultif criteria' to apply all the more so (à plus forte raison) to cases concerning applicants who were born in the host country or who moved there at an early age (see Mokrani v. France, no. 52206/99, § 31, 15 July 2003). Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-

evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there."

De elementer, som jf. *Boultif*-sagen og *Üner*-sagen skal anvendes ved vurderingen af, om der vil ske en krænkelse af privat- og/eller familielivet, er:

- Typen og alvorligheden af den begåede kriminalitet
- Den tid, der er forløbet siden begåelsen af lovovertrædelserne, og klagerens adfærd i denne periode Om ægtefællen havde kendskab til pågældendes lovovertrædelse på tidspunktet for indgåelse af familielivet
- Længden af opholdet i opholdslandet
- De berørte personers nationalitet
- Pågældendes familiemæssige situation, herunder længden af ægteskabet eller andre faktorer, som kan påvise et reelt familieliv
- Om der er børn i ægteskabet, og hvis dette er tilfældet, deres alder
- Karakteren af de udfordringer, som samleveren/ægtefællen angiveligt vil møde, såfremt der skal tages ophold i klagerens hjemland
- Der skal tages hensyn til barnets tarv, i særdeleshed karakteren af de udfordringer, som ethvert barn af klageren angiveligt vil møde i det land, som klageren skal udrejse til
- Fastheden af de sociale, kulturelle og familiemæssige bånd til henholdsvis opholdslandet og hjemlandet

I sagen *Maslov v. Austria (2008)*, der ligeledes handlede om udvisning som følge af kriminalitet, citerede Storkammeret i præmis 68 opregningen af kriterierne i Üner-dommen og tilføjede:

"70. The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Moreover, it has to be borne in mind that where, as in the present case, the interference with the applicant's rights under Article 8 pursues, as a legitimate aim, the 'prevention of disorder or crime' (see paragraph 67 above), the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities.

71. In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family of his own, the relevant criteria are

– the nature and seriousness of the offence committed by the applicant;
– the length of the applicant's stay in the country from which he or she is to be expelled;
– the time elapsed since the offence was committed and the applicant's conduct during that period; and
– the solidity of social, cultural and family ties with the host country and with the country of destination.

72. The Court would also clarify that the age of the person concerned can play a role when applying some of the above criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult (see,

for instance, Moustaquim v. Belgium, 18 February 1991, § 44, Series A no. 193, and Radovanovic v. Austria, no. 42703/98, § 35, 22 April 2004).

73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec(2000)15 and Rec(2002)4 (see paragraphs 34-35 above).

74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see Üner, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there (see Üner, § 58 in fine).

75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

Vedrørende spørgsmålet om den tid, der er forløbet siden begåelsen af lovovertrædelserne, og klagerens adfærd i denne periode udtalte EMD i præmis 89-95:

"89. The Court notes that the Boultif judgment (cited above, § 48) established "the time elapsed since the commission of the offence[s] and the applicant's conduct during that period" as a criterion to be taken into account. In that case the Court had regard to the entire period between the commission of the offences in 1994 and the applicant's departure from Switzerland in 2000, considering that the applicant's exemplary conduct in prison and his employment thereafter mitigated the fears that he constituted a danger to public order and security. However, on the facts of the case it is not clear how much time exactly elapsed between the final domestic decision given by the Swiss Federal Court in November 1999 and the applicant's departure "on an unspecified date in 2000" (ibid., §§ 19 and 22). In a subsequent case, in which seven months elapsed between the Austrian Administrative Court's decision in December 1996 and the applicant's departure in July 1997, the Court had regard to the applicant's good conduct between the last conviction in April 1994 and the termination of the proceedings in December 1996 (see Yildiz, cited above, §§ 24-26 and 45).

90. Under the approach taken in the Boultif judgment (cited above, § 51), the fact that a significant period of good conduct elapses between the commission of the offences and the deportation of the person concerned necessarily has a certain impact on the assessment of the risk which that person poses to society.

91. In this connection, it is to be borne in mind that according to the Court's established case-law under Article 3, where an expulsion has taken place before the Court gives judgment, the existence of the risk the applicant faced in the country to which he was expelled is to be assessed with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion. In cases in which the applicant has not yet been deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see Saadi v. Italy [GC], no. 37201/06, § 133, ECHR 2008). Thus, in these

cases the Court does not limit itself to assessing the situation at the time when the final domestic decision ordering the expulsion was given.

92. The Court is not convinced by the Government's argument, drawn from Article 35 § 1 of the Convention, to the effect that developments which occurred after the final domestic decision should not be taken into account. It is true that the requirement to exhaust domestic remedies is designed to ensure that States are only answerable for their acts before an international body after they have had an opportunity to put matters right through their own legal system (see Akdivar and Others v. Turkey, 16 September 1996, § 65, Reports 1996-IV). However, such an issue will only arise in the event that a significant lapse of time occurs between the final decision imposing the exclusion order and the actual deportation.

93. In this connection, the Court would point out that its task is to assess the compatibility with the Convention of the applicant's actual expulsion, not that of the final expulsion order. Mutatis mutandis, this would also appear to be the approach followed by the CJEU which stated in its Orfanopoulos and Oliveri judgment that Article 3 of Directive 64/221 precludes a national practice whereby the national courts may not take into consideration, in reviewing the lawfulness of the expulsion of a national of another member State, factual matters which occurred after the final decision of the competent authorities (see paragraph 43 above). Consequently, in such cases it is for the State to organise its system in such a way as to be able to take account of new developments. This is not in contradiction with an assessment of the existence of "family life" at the time when the exclusion order becomes final, in the absence of any indication that the applicant's "family life" would have ceased to exist after that date (see paragraph 61 above). Even if it had done so, the applicant could still claim protection of his right to respect for his "private life" within the meaning of Article 8 (see paragraph 63 above).

94. The Government indicated in this respect that proceedings allowing for a review of whether the conditions for an exclusion order still pertained could be instituted either at the applicant's request or at the initiative of the authorities acting of their own motion. It follows that in the present case it was open to the domestic authorities to make a new assessment.

95. The Court will therefore have regard to the applicant's conduct between the commission of the last offence, in January 2000, and his actual deportation in December 2003. Of this period of almost three years and eleven months the applicant spent two years and three and a half months in prison, namely from 11 February 2000 to 24 May 2002. Following his release from prison and up until 27 November 2003, when he was taken into detention with a view to his expulsion, he spent one and a half years at liberty without reoffending. However, unlike in the Boultif case (cited above, § 51), little is known about the applicant's conduct in prison – except that he did not benefit from early release – and it is even less clear to what extent his living circumstances had stabilised after his release. Consequently, unlike the Chamber, the Court considers that "the time elapsed since the commission of the offence[s] and the applicant's conduct during that period" carries less weight as compared to the other criteria, in particular the fact that the applicant committed mostly non-violent offences when a minor."

Se også om betydningen af klagerens adfærd i den periode, der er forløbet siden begåelsen af lovovertrædelsen, og af risikoen for recidiv, P.J. AND R.J. v. SWITZERLAND (2024), hvor EMD blandt andet udtalte:

"50. Having identified the relevant factors, the domestic courts focused their assessment of the first applicant's situation on the nature and gravity of the offence committed. In this regard, the Court notes that, although the first applicant's offence was serious, it was not punished by actual imprisonment but by a suspended conditional sentence (see, by contrast, Veljkovic-Jukic v. Switzerland, no. 59534/14, §§ 6-7, 21 July 2020; K.A. v. Switzerland, no. 62130/15, § 49, 7 July 2020; and Ukaj v. Switzerland, no. 32493/08, § 37, 24 June 2014).

51. However, having established that the degree of culpability was low, the domestic courts merely referred to the fact that the first applicant had confessed from the outset, that he had cooperated with the police and that there was a favourable prognosis as to the risk of recidivism (see, by contrast, Z v. Switzerland, cited above, § 24, where there was a proven risk of recidivism as the applicant had committed an offence of illegal surveillance shortly after completing his probationary period, and Vasquez v. Switzerland, no. 1785/08, § 46, 26 November 2013, where there was a proven risk of recidivism given the applicant's record of difficulties controlling his sexual instincts after his conviction).

52. Moreover, the domestic courts merely mentioned that shortly after the expulsion decision was issued in July 2018, the first applicant found a full-time job, which he kept until he was expelled from Switzerland two years later, and that he had shown good behaviour throughout the period (see paragraph 16 above). The Government implied that such behaviour was to be expected from the first applicant, given that he had received a suspended prison sentence (see paragraph 37 above). However, in their assessment, the domestic courts failed to consider that, while the fear of a suspended sentence turning into an actual prison term might have played a role, the first applicant's overall good behaviour, his ability to secure stable employment shortly after his conviction, and the absence of any subsequent administrative or criminal offenses demonstrated his genuine intention to prove that he was not a danger to public safety. This oversight neglected evidence of the first applicant's rehabilitation and commitment to lawful conduct.

53. The principle of proportionality requires, inter alia, that account be taken of personal conduct and the impact on family life (see paragraph 28 above). The domestic courts did not question the genuineness of his family life or the negative impact that the five-year expulsion would have on it. They argued that the second applicant could either follow him to Bosnia and Herzegovina, where she had good prospects, or remain in Switzerland, making the separation a matter of choice (see paragraphs 10 and 16 above).

54. As for the applicants' daughters, the courts concluded that given their age they could adapt to a new environment in Bosnia and Herzegovina and that their relocation would depend on the second applicant's choice to follow her husband (see Jeunesse v. the Netherlands ([GC], no. 12738/10, § 109, 3 October 2014).

55. In the light of the foregoing, the Court finds that, in imposing and upholding the five-year expulsion, the domestic courts did not satisfactorily apply the Court's case-law mandating a careful balancing of the individual and public interests. The courts failed to give due weight to certain aspects. These include the first applicant's low level of culpability, the fact that his sentence was suspended, his lack of a criminal record, the fact that he no longer posed a threat to public safety, his status as a long-term immigrant and the adverse effect of the expulsion on the members of his family.

56. In the light of the above, the Court considers that there has been a violation of Article 8 of the Convention."

Se i denne forbindelse tillige om den forløbne tid og opførsel under tilbageholdelse som følge af en behandlingsdom sagen *Azzaqui v. the Netherlands (2023).* EMD udtalte i præmis 58-60:

"58. With respect to the criterion "the time that has elapsed since the offence was committed and the applicant's conduct during that period", the Court notes that in the present case this period is more than twenty years and thus significantly long. The Court does not follow, however, the applicant's contention that the authorities had therefore relinquished their right to revoke his residence permit. The case of Aristimuño Mendizabal (cited above), relied on by the applicant, concerned a different issue.

59. The Court further notes that in the balancing exercise in the revocation proceedings, little attention was paid to the issues concerning the applicant's personal circumstances which had been regarded by the criminal courts in their rulings on the extension on the TBS order. The applicant had shown good behaviour during his TBS treatment, and otherwise made positive progress in the years after the commission of his most recent offence, which led the criminal division of the Gelderland Regional Court to follow the behavioural experts' advice to grant the applicant conditional release from confinement in the custodial clinic and continue his treatment in an assisted living facility (see paragraphs 9 and 10 above). While it is true that the applicant at one point in time, namely twenty years after his treatment had started, mentally deteriorated and relapsed into substance abuse (see paragraphs 13, 14, 20 and 21 above), this appears to have been prompted by the Deputy Minister's intention to revoke his residence permit and the subsequent decisions in the revocation proceedings (see paragraphs 11, 16 and 18 above).

60. In this respect it should also be noted that up to that moment the applicant's treatment had been aimed at reintegration into Dutch society and thus no steps had been taken to prepare him for a return to Morocco. Moreover, the Court considers that it follows from the criminal court rulings (see paragraphs 22 and 27 above) that the "status quo" situation in which the applicant ended up had an impact on his medical treatment, his reintegration and the possibility of ending the TBS order. In these particular circumstances, it fell to the authorities to coordinate the various proceedings touching on the applicant's right to respect for his private life and to timely and thoroughly assess the practical feasibility of his expulsion to Morocco, so as to afford due respect to the interests safeguarded by Article 8. That the circumstances of the present differ from those in Ciliz v. the Netherlands, as indicated by the Government, does not alter that finding. In reaching their conclusion about the existence of a threat to public order in the revocation proceedings, the authorities thus failed to sufficiently consider the applicant's personal circumstances, and particularly the relevant conclusions of the criminal courts, supported as they were by medical evidence (compare Savran, cited above, § 197)."

Endvidere har EMD i blandt andet sagerne *Emre v. Switzerland (2008)*, *Hasanbasic v. Switzerland (2013)* og *Veljkovic-Jukic v. Switzerland (2020)* yderligere suppleret de nævnte kriterier med helbredsforhold og indrejseforbuddets karakter. I Emre-sagen udtalte EMD således i forlængelse af opregningen af Boultif- og Üner-kriterierne i præmis 71 (uofficiel dansk oversættelse):

"Der skal endelig ligeledes tages højde for de særlige omstændigheder ved den foreliggende sag (Boultif, nævnt ovenfor, præmis 51), såsom f.eks. forholdene af medicinsk karakter i den foreliggende sag samt proportionaliteten af den anfægtede foranstaltning og indrejseforbuddets midlertidige eller endelige karakter."

I forbindelse med gennemgangen af klagerens forhold over for de generelle kriterier udtalte EMD i præmis 81-87 (uofficiel dansk oversættelse):

"– Særlige forhold i sagen: sagens medicinske aspekt

81. Domstolen bemærker, at der i en rapport fra det psykosociale center i Neuchâtel af 14. januar 2003 rapporteres om "en følelsesmæssigt labil personlighedsforstyrrelse med impulsive elementer og borderline såvel som fobisk angstlidelse" hos klager ved truslen om tilbagesendelse (dom afsagt af forbundsdomstolen, betragtning 3.4.2; ovenfor, præmis 18). Det er i øvrigt i et brev fra familiens læge af 21. januar 2003 bekræftet, at klager er opvokset i et voldeligt og ikke særligt stimulerende miljø, og det understreges, at en udvisning ville fjerne ham fra de beroligende og strukturerende forhold, der er etableret de senere år (ibidem.).

82. Parterne i den foreliggende sag har forskellige meninger om dette punkt. Klager hævder, at hans sygdom, der har udmundet i selvmordsforsøg, ikke ville kunne behandles tilstrækkeligt i Tyrkiet (jf. ovenstående præmis 42). Regeringen hævder til gengæld det modsatte og mener, at hans familie lige såvel kunne støtte ham økonomisk fra Schweiz. Den understreger i øvrigt, at klager i vidt omfang har afvist den psykiatriske behandling, der er ordineret til ham (jf. ovenstående præmis 57).

83. Domstolen udelukker ikke, at klagers helbredsproblemer kan behandles på passende vis i Tyrkiet. Den er ligeledes opmærksom på, at klager i det mindste i starten ignorerede den ordinerede behandling. Samtidig finder Domstolen, at klagers forstyrrelser, som Regeringen i øvrigt på ingen måde har rejst tvivl om, selv om de ikke i sig selv er tilstrækkelige til at retfærdiggøre et særskilt klagepunkt i henhold til artikel 8, ikke desto mindre udgør et yderligere aspekt, der sandsynligvis vil gøre det endnu sværere for klager at vende tilbage til sit hjemland, hvor han næppe har noget socialt netværk.

– Udsendelsesforanstaltningens definitive karakter

84. Domstolen skal til vurdering af den anfægtede foranstaltnings proportionalitet tage højde for den midlertidige eller endelige karakter af forbuddet mod ophold i Schweiz.

85. Domstolen bemærker, at politiretten samt den strafferetlige afdeling ved kassationsdomstolen i kantonen Neuchâtel i den foreliggende sag beordrede udvisning af klager i en periode på syv år (jf. ovenstående præmis 11). På den anden side blev den administrative udvisning af klager beordret af udlændingeenheden i kantonen Neuchâtel i en ubestemt periode (jf. ovenstående præmis 15). Domstolen bemærker, at klagers klage er rettet mod den administrative udvisning, hvis tidsubegrænsede varighed Domstolen finder særdeles streng (jf. som eksempler på sager, hvor den endelige karakter af det nedlagte forbud blev beordret af Domstolen til støtte for konklusionen om, at foranstaltningen var uforholdsmæssig: Ezzouhdi mod Frankrig, nr. 47160/99, præmis 34, 13. februar 2001, Keles, nævnt ovenfor, præmis 65, Yilmaz, nævnt ovenfor, præmis 48, og Radovanovic mod Østrig, nr. 42703/98, præmis 37, 22. april 2004; og a contrario sager, hvor den anfægtede foranstaltnings begrænsede varighed bidrog til, at den blev betragtet som forholdsmæssig: Benhebba, nævnt ovenfor, præmis 37, Jankov, nævnt ovenfor, og Üner, nævnt ovenfor, præmis 65). Hvad angår den pågældende persons mulighed for at anmode om en midlertidig eller endelig ophævelse af udvisningen, finder Domstolen, at denne mulighed for øjeblikket er rent spekulativ.

86. I betragtning af ovenstående og navnlig den relative grovhed af domfældelserne mod klager [på fransk: la gravité relative des condamnations prononcées contre le requérant, red.]*, hans svage tilknytning til hjemlandet og den endelige karakter af udsendelsesforanstaltningen finder Domstolen, at den indklagede stat ikke kan anses for at have foretaget en rimelig afvejning mellem klagers og hans families interesser på den ene side og statens egen interesse i at kontrollere indvandringen på den anden.*

87. Der er følgelig sket en krænkelse af artikel 8."

I Veljkovic-Jukic-sagen udtalte EMD i forlængelse af opregningen af Boultif- og Üner-kriterierne i præmis 45 (uofficiel dansk oversættelse):

"Der skal ligeledes i givet fald tages højde for de særlige omstændigheder i forbindelse med den foreliggende sag, som f.eks. forhold af lægelig art eller indrejseforbuddets midlertidige eller definitive karakter (Shala mod Schweiz, nr. 52873/09, præmis 46, 15. november 2012, og de citerede referencer)."

Se også for så vidt angår helbredsforhold Hasanbasic-dommen, præmis 54.

Ved vurderingen af klagerens tilknytning til opholdslandet og hjemlandet har EMD i sin praksis navnlig lagt vægt på:

- *Længden af opholdet i opholdslandet*
- *Alder ved ankomsten*
- *Skolegang*
- *Arbejde*
- *Sproglige kundskaber*
- *Kulturel tilknytning*
- *Social/familiemæssig tilknytning*
- *Længden af opholdet i hjemlandet før udrejsen/efterfølgende ophold eller besøg*
- *Evt. skolegang/sproglige kundskaber/kulturel tilknytning til hjemlandet*
- *Social/familiemæssig tilknytning til hjemlandet*
- *For børns vedkommende: barnets tarv*
- *Evt. helbredsforhold*

De i de ovennævnte domme fastsatte elementer anvendes til stadighed, hvilket ses i dommen *Said Abdul Salam Mubarak v. Denmark (2019)*, hvor en dansk-marokkansk statsborger blev dømt for terrorisme. Klageren fik efterfølgende frataget sit danske statsborgerskab og blev udvist fra Danmark.

EMD udtalte i præmis 74:

"The relevant criteria to be applied, in determining whether an interference is necessary in a democratic society, were set out in, inter alia, Üner v. the Netherlands [GC], no. 46410/99, §§ 54-55 and 57-58, ECHR 2006-XII; … They are the following:

'- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age; and
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination.'"

EMD har i sin praksis anvendt de samme elementer i proportionalitetsafvejningen, som er oplistet i de ovennævnte domme, også i sager, hvor der *ikke* er begået kriminalitet.

I sagen *Hasanbasic v. Switzerland (2013)* om nægtelse af forlængelse af en opholdstilladelse udtalte EMD i præmis -55 (uofficiel dansk oversættelse):

" iii. Indgrebets nødvendighed i et demokratisk samfund

α) Generelle principper

53. Det primære spørgsmål, der skal afklares i den foreliggende sag, er, hvorvidt indgrebet var "nødvendigt i et demokratisk samfund". De grundlæggende principper med hensyn til udvisning af en person, der har tilbragt længere tid i et værtsland, som den pågældende efterfølgende skulle udvises fra efter at have begået lovovertrædelser, er fastlagt i Domstolens retspraksis og er for nyligt sammenfattet, navnlig i sagerne Üner (nævnt ovenfor, præmis 54-55 og 57-58), Maslov mod Østrig ([Storkammeret], nr. 1638/03, præmis 68-76, EMD 2008), og Emre, nævnt ovenfor, præmis 65- 71. Domstolen havde i sagen Üner mulighed for at sammenfatte de kriterier, der skal vejlede de nationale instanser i sådanne sager (præmis 57 ff.):

– arten og alvoren af den af klager begåede kriminalitet;

– længden af klagers ophold i det land, som vedkommende skal udvises fra;

– den tid, der er forløbet, siden lovovertrædelsen blev begået, og klagers adfærd i denne periode;

– de pågældende personers nationalitet;

– klagers familiesituation, navnlig ægteskabets varighed og andre faktorer, der viser familielivets effektivitet;

– hvorvidt ægtefællen havde kendskab til lovovertrædelsen, da den familiemæssige relation etableret;

– hvorvidt der er børn i ægteskabet og i så fald deres alder;

– alvorligheden af de problemer, som ægtefællen risikerer at blive stillet over for i det land, hvortil klager skal udvises;

– de berørte børns tarv og trivsel, herunder alvorligheden af de vanskeligheder, som klagers børn med sandsynlighed vil blive stillet over for i det land, som den udviste udvises til, og

– fastheden af klagers sociale, kulturelle og familiemæssige bånd med værtslandet og med modtagerlandet.

54. Der skal ligeledes i givet fald tages højde for særlige omstændigheder i forbindelse med nærværende sag, som for eksempel lægelige informationer (Emre, nævnt ovenfor, præmis 71, 81-83).

55. Domstolen erkender, at den foreliggende sag adskiller sig fra ovennævnte sager, for så vidt som klagerne klager over de schweiziske myndigheders afvisning af at forny den mandlige klagers etableringstilladelse, idet

de først og fremmest gør deres dybtgående integration i landet gældende, efter at de havde tilbragt en betydelig periode i landet. Den første klagers lovstridige adfærd synes kun at have spillet en sekundær rolle i de nationale myndigheders vurdering. Domstolen er under alle omstændigheder af den mening, at ovennævnte kriterier tilsvarende skal finde anvendelse for en sådan situation."

Sagen *Konstatinov v. the Netherlands (2007)* omhandler ulovligt ophold, og EMD udtalte i præmis 48:

"The Court further reiterates that, moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would be precarious from the outset. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see Rodrigues da Silva and Hoogkamer v. the Netherlands, no. 50435/99, § 39, ECHR 2006-..., with further references)." [understreget her]

I sagen *Mirzoyan v. the Czech Republic (2024)*, som handlede om nægtelse af forlængelse af en arbejdstilladelse og afslag på familiesammenføring til en russisk statsborger under henvisning til blandt andet den nationale sikkerhed, men hvor der på tidspunktet for EMD's behandling af sagen ikke var truffet en formel beslutning om udsendelse, hvilken beslutning i givet fald ville kunne anfægte, udtalte EMD i præmis 80 og 98:

"80. In line with its established case-law (see paragraph 76 above), the Court therefore considers that the decisions issued in the two sets of proceedings, which it is called upon to review in the present case, interfered with the applicant's right to respect for family life. Nevertheless, since the domestic proceedings leading up to the present application exclusively concerned the issue of whether the applicant was entitled to an extension of a residence permit which has expired, or to be granted another one on different grounds, and since there had been neither an expulsion order nor a withdrawal or revocation of a valid residence permit following a criminal conviction, the criteria developed in the Court's case-law for assessing the compatibility of such measures with Article 8 (see, in particular, Üner, cited above, §§ 57-60; and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of the applicant.

[…]

98. It remains for the Court to examine whether, in the domestic proceedings at issue, the authorities failed, as alleged by the applicant, to properly assess and take into account his existing family ties, to the extent that this deficiency rendered the interference with his Article 8 rights unjustified (see paragraphs 75 and 86 above). The Court reiterates in this regard that, given that he has not been (yet) subject to an expulsion order, the criteria established in this respect by the Court's case-law cannot be transposed automatically to the present

case (see paragraph 80 above). In line with his arguments and the approach to be followed in this case (see paragraphs 74 and 75 above), the Court is called upon to examine, in particular, whether, in the proceedings on the residence permit for family purposes, the domestic authorities gave due consideration to his family ties in the country and sufficient weight to the best interests of his children. In so doing, the Court cannot ignore the fact that those interests cannot be decisive in themselves and that they represent only one of a number of factors to be assessed, among which considerations of national security and public order are of significant weight."

EMD har i sin praksis udtalt, at vægtningen af de enkelte elementer i proportionalitetsafvejningen afhænger af de konkrete omstændigheder i hver enkelt sag, se f.eks. *Maslov v. Austria (2008)*, hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

3.3.3.3. Berettiget forventning

I en række sager, hvor EMD har fundet, at en udsendelse[3] af en udlænding vil indebære et indgreb i retten til privat- og/eller familieliv, har EMD inddraget de nærmere omstændigheder på tidspunktet for etableringen af dette privatliv og/eller familieliv i sin vægtning af privatlivs- og/eller familielivselementerne i proportionalitetsafvejningen.

For så vidt angår familieliv har EMD i sagen *Boultif v. Switzerland (2001)*, der angik alvorlig kriminalitet, i præmis 48 som et af de såkaldte Boultif-kriterier angivet "whether the spouse knew about the offence at the time when he or she entered into a family relationship".

EMD har siden anvendt kriteriet i sagen *Sezen v. the Netherlands (2006)*, hvor klageren ligeledes havde begået alvorlig kriminalitet, og hvor EMD i præmis 47 udtalte følgende om klagerens ægtefælles (den anden klagers) kendskab til den begåede kriminalitet på tidspunktet for etableringen af deres familieliv:

"[…] Although the parties disagree as to whether the second applicant was aware of the criminal activities of her husband, the fact remains that he had not yet committed the offence at the time they married and she entered into a family relationship with him, which is the relevant criterion in this context (see Boultif, cited above, § 48). […]"

Det bemærkes, at EMD i præmis 44 udtalte, at klageren efter tidspunktet for den begåede kriminalitet yderligere havde udbygget sin tilknytning til opholdslandet:

[3] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

"At the time the first applicant was arrested, i.e. on 31 July 1992, he had been residing lawfully in the Netherlands for less than one and a half years, having been granted a residence permit in February 1991. Applying the "sliding scale" principle, the authorities of the respondent State attached weight to this undeniably short duration of the first applicant's lawful stay in the Netherlands before he committed the offence. It is nevertheless to be noted that, following his conviction on 20 January 1993, it was not until more than four years later, namely on 5 June 1997, that the decision was taken to refuse the first applicant continued residence. Following his early release from prison in April 1995, the first applicant had thus been allowed to build up even closer ties with the Netherlands for a further two years. In addition, it appears that the first applicant has not re-offended and that he has been gainfully employed ever since his release from prison."

Se vedrørende udbygning af privatlivstilknytning til opholdslandet også sagen *A.A. v. the United Kingdom (2011)* nedenfor.

Som yderligere eksempel på sager, hvor klageren var dømt og udvist for alvorlig kriminalitet, og hvor familielivet var indledt, herunder klagerens børn født, forud for den begåede kriminalitet, kan der henvises til *Salija v. Switzerland (2017)*, hvor EMD i præmis 48 udtalte:

"48. As regards the applicant's family situation, he has been married to his wife since 1999 and it has, explicitly, not been contested by the respondent Government that real and effective family existed between the applicant, his wife and their two children. It has to be noted that the applicant's wife could not know about the offences at issue at the time when she entered into a family relationship with the applicant, as the couple married in 1999 and thus prior to the commission of the offences in 2000. It has to be noted that the applicant, with the exception of the purchase and consumption of marihuana, for which he was fined in 2007, committed the criminal offences prior to the birth of his children."

Som eksempel på sager vedrørende alvorlig kriminalitet, hvor klagerens kæreste var vidende om kriminaliteten ved etableringen af forholdet, kan der henvises til *A.W. Khan v. the United Kingdom (2010)*, hvor EMD i præmis 44-47 udtalte:

"44. With regard to the applicant's family life, the Court notes that the applicant has submitted that he and his girlfriend are in a stable relationship, and although they cannot live together as a family unit, the applicant enjoys regular contact with his girlfriend and their daughter. The applicant's girlfriend is a British citizen, who states that she has never lived anywhere other than the United Kingdom. She does not speak Urdu or Punjabi and has no family or friends in Pakistan. The applicant's girlfriend has therefore indicated that she would not be prepared to move to Pakistan if he were to be deported, although no circumstances have been identified which would inherently preclude her from living there.

45. Although the Court has no reason to doubt the applicant's claims, it observes that he has not sought to make fresh representations to the Home Office on the basis of his family life. In particular, the Court notes that despite making fresh representations to the Home Office in August 2008, the applicant did not mention that he had a pregnant girlfriend even though he must have known of the pregnancy at the time.

46. Moreover, the Court notes that the applicant's relationship with his girlfriend began in August 2005, while he was still serving his prison sentence. She was therefore fully aware of his criminal record at the beginning of the relationship.

47. Accordingly, no decisive weight can be attached to this family relationship."

Se som eksempel på sager vedrørende mindre alvorlig kriminalitet, hvor klagerens kæreste tilsvarende var bekendt med kriminaliteten ved etableringen af forholdet, *Jakupovic v. Austria (2003)*, hvor EMD i præmis 28-31 udtalte:

"28. The Court observes that at the time of the expulsion the applicant had not been in Austria for a long time – just four years. Furthermore his situation was not comparable to that of a second generation immigrant, as he had arrived in Austria at the age of eleven, had previously attended school in his country of origin and must therefore have been well acquainted with its language and culture. However, the residence prohibition seriously upset his private and family life: he had arrived in Austria with his brother to join his mother and the new family she had founded there and has apparently no close relatives in Bosnia. The applicant's father remained in Bosnia, a fact which is emphasised by the Government, but the applicant points out that he last saw his father in 1988 and the father has been reported missing since the end of the armed conflict in that country.

29. Thus, the Court considers that very weighty reasons have to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which has recently experienced a period of armed conflict with all its adverse effects on living conditions and with no evidence of close relatives living there.

30. The Government rely in this respect on the applicant's criminal record. The Court finds that this record, which is the essential element of justification for the expulsion, must be examined very carefully. It consists of two convictions for burglary. The Court cannot find that these convictions – even taking into account a further set of criminal proceedings which were discontinued after the victim had been compensated by the applicant – for which the Austrian courts had only imposed conditional sentences of imprisonment can be considered particularly serious as these offences did not involve elements of violence. The only element which may indicate any tendency of the applicant towards violent behaviour was a prohibition to possess arms issued in May 1995. Although the seriousness of such a measure should not be underestimated, it cannot be compared to a conviction for an act of violence, and there is no indication that such charges have ever been brought against the applicant.

31. However, the Court does not consider the applicant's relation to Mrs A.S. a weighty element to be taken into account when balancing the interests at issue, because the applicant has not argued that he had entered into this relationship before September 1995, when the residence prohibition was issued against him and after this time he must have been aware that his further stay in Austria was unlawful."

Udover at henvise til Boultif-kriterierne har EMD i flere domme udtalt: "Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court's well-established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8."

Der kan herved blandt andet henvises til sagerne *Rodrigues da Silva and Hoogkamer v. the Netherlands (2006)*, præmis 39, *Jeunesse v. the Netherlands (2014)*, præmis 108, og *Pormes v. the Netherlands (2020)*,

præmis 57, der begge angik ulovligt ophold, samt sagen *Nunez v. Norway (2011)*, præmis 70, der angik opholdstilladelse opnået på baggrund af svig.

I sagen *Priya v. Denmark (2006)* udtalte EMD i forlængelse af den nævnte passus:

"Thus, a distinction must be drawn between those seeking entry into a country to pursue their newly established family life; those who had an established family life before one of the spouses obtained settlement in another country; and those who seek to remain in a country where they have already established close family life and other ties for a reasonable period of time (cf. e.g. Khannam v. United Kingdom (dec.) no 14112/88, DR 59, pp. 265- 273).

Turning to the circumstances of the present case, the applicant entered Denmark on 22 January 1999 on a three month visa, unmarried and without any ties to Denmark. She left six month later on 22 July 1999, married to an Indian national, PK, and expecting his child. On 14 July 2000 the applicant re-entered Denmark together with the child, GK on a visa valid for thirty days. The applicant still remains in the country although her requests to be granted a residence permit has been refused. The first decision in this respect was taken on 20 February 2001 by the Aliens Authorities, which at the same time ordered the applicant to leave the country within 30 days from the day on which she was notified of the decision. Accordingly, most of the applicant's stay in Denmark has been illegal. The Court is aware that, where Contracting States tolerate the presence of aliens in their territory while the latter await a decision on an application for a residence permit, an appeal against such a decision or a request to re-open such proceedings, this enables the persons concerned to take part in the host country's society and to form relationships and to create a family there. However, as set out above, this does not entail that the authorities of the Contracting State involved are, as a result, under an obligation pursuant to Article 8 of the Convention to allow the alien concerned to settle in their country. In this context a parallel may be drawn with the situation where a person who, without complying with the regulations in force, confronts the authorities of a Contracting State with his or her presence in the country as a fait accompli. The Court has previously held that, in general, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them (see Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003).

In the present case the applicant was never given any assurances that she would be granted a right of residence by the competent Danish authorities. Moreover, having regard to the applicable rules at the relevant time, which the applicant and PK were advised on in June 1999, in July 2000 she could hardly expect that any right of residence would be conferred on her and the first child as a fait accompli due to their presence in the country. Nor could she expect to be able to continue a family life in Denmark (cf. Bouchelkia v. France, judgment of 29 January 1997, Reports 1997-I, p. 65, § 53; and Baghli v. France, no. 34374/97, § 48, ECHR 1999-VIII).

Furthermore, the Court considers that the present case discloses no exceptional circumstances. It observes in this context that the applicant entered Denmark in January 1999, when she was twenty-seven years old. At the relevant time she had no ties to Denmark. Less than two months later, she married PK, an Indian national, who had entered Denmark illegally in October 1993, when he was twenty-eight years old. At the relevant time he had no ties to Denmark either. Both spouses were born and raised in India, where their family lived, and the applicant and her husband communicated in Punjabi and Hindi."

EMD lagde til grund, at ægtefællerne stadig var gift. EMD udtalte derefter, at:

"Thus, there are no obstacles to the applicant, her husband and children enjoying their family life in their home country India, and the respondent State cannot be said to have failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention."

I sagen *Rodrigues da Silva and Hoogkamer v. the Netherlands (2006)*, der vedrørte ulovligt ophold, udtalte EMD i forlængelse af den citerede ofte anvendte passus, der i denne dom fremgik af præmis 39:

"43. Whilst it does not appear that the first applicant has been convicted of any criminal offences (see Berrehab, cited above, § 29, and Cılız v. the Netherlands, no. 29192/95, § 69, ECHR 2000-VIII), she did not attempt to regularise her stay in the Netherlands until more than three years after first arriving in that country (see paragraphs 9 and 13 above) and her stay there has been illegal throughout. The Court reiterates that persons who, without complying with the regulations in force, confront the authorities of a Contracting State with their presence in the country as a fait accompli do not, in general, have any entitlement to expect that a right of residence will be conferred upon them (see Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003). Nevertheless, the Court finds relevant that in the present case the Government indicated that lawful residence in the Netherlands would have been possible on the basis of the fact that the first applicant and Mr Hoogkamer had a lasting relationship between June 1994 and January 1997 (see paragraph 34 above). Although there is no doubt that a serious reproach may be made of the first applicant's cavalier attitude to Dutch immigration rules, this case should be distinguished from others in which the Court considered that the persons concerned could not at any time have reasonably expected to be able to continue family life in the host country (see, for example, Solomon, cited above).

44. 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. Indeed, by attaching such paramount importance to this latter element, the authorities may be considered to have indulged in excessive formalism. The Court concludes that a fair balance was not struck between the different interests at stake and that, accordingly, there has been a violation of Article 8 of the Convention."

Se vedrørende betydningen af klagerens ulovlige ophold på tidspunktet for hendes barns fødsel sagen *Dalia v. France (1998)*, præmis 54-55, hvor EMD udtalte:

"54. The Court notes further that, as the Government pointed out, the French legislature, in restricting (other than in the exceptional cases provided for in section 28 bis of the Ordinance of 1945) relief from exclusion orders to aliens who had complied with such an order, had wished to remove the benefit of such relief from those who remained in France unlawfully. Applying this rule of procedure – which has a legitimate aim – to the applicant cannot in itself entail a breach of Article 8. In support of her application to have the exclusion order lifted, Mrs Dalia relied mainly on the fact that she was the mother of a French child. The evidence shows

that the applicant formed this vital family link when she was in France illegally. She could not be unaware of the resulting insecurity. In the Court's view, this situation, which was created at a time when she was excluded from French territory, cannot therefore be decisive.
Furthermore, the exclusion order made as a result of her conviction was a penalty for dangerous dealing in heroin. In view of the devastating effects of drugs on people's lives, the Court understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge. Irrespective of the sentence passed on her, the fact that Mrs Dalia took part in such trafficking still weighs as heavily in the balance.

55. Having regard to the foregoing, the Court considers that the refusal to lift the exclusion order made against the applicant cannot be regarded as disproportionate to the legitimate aim pursued. There has therefore been no violation of Article 8."

I sagen *Darren Omoregie a.o. v. Norway (2008)*, der angik familieliv etableret under klagerens ulovlige ophold i opholdslandet, udtalte EMD i præmis 58-64:

"58. In this regard the Court first observes that when the first applicant arrived and applied for asylum in Norway on 25 August 2001, he was an adult and had no links to the country. His family links to the second and third applicants were formed at different stages during his stay in the country.

59. The first and second applicants met in October 2001 and started co-habiting in March 2002. Already from the beginning of their relationship it must have been clear to them both that their prospects of being able to settle as a couple in Norway were precarious. The first applicant's asylum request was rejected, first by the Directorate of Immigration on 22 May 2002, and then by the Immigration Appeals Board on 11 September 2002, giving him until 30 September 2002 to leave the country. No judicial appeal was lodged against these decisions, which became final. Nevertheless, the first applicant opted to evade his duty to leave and stayed in Norway unlawfully.

60. On 2 February 2003, while the first applicant was staying illegally in Norway, he got married to the second applicant. Because of his lack of residence status the marriage had not been contracted in accordance with domestic law, though this shortcoming did not deprive the marriage of its validity.

61. In the Court's view, at no stage prior to their marriage on 2 February 2003 could the first and the second applicants have reasonably held any expectation that he would be granted leave to remain in Norway.

62. This state of affairs was not changed, but was confirmed rather, by the developments in the case in the ensuing period. On 14 February 2003 the first applicant made a new request on the ground of family reunification with the second applicant, but again his request was rejected and he was ordered to leave the country, in a decision of 26 April 2003, notified to him on 7 May 2003. Therefore the applicant could not reasonably expect a right to reside in Norway based on these proceedings.

63. Moreover, on account of the first applicant's unlawful stay in Norway for four months and a half from September 2002 to February 2003 and for his having worked there unlawfully without a work permit for nine months from September 2002 to July 2003, the Directorate of Immigration decided on 26 August 2003 firstly that he should be expelled pursuant to section 29(1)(a) of the Immigration Act and secondly be prohibited to reenter Norway for five years (with a possibility of re-entry on applicationnormally after two years). To the

Court's understanding, the first part of the decision represented hardly anything new but was rather a renewed response to the first applicant's failure to comply with previous orders to leave the country. The decision of 26 August 2003 was upheld by the Immigration Appeals Board on 21 July 2004 and by the appellate courts respectively on 27 February and 14 June 2006. At each level (including the City Court which held in his favour on 15 February 2005) it was found established that the basic condition for expelling the first applicant – that he had seriously or repeatedly violated the Immigration Act or had defied implementation of the decision that he should leave the country – had been fulfilled. It is true that the City Court found the measure disproportionate but that finding was not final and was overturned by the High Court and leave to appeal was refused by the Appeals Leave Committee of the Supreme Court.

64. Against this background the Court does not consider that the first and second applicants, by confronting the Norwegian authorities with the first applicant's presence in the country as a fait accompli, were entitled to expect that any right of residence would be conferred upon him (see Roslina Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003; Yash Priya v. Denmark (dec.) 13594/03; 6 July 2006; cf. Rodrigues da Silva and Hoogkamer, cited above, § 43)."

For så vidt angår privatliv har EMD tilsvarende udtalt følgende i ovennævnte Pormes-sag, præmis 58:

"As can be seen from the preceding paragraphs, the relevant principles as well as the factors and considerations to be taken into account when examining whether Article 8 of the Convention imposes a positive obligation on a State to admit an alien unlawfully residing in its territory have so far mainly been formulated in cases which concerned family life or in which the Court considered it appropriate to focus on that aspect. The Court finds that similar considerations apply in respect of an alien who has established social ties amounting to private life in the territory of a State during a period of unlawful stay. The extent of the State's positive obligations to admit such an alien will depend on the particular circumstances of the person concerned and the general interest. Moreover, the factors set out in paragraph 56 above also apply – to the extent possible – to cases where it is more appropriate to focus on the aspect of private life. Equally, if an alien establishes a private life within a State at a time when he or she is aware that his or her immigration status is such that the continuation of that private life in that country would be precarious from the start, a refusal to admit him or her would amount to a breach of Article 8 in exceptional circumstances only."

Se også sagen *Nnyanzi v. the United Kingdom (2008)*, der vedrørte udsendelse af en afvist asylansøger, der aldrig havde haft opholdstilladelse i UK. EMD udtalte i præmis 76:

"The Court does not consider it necessary to determine whether the applicant's accountancy studies, involvement with her church and friendship of unspecified duration with a man during her stay of almost ten years in the United Kingdom constitute private life within the meaning of Article 8 § 1 of the Convention. Even assuming this to be the case, it finds that her proposed removal to Uganda is "in accordance with the law" and is motivated by a legitimate aim, namely the maintenance and enforcement of immigration control. As to the necessity of the interference, the Court finds that any private life that the applicant has established during her stay in the United Kingdom when balanced against the legitimate public interest in effective immigration control would not render her removal a disproportionate interference. In this regard, the Court notes that, unlike the applicant in the case of Üner (cited above), the present applicant is not a settled migrant and has never been granted a right to remain in the respondent State. Her stay in the United Kingdom, pending the determination of her several asylum and human rights claims, has at all times been precarious and her

removal, on rejection of those claims, is not rendered disproportionate by any alleged delay on the part of the authorities in assessing them."

EMD har i nogle sager tillagt udbygning af klagerens tilknytning til opholdslandet efter tidspunktet for den begåede kriminalitet vægt i proportionalitetsafvejningen. Der kan herved henvises til EMD's udtalelse i sagen *Sezen v. the Netherlands (2006)*, præmis 44, der er gengivet ovenfor. Se også sagen *A.A. v. the United Kingdom (2011)*, hvor EMD i præmis 65-67 udtalte:

"65. The Court recalls that all of the above factors were referred to and discussed, with reference to the relevant facts at the time, by the AIT in its decision of April 2007 (see paragraphs 20-22 above). Like the AIT, the Court is persuaded that it is appropriate to accord significant weight to the seriousness of the offence for which the applicant was convicted when considering the proportionality of deportation for the prevention of disorder or crime. At the time the AIT considered the applicant's appeal, he had been at liberty following his release from detention for less than three years and was in the second year of his undergraduate degree. The AIT decided at that time that the public interest in favour of deportation prevailed. The Court considers that, having identified the relevant factors, the AIT's assessment of the weight to be accorded to each of these factors was within its margin of appreciation. The Court observes that no subsequent assessment of the proportionality of the applicant's deportation took place: in January 2008, the Court of Appeal refused leave to appeal without examining in detail the merits of the applicant's case (see paragraph 23 above).

66. Although the refusal of leave by the Court of Appeal meant that the applicant had exhausted his appeal rights, the immigration authorities appear to have taken no steps to deport him following the conclusion of the domestic proceedings, even though no interim measures preventing the applicant's expulsion were ever sought by him, or applied by the Court. As a consequence, the applicant has remained in the United Kingdom for a further period of over three and a half years since the domestic courts last considered the proportionality of his deportation. In that time, as noted above, he has completed his university education and commenced stable employment. He has committed no further offences.

67. The Government did not argue in their written observations that the Court should not have regard to facts which occurred after the final domestic decision in January 2008. The Court recalls that according to its established case-law under Article 3 of the Convention, the existence of a risk faced by an applicant in the country to which he is to be expelled is assessed by reference to the facts which were known or ought to have been known at the time of the expulsion; in cases where the applicant has not yet been deported, the risk is assessed at the time of the proceedings before the Court (see Saadi v. Italy [GC], no. 37201/06, § 133, ECHR 2008-...). The Court sees no reason to take a different approach to the assessment of the proportionality of a deportation under Article 8 of the Convention and points out in this regard that its task is to assess the compatibility with the Convention of the applicant's actual expulsion and not of the final expulsion order (see Maslov, cited above, § 93). Any other approach would render the protection of the Convention theoretical and illusory by allowing Contracting States to expel applicants months, even years, after a final order had been made notwithstanding the fact that such expulsion would be disproportionate having regard to subsequent developments. The Government have not explained whether further remedies within the domestic legal system are now available to allow the applicant to challenge his deportation a second time, nor have they suggested that the Court is precluded from examining developments on the basis that the applicant has failed to exhaust domestic remedies. In the circumstances, it is appropriate for the Court itself to assess the effect of this additional lapse of time on the proportionality of the applicant's deportation.

68. The Court has already indicated that in a case where deportation is intended to satisfy the aim of preventing disorder or crime, the period of time which has passed since the offence was committed and the applicant's conduct throughout that period are particularly significant (see paragraph 63 above). The Court has further referred to the importance, in cases where the deportation offence was committed by the applicant when he was a minor, of facilitating his reintegration into society (see paragraph 60 above). Thus while the fact that the applicant was a minor when he committed the offence does not preclude his deportation given the seriousness of the offence in question, the latter consideration must be carefully weighed against the applicant's exemplary conduct and, as the evidence before the Court demonstrates, commendable efforts to rehabilitate himself and to reintegrate into society over a period of seven years. In such circumstances, the Government are required to provide further support for their contention that the applicant can reasonably be expected to cause disorder or to engage in criminal activities such as to render his deportation necessary in a democratic society. However, the Government have neither cited other relevant concerns nor submitted any documents capable of supporting such a contention.

69. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's deportation from the United Kingdom would be disproportionate to the legitimate aim of the "prevention of disorder and crime" and would therefore not be necessary in a democratic society.

70. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Nigeria.

71. In the circumstances the Court considers it unnecessary to examine the applicant's arguments regarding paragraph 364 of the Immigration Rules."

3.3.3.4. Betydningen af indgrebets karakter og varighed

Ved proportionalitetsvurderingen skal indgrebets karakter og tidsmæssige udstrækning tillægges betydning, herunder hvor lang tid indgrebet har påvirket eller vil påvirke en beskyttet rettighed.

I sager om immigration og opholdstilladelser vil det derfor have betydning, om indgrebet indebærer, at retten til familieliv eller privatliv vil blive påvirket midlertidigt eller permanent. Ligeledes har det betydning, med hvilken intensitet indgrebet har påvirket eller vil påvirke denne rettighed.

I sager, hvor en person mister sit opholdsgrundlag, kan det derfor have betydning for proportionalitetsvurderingen, hvorvidt klageren efterfølgende har mulighed for at genindrejse på statens territorie, eller om klageren helt afskæres fra denne mulighed.

I en sag om alvorlig kriminalitet, *Mehemi v. France (1997)*, lagde EMD vægt på, at klageren blev udvist for bestandigt fra sit opholdsland.

I præmis 37 udtalte EMD:

"Nevertheless, in view of the applicant's lack of links with Algeria, the strength of his links with France and above all the fact that the order for his permanent exclusion from French territory separated him from his minor children and his wife, the Court considers that the measure in question was disproportionate to the aims pursued. There has accordingly been a breach of Article 8."

I en sag om opholdstilladelse opnået på baggrund af svig, *Alleleh a.o. v. Norway (2022)*, var det lagt til grund, at en udvisning af klageren ville have en betydelig påvirkning af hendes børn. EMD lagde i dommen vægt på, at klagerens indrejseforbud i opholdslandet var begrænset til to år, ligesom der var forskellige muligheder for at afbøde påvirkningen af udvisningen på børnene. EMD lagde endvidere til grund, at klageren ville kunne genoptage sit familieliv i opholdslandet efter de to år.

I præmis 102-104 udtalte EMD:

"102. Against that background, the Court does not consider that it has a basis for concluding that the Supreme Court erred in its assessment that there were no concrete facts in the case before it that gave grounds for characterising the children's situation as different from what would essentially always follow with the expulsion of a parent. The Court therefore understands the Supreme Court's reluctance to qualify the circumstances as "exceptional" within the meaning of the Court's case-law. The Court notes that the case differed from those of Nunez and Kaplan and Others (both cited above), where the Court found violations of Article 8 of the Convention. It refers to Antwi and Others (cited above, §§ 101-02), where a five-year re-entry ban was accepted by the Court with reference to the fact that the child in question, also a Norwegian national who since birth had spent her entire life in Norway, had not been made vulnerable by previous disruption and that the duration of the immigration authorities' processing of the matter had not been so long as to give reasons to question whether the impugned measure fulfilled the requirements of swiftness and efficiency, in contrast to what had been the situation in the case of Nunez. The applicant children in the instant case had not either been exposed to the same degree of disruption and stress as in the case of Nunez (cited above). Neither can the authorities be blamed for not having dealt with the expulsion case in a timely manner. The facts of the current case also clearly differ from those in the case of Butt (cited above).

103. Moreover, the Court observes that the Supreme Court stressed various aspects that mitigated the effects of the expulsion on the children. First of all, the Supreme Court emphasised that it was only out of consideration for the children that the ban on re-entry imposed on the first applicant had been limited to two years in the first place (see paragraph 70 above). The duration of the exclusion order is an important element in the proportionality assessment (see Savran, cited above, § 182), and the Court must take into account that it did not find re-entry bans of five years imposed on parents disproportionate in cases such as Antwi and Others (cited above, § 104) and Darren Omoregie and Others (cited above, § 67).

104. Furthermore, the Supreme Court emphasised the first applicant's possibility to apply to have the ban from re-entry revised (see paragraphs 57 and 71 above). Such a revision of the re-entry ban according to the second paragraph of section 71 of the Immigration Act (see paragraph 75 above) would enable the domestic authorities to take into account any subsequent negative development, such as the second applicant not being able to take adequately care of the four children, or any unforeseen change related to the children's health or overall situation. The Supreme Court also emphasised the first applicant's possibility to apply for access to Norway for brief visits during the two-year ban from re-entry (see paragraph 57 above). Lastly, the Court finds reasons to stress not only the importance of the fact that the ban from re-entry had been limited to two years (see paragraph 103 above), but that it proceeds on the basis that she will be allowed to resume her family life in Norway when the two years have passed."

Herefter konkluderede EMD i præmis 105-107:

"105. Considering all of the above, the Court accepts that the present case disclosed no exceptional circumstances as such requiring the respondent State to withdraw the expulsion order so as to enable the applicants to maintain and continue to develop family life in Norway. Moreover, the Court accepts that the domestic authorities were faced with a balancing of interests that had to be done in a situation where particularly weighty interests in immigration control supported the first applicant's expulsion while at the same time an

expulsion would impose considerable difficulties on the other applicants. The Court also accepts that the domestic authorities, including the Supreme Court, sought to attend to the children's interests in so far they could be reconciled with the public interest reasons in sanctioning the first applicant's behaviour.

106. Therefore, as to the final conclusion that the expulsion was not disproportionate because it did not exceed the standards indicated by the Court in its case-law relevant to the case, the Court does not find that the authorities of the respondent State transgressed their margin of appreciation when, having carefully examined the facts and adequately balanced the interests in issue (see paragraphs 92-93 above), they decided to expel the first applicant and to prohibit her re-entry for two years. Neither are there any other reasons for the Court to substitute its own assessment for that of the competent national authorities, bearing in mind in particular the domestic courts' careful examination.

107. On the basis of the above, the Court concludes that there has been no violation of Article 8 of the Convention."

I en sag om ulovligt ophold og mindre alvorlig kriminalitet, *Konstatinov v. the Netherlands (2007)*, lagde EMD i vurderingen blandt andet vægt på, at indrejseforbuddet var tidsbegrænset.

I præmis 52 udtalte EMD:

"[…] In any event, the decision to declare the applicant an undesirable alien does not entail a permanent exclusion order, but an exclusion order of a temporary validity in the sense that – at the applicant's request – it can be lifted after a limited number of years of residency outside of the Netherlands."

EMD udtalte i samme præmis om hindringer for udlevelse af familielivet udenfor medlemsstatens grænser at:

"As regards the question whether there are any insurmountable obstacles for the exercise of the family life at issue outside of the Netherlands, the Court notes that the applicant's son will come of age in April 2007 whereas, according to its well-established case-law under Article 8, relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see Ezzouhdi v. France, no. 47160/99, § 34, 13 February 2001). The Court considers the fact that the applicant's son is suffering from asthma does not constitute such a further element of dependency. The Court further notes that the applicant was born in Serbia where she lived until the age of seven, that she held a valid passport issued in Pančevo (Serbia) by the authorities of the former Socialist Federal Republic of Yugoslavia when she filed her second request for a Netherlands residence permit in 1991, and that her claim of having become stateless after the dissolution of this Federal Republic is no more than conjecture. The same applies to her claim that Mr G. is stateless and might be denied admission to her country of origin. […]"

I fire domme af 12. november 2024 vedrørende udvisning af kriminelle udlændinge fra Danmark udtalte EMD sig generelt om betydningen af tidsbegrænsede indrejseforbud i den samlede artikel 8-afvejning.

I sagen Sharafane v. Denmark (2024) var klageren en irakisk statsborger, der var født i opholdslandet. I 2022 blev han idømt to år og seks måneders fængselsstraf og udvist med indrejseforbud i seks år for narkotikakriminalitet. Klageren var ikke tidligere dømt. Klageren havde ikke partner eller børn. EMD fandt, at der var sket en krænkelse af artikel 8, da genindrejse efter indrejseforbuddets udløb var teoretisk. EMD henviste til, at

Irak er et land, der er i visum gruppe 5, og at muligheden for at opnå visum for en irakisk statsborger er meget begrænset.

I sagen Savuran v. Denmark (2024) var klageren en tyrkisk statsborger, der var født i opholdslandet. I 2022 blev han idømt to år og tre måneders fængselsstraf og udvist med indrejseforbud i seks år for narkotikakriminalitet. Klageren var ikke tidligere dømt. Klageren havde ikke partner eller børn. EMD fandt, at der ikke var sket en krænkelse af artikel 8.

I sagen Winther v. Denmark (2024) var klageren en syrisk statsborger indrejst i opholdslandet som 20-årig med under fire års lovligt ophold i opholdslandet på tidspunktet for den seneste kriminalitet. I 2020 blev han idømt otte måneders fængselstraf og udvist med indrejseforbud i seks år for med tre medgerningsmænd at have slået og sparket en mand i hovedet og på kroppen med et bat og en flaske og for afpresning samt tvang. Klagerens partner og deres to børn var danske statsborgere. EMD fandt, at der ikke var sket en krænkelse af artikel 8.

I sagen Al-Habeeb v. Denmark (2024) var klageren en irakisk statsborger indrejst i opholdslandet som syvårig og med mere end 21 års lovligt ophold på tidspunktet for den seneste kriminalitet. Han var tidligere blevet idømt fængselsstraf i 2010, 2011 og 2019, hvor han ligeledes blev tildelt advarsel om udvisning. I 2021 blev han idømt to år og tre måneders fængselsstraf og udvist med indrejseforbud i 12 år for i forening med tre maskerede medgerningsmænd at stikke en person fem gange. Klageren var religiøst viet til en dansk statsborger. EMD fandt, at der ikke var sket en krænkelse af artikel 8.

EMD gjorde i alle sagerne en bemærkning om betydningen af længden af indrejseforbud i "den danske kontekst", se fx Savuran-dommens præmis 37:

"The length of the re-entry ban is only one of many factors in assessing whether an expulsion order is compatible with Article 8. Normally it cannot be said that this factor or any other factor is in itself decisive for the outcome of this assessment. In the Danish context this is different due to the Danish law that allows the courts to reduce the length of the re-entry ban if and only if a longer duration would "for certain" be contrary to Denmark's international obligations. This means that in some borderline cases the length of the re-entry ban becomes decisive in the assessment made by the Danish courts."

EMD udtalte endvidere i dommene, at muligheden for lovlig genindrejse efter udløbet af et indrejseforbud – hvad enten det er på en opholdstilladelse eller på et kortvarigt besøg/visum – ikke må være rent teoretisk, se fx Winther-dommen:

"45. It appears that in general the Danish courts, when issuing an expulsion order in criminal proceedings with a time-limited re-entry ban, do not take into account whether in the future, after the expiry of the time-limited re-entry ban, the expelled person would have prospects of being readmitted to Denmark.

46. In the present case, the Supreme Court stated that it would be possible for the family to restore their cohabitation "if the conditions were otherwise met", but it did not as such assess whether it would be realistically possible for the applicant to obtain a new residence permit (see paragraph 10 above).

47. The Court cannot exclude that exceptionally, in those few borderline cases where the length of the re-entry ban becomes decisive in the assessment of the compatibility of the expulsion order with Article 8, it may

be relevant to take into account whether in the future, after the expiry of the time-limited re-entry ban, the expelled person would have prospects of being readmitted to the country.

48. For example in the Danish context, if by virtue of section 32(5)(i) of the Aliens Act, in the proportionality test, the domestic courts reduce the length of a re-entry ban, since otherwise the length would "for certain" be considered in breach of Denmark's international obligations, including Article 8 of the Convention (see paragraph 20 above), the Court considers that the time-limited nature of the re-entry ban can only be considered a factor capable of rendering the applicant's expulsion compatible with Article 8, if the expelled person has some prospect of one day returning at least for a visit. Thus, if at the time of expulsion, in view of the rules on re-entry in place at that time, the national courts find that the prospect of the expelled person being readmitted to the country in any legal manner, whether on a residence permit or on a short-term visa, is purely theoretical, it would in the Court's opinion not be justified to attribute significant weight to the length of the reentry ban as factor capable of rendering the expulsion compatible with Article 8. A time-limited re-entry ban would in such circumstances amount de facto to a permanent ban (see, mutatis mutandis, Savran, cited above, §§ 182, 199-200, where the possibility of the applicant's re-entering Denmark on a visitor's visa despite a permanent re-entry ban was found to be purely theoretical, owing to the very limited basis on which such a visa could be issued)."

Efter at have konstateret, at en udlænding, der har været udvist af Danmark med indrejseforbud, efter udløbet af forbuddet kan søge om opholdstilladelse, fx på baggrund af familiesammenføring, gennemgik EMD det fremlagte statistiske materiale vedr. udvisninger og efterfølgende afgørelser om opholdstilladelse, herunder på baggrund af familiesammenføring, og udtalte:

"[…] The figures seem to indicate, however, that for a person who has a spouse or a partner, the prospect of re-entering Denmark on the grounds of family reunification does not remain purely theoretical." (Sharafane-dommen præmis 65)

Med udgangspunkt i de dagældende visumregler udtalte EMD i Sharafane-dommen følgende om muligheden for genindrejse i Danmark for udlændinge, som kommer fra immigrationsrisikolande og som ikke har ægtefælle eller partner i Danmark:

"67. The Court notes that by virtue of the Danish legislation on visa requirements for entering the country […], the requirements for obtaining a visa depend on the citizenship of the person applying (see paragraphs 20-32 above).

68. A person from a country designated as belonging to visa group 5 – that is, a national of Afghanistan, Eritrea, Iraq, Pakistan, Russia, Somalia or Syria (see paragraph 25 above) – generally only qualifies for a visa to enter Denmark if there are "extraordinary circumstances", such as the death or terminal illness of a family member living in Denmark. A visa will be refused if the person poses a risk to public order and security. The Court notes that the "extraordinary circumstances" mentioned in the rules are the same as those where a visa can exceptionally be granted to a person with a re-entry ban that has not expired. In Savran, cited above § 200, the Court found that such a limited basis for issuing a visitor's visa meant that the possibility of the applicant re-entering Denmark even for a short period remained purely theoretical.

[…]

71. Having regard to the above, in particular the very limited basis on which a visa may be issued to a person belonging to visa group 5, and the statistics which support this understanding, the Court is of the view that for nationals belonging to visa group 5 without a spouse or a partner, the Government has failed to show that the possibility of entering Denmark, even for a short-term visit, is not purely theoretical.

72. More concretely, the applicant's prospects of being readmitted to Denmark after the expiry of the six-year re-entry ban remain purely theoretical. He has been left without any realistic prospect of entering, let alone returning to, Denmark (see also Savran, cited above, § 200). For him, the six-year re-entry ban would de facto amount to a permanent ban.

73. Accordingly, in the present case, the fact that the re-entry ban was limited to six years cannot be attributed decisive weight as a factor capable of rendering the applicant's expulsion compatible with Article 8."

Der kan endvidere henvises til følgende sager:

- *Loukili v. the Netherlands (2023).*
- *Sharifi v. Denmark (2023).*
- *Al-Masudi v. Denmark (2023).*
- *Noorzae v. Denmark (2023).*
- *Goma v. Denmark (2023).*
- *Nguyen v. Denmark (2024).*

3.3.3.5. Margin of appreciation (staternes skønsmargin ved proportionalitetsvurderingen)

Det er de nationale myndigheder, som skal vurdere, om et indgreb er proportionalt med det ønskede legitime formål, og såvel de inddragede hensyn som myndighedernes afvejning af hensynene over for hinanden skal tydeligt fremgå af afgørelsen.

I sagen *Konstatinov v. the Netherlands (2007)* præmis 46 udtalte EMD:

"In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation."

Sagen vedrørte en klager, som aldrig havde haft lovligt ophold i medlemsstaten, og som tillige havde begået mindre alvorlig kriminalitet. Klageren havde under sit ulovlige ophold stiftet familie i medlemsstaten.

I den konkrete sag afvejede de nationale myndigheder hensynet til statens kontrol med immigration og forebyggelse af kriminalitet over for hensynet til familielivet i staten.

EMD fandt, at denne afvejning af de to modsatrettede hensyn var sket korrekt, hvorfor der ikke forelå en krænkelse af artikel 8. I præmis 53 udtalte EMD:

"The foregoing considerations are sufficient to enable the Court to conclude that it cannot be said that the Netherlands authorities have failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration and public expenditure and in the prevention of disorder or crime on the other. Consequently, there has been no violation of the applicant's right to respect for her rights guaranteed by Article 8 of the Convention."

Modsat vurderede EMD i sagen *Jakupovic v. Austria (2003)*, at den indklagede stat havde overtrådt den tilladte skønsmargin.

Klageren var blevet udvist til hjemlandet Bosnien-Herzegovina på grund af mindre alvorlig og hovedsagelig ikke-personfarlig kriminalitet begået i opholdslandet. Pågældende var indrejst i opholdslandet som 12-årig og var på afgørelsestidspunktet 16 år. EMD udtalte i den forbindelse i præmis 29:

"Thus, the Court considers that very weighty reasons have to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which has recently experienced a period of armed conflict with all its adverse effects on living conditions and with no evidence of close relatives living there."

EMD udtalte i præmis 30, at:

"The Government rely in this respect on the applicant's criminal record. The Court finds that this record, which is the essential element of justification for the expulsion, must be examined very carefully. It consists of two convictions for burglary. The Court cannot find that these convictions – even taking into account a further set of criminal proceedings which were discontinued after the victim had been compensated by the applicant – for which the Austrian courts had only imposed conditional sentences of imprisonment can be considered particularly serious as these offences did not involve elements of violence. The only element which may indicate any tendency of the applicant towards violent behaviour was a prohibition to possess arms issued in May 1995. Although the seriousness of such a measure should not be underestimated, it cannot be compared to a conviction for an act of violence, and there is no indication that such charges have ever been brought against the applicant."

Den indklagede stat anførte, at indgrebet var nødvendigt i forhold til at forebygge kriminalitet.

I præmis 32 udtalte EMD:

"Taking all the above elements into account, the Court finds that by imposing the residence prohibition in the particular circumstances of the case, the Austrian authorities have overstepped their margin of appreciation under Article 8 as the reasons in support of the necessity of the residence prohibition are not sufficiently weighty. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued."

Se endvidere *Maslov v. Austria (2008)*, præmis 76:

"Finally, the Court reiterates that national authorities enjoy a certain margin of appreciation when assessing whether an interference with a right protected by Article 8 was necessary in a democratic society and proportionate to the legitimate aim pursued (see Slivenko v. Latvia [GC], no. 48321/99, § 113, ECHR 2003-X, and Berrehab v. the Netherlands, 21 June 1988, § 28, Series A no. 138). However, the Court has consistently held that its task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests on the other (see, among many other authorities, Boultif, cited above, § 47). Thus, the State's margin of appreciation goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (see, mutatis mutandis, Société Colas Est and

Others v. France, no. 37971/97, § 47, ECHR 2002-III). The Court is therefore empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8."

Har medlemsstaterne foretaget en indgående prøvelse af sagen og i afvejningen inddraget og vurderet alle relevante hensyn, er EMD i overensstemmelse med subsidiaritetsprincippet tilbageholdende med at foretage sin egen prøvelse. EMD indrømmer også medlemsstaterne en såkaldt skønsmargin (margin of appreciation) i den praktiske anvendelse af EMRKs bestemmelser og i proportionalitetsafvejningen, når den pågældende medlemsstat i afvejningen har inddraget og vurderet alle relevante hensyn. Det indebærer, at EMD ikke foretager en tilbundsgående prøvelse af den af medlemsstaten foretagne afvejning i den enkelte sag.

Omfanget af skønsmarginen i den enkelte sag afgøres på baggrund af en vurdering af karakteren af indgrebet og den rettighed, der foretages indgreb i. Således vil medlemsstaterne typisk indrømmes en videre skønsmargin i sager, hvor indgrebet er begrundet i moralske vurderinger og politiske prioriteringer i det pågældende land og en snævrere skønsmargin i sager, hvor indgrebet påvirker grundlæggende aspekter af individets liv.

Se endvidere præmis 76 i sagen *Ndidi v. UK (2017)*, som handlede om udvisning af en kriminel udlænding:

"The requirement for 'European supervision' does not mean that in determining whether an impugned measure struck a fair balance between the relevant interests, it is necessarily the Court's task to conduct the Article 8 proportionality assessment afresh. […] where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so (see, mutatis mutandis, Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012). Consequently, in two recent cases concerning the expulsion of settled migrants, the Court declined to substitute its conclusions for those of the domestic courts, which had thoroughly assessed the applicants' personal circumstances, carefully balanced the competing interests and took into account the criteria set out in its case law, and reached conclusions which were 'neither arbitrary nor manifestly unreasonable' (see Hamesevic v. Denmark (dec.), no. 25748/15, § 43, 16 May 2017 and Alam v. Denmark (dec.), no. 33809/15, § 35, 6 June 2017)."

Medlemsstaternes forhold til den skønsmargin, som EMD tillægger medlemsstaterne i den enkelte sag, var et særskilt emne på Europarådets møde den 12. og 13. april 2018. Dette møde mundede ud i en erklæring, som blev underskrevet af de 47 deltagende medlemslande. Denne erklæring, benævnt Københavnererklæringen (*Copenhagen Declaration*) omhandlede medlemsstaternes ønske om dels at præcisere EMD´s rolle i forhold til nationale domstole, samt at præcisere medlemsstaternes ret til en skønsmargin i konkrete sager omhandlende EMRK´s rettigheder.

Under afsnittet om *"European supervision – the role of the Court"* udtalte Europarådet i punkterne 26 til 32, at:

"26. The Court provides a safeguard for violations that have not been remedied at national level and authoritatively interprets the Convention in accordance with relevant norms and principles of public international

law, and, in particular, in the light of the Vienna Convention on the Law of Treaties, giving appropriate consideration to present-day conditions.

27. The quality and in particular the clarity and consistency of the Court's judgments are important for the authority and effectiveness of the Convention system. They provide a framework for national authorities to effectively apply and enforce Convention standards at domestic level.

28. The principle of subsidiarity, which continues to develop and evolve in the Court's jurisprudence, guides the way in which the Court conducts its review.

a) The Court, acting as a safeguard for individuals whose rights and freedoms are not secured at the national level, may deal with a case only after all domestic remedies have been exhausted. It does not act as a court of fourth instance.

b) The jurisprudence of the Court makes clear that States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions.

c) The Court's jurisprudence on the margin of appreciation recognises that in applying certain Convention provisions, such as Articles 8-11, there may be a range of different but legitimate solutions which could each be compatible with the Convention depending on the context. This may be relevant when assessing the proportionality of measures restricting the exercise of rights or freedoms under the Convention. Where a balancing exercise has been undertaken at the national level in conformity with the criteria laid down in the Court's jurisprudence, the Court has generally indicated that it will not substitute its own assessment for that of the domestic courts, unless there are strong reasons for doing so.

d) The margin of appreciation goes hand in hand with supervision under the Convention system, and the decision as to whether there has been a violation of the Convention ultimately rests with the Court.

The Conference therefore:

29. Welcomes efforts taken by the Court to enhance the clarity and consistency of its judgments.

30. Appreciates the Court's efforts to ensure that the interpretation of the Convention proceeds in a careful and balanced manner.

31. Welcomes the further development of the principle of subsidiarity and the doctrine of the margin of appreciation by the Court in its jurisprudence.

32. Welcomes the Court's continued strict and consistent application of the criteria concerning admissibility and jurisdiction, including by requiring applicants to be more diligent in raising their Convention complaints domestically, and making full use of the opportunity to declare applications inadmissible where applicants have not suffered a significant disadvantage."

EMD har efterfølgende i sagen *I.M. v. Switzerland (2019)*, hvor klageren var dømt og udvist for alvorlig kriminalitet, forholdt sig til de nationale myndigheders skønsbeføjelser og begrundelsespligt .

I præmis 69 gennemgik EMD de generelle kriterier, som Storkammeret havde sammenfattet i Üner-dommen, som skal vejlede de nationale domstole i sager om udvisning af kriminelle udlændinge ved vurderingen af, om indgrebet er nødvendigt i et demokratisk samfund. EMD udtalte herefter i præmis 70 (uofficiel dansk oversættelse):

"Der skal ligeledes i givet fald tages højde for de særlige omstændigheder i forbindelse med den foreliggende sag, som f.eks. forhold af lægelig art eller indrejseforbuddets midlertidige eller definitive karakter (Shala mod Schweiz, nr. 52873/09, præmis 46, 15. november 2012, og de citerede referencer)."

Herefter udtalte EMD i præmis 71-73 (uofficiel dansk oversættelse):

"71. Domstolen henviser til, at de nationale myndigheder har visse skønsbeføjelser til at udtale sig om nødvendigheden af et indgreb i udøvelsen af en rettighed, der er beskyttet i medfør af artikel 8, og om den pågældende foranstaltnings proportionalitet med det legitime mål, der forfølges. Domstolens opgave består i at bestemme, om der i forbindelse med anfægtede foranstaltninger er respekteret en rimelig afvejning mellem de tilstedeværende interesser, dvs. på den ene side den pågældende persons interesser, der er beskyttet i medfør af Konventionen, og på den anden side samfundets interesser (Slivenko, nævnt ovenfor, præmis 113, og Boultif, nævnt ovenfor, præmis 47).

72. Domstolen henviser ligeledes til, at de nationale domstole skal begrunde deres afgørelser tilstrækkeligt udførligt, for navnlig at gøre det muligt for Domstolen at sikre det europæiske tilsyn, som Domstolen er betroet (jf., mutatis mutandis, X mod Letland [Storkammeret], nr. 27853/09, præmis 107, EMD 2013, og El Ghatet mod Schweiz, nr. 56971/10, præmis 47, 8. november 2016). Et utilstrækkeligt ræsonnement fra de nationale myndigheders side uden en reel afvejning af de tilstedeværende interesser strider mod kravene i Konventionens artikel 8. Det er tilfældet, når de nationale myndigheder ikke på en overbevisende måde formår at overbevise om, at indgrebet i en ret, der er beskyttet i medfør af Konventionen, står i forhold til de forfulgte mål, og at det herefter svarer til et "bydende nødvendigt socialt behov" i overensstemmelse med den ovennævnte retspraksis (El Ghatet, nævnt ovenfor, præmis 47, og mutatis mutandis, Schweizerische Radio- und Fernsehgesellschaft SRG mod Schweiz, nr. 34124/06, præmis 65, 21. juni 2012, Saber og Boughassal mod Spanien, nr. 76550/13 og 45938/14, præmis 51, 18. december 2018).

73. Hvis det til gengæld viser sig, at de nationale myndigheder har foretaget en tilstrækkelig og overbevisende undersøgelse af de faktiske forhold og relevante betragtninger, herunder en passende afvejning af klagers interesser og samfundets mere generelle interesser, tilkommer det ikke Domstolen at lade sin vurdering træde i stedet for den vurdering, der er foretaget af de nationale myndigheder, herunder i forhold til behandlingen af proportionaliteten i den omtvistede sag, medmindre der findes væsentlige årsager til at gøre dette (jf. i denne henseende Ndidi mod Det Forenede Kongerige, nr. 41215/14, præmis 76, 14. september 2017, Hamesevic mod Danmark (dec.), nr. 25748/15, præmis 43, 16. maj 2017 og Alam mod Danmark (dec.), nr. 33809/15, præmis 35, 6. juni 2017)."

EMD konstaterede om de nationale domstoles konkrete vurdering af indgrebets nødvendighed i et demokratisk samfund i præmis 76-79 (uofficiel dansk oversættelse):

"76. Domstolen bemærker, at den administrative forbundsdomstol har udtalt sig om alvoren af den begåede lovovertrædelse, kortfattet behandlet spørgsmålet om risikoen for gentagelse af den strafbare handling og bemærket de problemer, som klager måtte blive konfronteret med ved sin tilbagevenden til Kosovo. Domstolen henviser imidlertid til, at forbundsdomstolen har begrænset sin analyse i forhold til Konventionens artikel 8 til alene disse dele. Da forbundsdomstolen traf afgørelse mere end tolv år efter lovovertrædelsen, tog den på ingen måde højde for udviklingen i klagers adfærd, siden lovovertrædelsen blev begået (K.M. mod Schweiz, nr. 6009/10, præmis 54, 2. juni 2015, og de nævnte referencer). Den vurderede heller ikke indvirkningen af den betydelige forværring af den pågældende persons helbredstilstand (invaliditetsgrad på 80 % siden 1. oktober 2012) i forhold til risikoen for gentagelse af de strafbare forhold og har ikke behandlet flere kriterier, der er fastlagt i Domstolens retspraksis ved vurdering af nødvendigheden af udvisningsforanstaltningen. Den administrative forbundsdomstol har navnlig ikke taget højde for fastheden af klagers sociale, kulturelle og familiemæssige tilknytning til værtslandet Schweiz og destinationslandet Kosovo samt de særlige omstændigheder i den foreliggende sag, som for eksempel de lægelige oplysninger (Üner, nævnt ovenfor, præmis 58, og Shala, nævnt ovenfor, præmis 46). For så vidt angår navnlig respekten for familielivet, selv om domstolene har anerkendt klagers afhængighed, i det mindste hans økonomiske afhængighed af de myndige børn, er der ikke foretaget en mere dybtgående analyse af indvirkningerne af denne afhængighed på klagers udøvelse af rettighederne i medfør af Konventionens artikel 8.

77. Domstolen vurderer henset til ovenstående, at der ved anvendelse af de kriterier, der er fastlagt i dens retspraksis (ovenstående præmis 68 og 69), ikke kan udledes nogen tydelig konklusion med hensyn til, hvorvidt klagers private og familiemæssige interesse i fortsat at kunne bo på den indklagede stats territorium går forud for sidstnævntes offentlige interesse i at udvise klager med henblik på at varetage missionen med opretholdelse af den offentlige orden (jf., mutatis mutandis, El Ghatet, nævnt ovenfor, præmis 52). Hvis de nationale myndigheder havde foretaget en grundig afvejning af de pågældende interesser og taget højde for de forskellige kriterier, der er fastlagt i Domstolens retspraksis, og hvis de havde anført relevante og tilstrækkelige grunde, der kunne berettige deres afgørelse, ville Domstolen i givet fald, i tråd med nærhedsprincippet, kunne have været foranlediget til at vurdere, at de nationale myndigheder hverken havde undladt at foretage en retfærdig afvejning af klagers og den indklagede stats interesser eller overskredet de skønsbeføjelser, som de har inden for immigrationsområdet (jf., El Ghatet, nævnte ovenfor, præmis 52).

78. Domstolen vurderer imidlertid, at den administrative forbundsdomstol i den foreliggende sag har foretaget en overfladisk behandling af udsendelsesforanstaltningens proportionalitet. Henset til fraværet af en reel afvejning af de interesser, der står på spil, vurderer Domstolen, at de nationale myndigheder ikke på en overbevisende måde har formået at bevise, at udsendelsesforanstaltningen skulle være proportionel med de forfulgte legitime mål og dermed nødvendig i et demokratisk samfund.

79. Der ville herefter foreligge en krænkelse af Konventionens artikel 8, hvis klager udvises."

Omvendt fandt EMD i sagen *Pormes v. the Netherlands (2020)*, der både omhandlede ulovligt ophold og alvorlig kriminalitet, at de nationale myndigheder havde foretaget en grundig artikel 8-afvejning. Efter at

have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig, og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67-70:

"67. The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands.

68. In addition, the Court recognises that in the case at hand every domestic decision-making body had specific regard to the State's obligations under Article 8 of the Convention. The Deputy Minister of Justice, while emphasising that the applicant's stay in the Netherlands had never been lawful, balanced his ties to the Netherlands and the difficulties he would face adjusting to life in Indonesia against the seriousness of his criminal offending (see paragraphs 11 and 15-16 above). Whereas the Regional Court considered that the Deputy Minister had not sufficiently indicated what weight she attached to certain circumstances (see paragraph 22 above), the Administrative Jurisdiction Division of the Council of State held that the Deputy Minister had rightly attached great weight to the offences committed by the applicant in view of their nature and seriousness and the fact that the applicant was a recidivist. In its ruling it noted also that when the applicant had committed the offences at issue he was an adult and was aware that he did not have a residence permit (see paragraph 23 above). Having found that all relevant elements had been addressed in the balancing exercise carried out by the Deputy Minister, it reached the same conclusion, namely that the interests served by denying the applicant a residence permit were not outweighed by the latter's Article 8 rights.

69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

Der kan endvidere henvises til sagen *Veljkovic-Jukic v. Switzerland (2020)* vedrørende alvorlig kriminalitet, hvor EMD efter at have gennemgået Boultif- og Üner-kriterierne og de supplerende hensyn til helbredsforhold og indrejseforbuddet, i præmis 46-47 udtalte (uofficiel dansk oversættelse):

"46. Domstolen henviser til, at de nationale myndigheder har visse skønsbeføjelser til at udtale sig om nødvendigheden af et indgreb i udøvelsen af en rettighed, der er beskyttet i medfør af artikel 8, og om den pågældende foranstaltnings proportionalitet med det legitime mål, der forfølges. Domstolens opgave består i at bestemme, om der i forbindelse med anfægtede foranstaltninger er respekteret en rimelig afvejning mellem de tilstedeværende interesser, dvs. på den ene side den pågældende persons interesser, der er beskyttet

i medfør af Konventionen, og på den anden side samfundets interesser (Slivenko, nævnt ovenfor, præmis 113, og Boultif, nævnt ovenfor, præmis 47).

47. Domstolen henviser ligeledes til, at de nationale domstole skal begrunde deres afgørelser tilstrækkeligt udførligt for navnlig at gøre det muligt for Domstolen at sikre det europæiske tilsyn, som Domstolen er betroet (jf., mutatis mutandis, X mod Letland [Storkammeret], nr. 27853/09, præmis 107, EMD 2013, og El Ghatet mod Schweiz, nr. 56971/10, præmis 47, 8. november 2016). Et utilstrækkeligt ræsonnement fra de nationale myndigheders side uden en reel afvejning af de tilstedeværende interesser strider mod kravene i Konventionens artikel 8. Det er tilfældet, når de nationale myndigheder ikke på en overbevisende måde formår at overbevise om, at indgrebet i en ret, der er beskyttet i medfør af Konventionen, står i forhold til de forfulgte mål, og at det herefter svarer til et "bydende nødvendigt socialt behov" i overensstemmelse med den ovennævnte retspraksis (El Ghatet, nævnt ovenfor, præmis 47, og I.M. mod Schweiz, nævnt ovenfor, præmis 72 og 77)."

I forhold til den konkrete sag udtalte EMD i præmis 53-56 (uofficiel dansk oversættelse):

"53. Domstolen henviser i øvrigt til, hvis det viser sig, at de nationale myndigheder har foretaget en passende afvejning af klagers interesser og samfundets mere generelle interesser, at det ikke tilkommer Domstolen at lade sin vurdering træde i stedet for den vurdering, der er foretaget af de nationale myndigheder, herunder i forhold til behandlingen af proportionaliteten i den omtvistede sag, medmindre der findes væsentlige årsager til at gøre dette (jf. i denne henseende Hamesevic mod Danmark (dec.) 25748/15, præmis 43, 16. maj 2017, Alam mod Danmark (dec.), nr. 33809/15, præmis 35, 6, juni 2017, Ndidi mod Det Forenede Kongerige , nr. 41215/14, præmis 76, 14. september 2017, og Levakovic mod Danmark, nr. 7841/14, præmis 45, 23. oktober 2018).

54. Forbundsdomstolen lagde imidlertid i sin analyse ganske vist stor vægt på alvoren af klagers overtrædelse af narkotikaloven. Den tog imidlertid ved vurdering af foranstaltningens proportionalitet ligeledes hensyn til de kriterier, som Domstolen havde anført i Üner-dommen (nævnt ovenfor – præmis 44 ovenfor), herunder navnlig klagers personlige situation, hendes grad af integration i Schweiz samt de vanskeligheder, som hun og hendes familie måtte støde på, hvis de vender tilbage til deres oprindelsesland.

55. Forbundsdomstolen vedgik således, at udsendelsen af klager efter 18 års ophold i Schweiz var en meget hård foranstaltning, som dog skulle nuanceres under hensyntagen til klagers unge alder og det forhold, at hun var ankommet til Schweiz kl. i en alder af femten [sic] år efter at have tilbragt hele sin barndom og en del af sin ungdom i Bosnien-Hercegovina. En tilbagevenden til Bosnien-Hercegovina, Kroatien eller Serbien ville derfor ikke være umulig. Forbundsdomstolen overvejede også børnenes situation, idet den vurderede, at en adskillelse fra deres mor ville være et stort indgreb i deres familieliv. Den fandt imidlertid, at klagers mand, der har serbisk statsborgerskab, kunne følge hende til hendes oprindelsesland, og at integrationen af børnene ikke burde udgøre et problem, eftersom de stadig var i en alder, hvor de kunne passe sig.

56. Domstolen vurderer derfor, at de nationale myndigheder, navnlig forbundsdomstolen, har foretaget en tilstrækkelig og overbevisende undersøgelse af de relevante kendsgerninger og overvejelser og foretaget en detaljeret afvejning af de pågældende interesser."

I sagen Alleleh a.o. v. Norway (2022) gennemgik EMD i præmis 92 og 93 de generelle betragtninger:

"92. Domestic courts must, when assessing whether the expulsion of a family member was necessary in a democratic society within the meaning of Article 8 § 2 of the Convention, put forward specific reasons in the light of the circumstances of the case, not least to enable the Court to carry out the European supervision entrusted to it. Where the reasoning of domestic decisions is insufficient, without any real balancing of the interests in issue, this would be contrary to the requirements of Article 8 of the Convention. In such a scenario, the Court will find that the domestic courts failed to demonstrate convincingly that the respective interference with a right under the Convention was proportionate to the aim pursued and thus met a "pressing social need."

93. At the same time, where independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for the Court to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so […]."

I sagen havde den første klager opnået sin opholdstilladelse på baggrund af svig. Klagerens ægtefælle (anden klager) og deres fire børn, som på tidspunktet for dommen var 12, syv, syv og fire år gamle (tredje - sjette klagere), var alle statsborgere i opholdslandet, ligesom hun selv havde opnået statsborgerskab i opholdslandet. 13 år efter indrejsen i opholdslandet blev myndighederne bekendt med klagerens rette identitet, hvorefter hendes statsborgerskab blev inddraget, og hun blev udvist med indrejseforbud i to år.

Hvad angår de nationale myndigheders sagsbehandling i den konkrete sag og den nationale højesterets begrundelse i forhold til udvisning af klageren udtalte EMD i præmis 94-97:

"94. The Court first notes that the decision to expel the first applicant and issue a two-year ban on re-entry was first taken by the Directorate of Immigration, and thereafter examined on appeal by the Immigration Appeals Board. Subsequently, a judicial review was carried out by three levels of court. During those proceedings, a psychologist was appointed to protect the best interests of the children, several witnesses were heard, and other pieces of evidence examined (see, in particular, paragraphs 22, 24 and 34 above). There is nothing to suggest that the expulsion case of the first applicant was not dealt with thoroughly and swiftly, enabling the decision makers to take into account all relevant circumstances, including those directly related to the situation of the four children.

95. As one additional initial observation the Court observes that the Supreme Court's conclusion that there were no insurmountable obstacles to the family moving as a whole to Djibouti – which relates to an aspect that under the Court's case-law is highly relevant to the proportionality assessment under Article 8 § 2 of the Convention (see paragraph 90 above) – did not touch on the applicants' argument before the Court concerning the risk of genital mutilation. Based on the materials provided to the Court, that appears to have been connected to how the applicants had structured their pleadings before the Supreme Court. Given the applicants' own limited focus on and their apparent lack of attempts to substantiate that argument before the domestic authorities, and observing that the Supreme Court in any event, in its assessment of the proportionality of the expulsion, included the assumption that the family would decide that the father and the children would remain in Norway during the ban on re-entry imposed on the first applicant, the Court does not in the circumstances of the case find it appropriate to analyse the situation in Djibouti on the basis of new material or replace the assessment of the national courts by its own on that point. It is sufficient to observe that the applicants have not shown convincingly that the Supreme Court's finding that the second to sixth applicants could also in principle go to Djibouti – either to stay (see paragraph 63 above) or at least to visit the first applicant (see paragraph 70 above) – was arbitrary or otherwise manifestly deficient.

96. The Court moreover notes the Supreme Court's meticulous examination of the Court's case-law in order to infer relevant legal standards under Article 8 of the Convention and to apply them in a Convention–compliant manner when deciding the first applicant's expulsion case. Such an approach is crucial for the distribution of responsibility between the Court and the domestic courts, in order to ensure that the proper standards have been applied at domestic level (see, as a recent authority, Savran, cited above, §§ 188-89).

97. The Court also attaches importance to the Supreme Court's detailed reasoning with regard to its explanation of the weighty immigration policy arguments in favour of the expulsion of the first applicant. The Supreme Court made particular reference to the seriousness of her offences and that a sanction – as had also been emphasised by the legislature in the preparatory work to the Immigration Act (see, in particular, paragraphs 46-48 above) – in the form of expulsion was considered necessary in order to uphold respect for the immigration regulations and deter from future contraventions, that is to say for reasons of general deterrence (see, inter alia, paragraph 60 above). Indeed, as already found by the Court in a number of cases, a scheme of implementation of national immigration law which is based on administrative sanctions in the form of expulsion and a ban on re-entry does not as such raise an issue of failure to comply with Article 8 of the Convention (see, for example, Antwi and Others, cited above, § 90). Thus, the Court has in principle no objections to the Supreme Court's approach in this respect, bearing in mind, at the same time, that any such scheme must be construed and applied in a manner that is compatible with the Convention rights of all involved."

Herefter pegede EMD i præmis 98-100 på sagens særlige omstændigheder, som skulle tages i betragtning ved proportionalitetsafvejningen:

"98. The Court furthermore observes that the Oslo City Court and the Borgarting High Court each examined the facts of the case with regard to what an expulsion would entail for each of the applicants, including the children (see paragraphs 26-33 and 36-42 above, respectively). The Borgarting High Court's findings as to the facts of the case, the children's situation included, formed the basis for the Supreme Court's assessment of the case within the scope of the appeal, the appeal having been limited to the High Court's application of the law. In this respect the Supreme Court considered that the proportionality analysis, unlike what had been done by the High Court (see paragraph 35 above), had to be conducted in the light of the Court's case-law according to which an expulsion of a person whose grounds for residence were precarious at the outset would only be disproportionate in "exceptional" circumstances (see, for example, paragraphs 52, 54 and 64 above). Moreover, the Supreme Court concluded that the facts of the case as established by the Borgarting High Court did not support the finding that such "exceptional circumstances" existed. In this connection the Supreme Court emphasised that there was nothing in the lower instances' findings of fact that stood out from what had generally to be assumed to follow from expulsion of one of the parents for a relatively short period (see paragraphs 66 and 71 above).

99. Regarding the Supreme Court's legal starting points under Article 8 of the Convention, the Court notes that the first applicant was not a "settled migrant" in Norway in so far as her stay there was based on repeatedly giving incorrect information over a long period and therefore had never had a valid legal basis. It was for that reason the Supreme Court proceeded on the basis that the expulsion was valid unless "exceptional circumstances" could be identified. Although the Court does not disagree with the Supreme Court regarding this being the starting point, the Court also notes the very particular aspect of the instant case that the sanction imposed on the first applicant impacted as much, if not more, on her family members, notably her children, all being Norwegian nationals who had been born and lived all their lives in Norway. Even if the other family members would follow the first applicant to Djibouti during the period when the ban on re-entry would be in force in order to preserve "family life", they would have to experience a considerable unwanted change in their "private life" in moving to a country with which they had no connection, including as concerned language. This contrasted with the first applicant's own situation, coming from Djibouti, speaking the language, having family there and even having visited there after she had arrived in Norway (see, inter alia, paragraph

26 above). The expulsion imposed on the first applicant to sanction her behaviour could thus, somewhat paradoxically, put an equally heavy if not heavier strain on the other family members. The Court observes in this context – as did the Supreme Court – that the Norwegian Parliament has requested that the Government consider an amendment of the Immigration Act to "make it possible for the immigration administration to supplement the use of expulsion and prohibition of entry with a broader set of sanctions where warranted by special circumstances such as the child's best interests" (see paragraph 57 above).

100. Furthermore, the Court understands the Supreme Court's role in being limited to correcting what had been an erroneous understanding of the law by the Borgarting High Court. Nonetheless, even an examination of whether any "exceptional circumstances" existed also required a concrete and broad examination of the whole case and how the whole family would be affected by the expulsion of one of them. It might even be particularly important that the Supreme Court demonstrate that concrete assessment in a situation where the lower court had, regardless of its misunderstanding of the law, given a detailed explanation of why it, based on evidence that had been presented to it directly during its hearing, considered the expulsion to contradict the children's best interests, which in its assessment made the expulsion disproportionate vis-à-vis them (see paragraphs 36-42 above)."

Hvad angår den nationale højesterets konkrete proportionalitetsafvejning udtalte EMD i præmis 101-104:

"102. Against that background, the Court does not consider that it has a basis for concluding that the Supreme Court erred in its assessment that there were no concrete facts in the case before it that gave grounds for characterising the children's situation as different from what would essentially always follow with the expulsion of a parent. The Court therefore understands the Supreme Court's reluctance to qualify the circumstances as "exceptional" within the meaning of the Court's case-law. […]"

Herefter konkluderede EMD i præmis 105-107:

"105. Considering all of the above, the Court accepts that the present case disclosed no exceptional circumstances as such requiring the respondent State to withdraw the expulsion order so as to enable the applicants to maintain and continue to develop family life in Norway. Moreover, the Court accepts that the domestic authorities were faced with a balancing of interests that had to be done in a situation where particularly weighty interests in immigration control supported the first applicant's expulsion while at the same time an expulsion would impose considerable difficulties on the other applicants. The Court also accepts that the domestic authorities, including the Supreme Court, sought to attend to the children's interests in so far they could be reconciled with the public interest reasons in sanctioning the first applicant's behaviour.

106. Therefore, as to the final conclusion that the expulsion was not disproportionate because it did not exceed the standards indicated by the Court in its case-law relevant to the case, the Court does not find that the authorities of the respondent State transgressed their margin of appreciation when, having carefully examined the facts and adequately balanced the interests in issue (see paragraphs 92-93 above), they decided to expel the first applicant and to prohibit her re-entry for two years. Neither are there any other reasons for the Court to substitute its own assessment for that of the competent national authorities, bearing in mind in particular the domestic courts' careful examination.

107. On the basis of the above, the Court concludes that there has been no violation of Article 8 of the Convention."

Der kan endvidere henvises til følgende sager:

- *Azzaqui v. the Netherlands (2023)*.
- *Sharifi v. Denmark (2023)*.
- *Al-Masudi v. Denmark (2023)*.

- *Noorzae v. Denmark (2023)*.
- *Goma v. Denmark (2023)*.
- *Nguyen v. Denmark (2024)*.

4. Privatliv i praksis

4.1. Hvad forstås ved privatliv

Det følger af EMD's praksis, at retten til respekt for privatlivet omfatter mange forskelligartede forhold i relation til individets identitet og personlige sfære samt opbygningen af relationer til andre mennesker. Som eksempler kan nævnes kønsidentifikation, fysisk og psykisk integritet, mentalt helbred og socialt tilhørsforhold til det omgivende samfund. Medlemsstaten kan i den forbindelse have en positiv forpligtelse til at sikre denne ret.

I sagen *Christine Goodwin v. the United Kingdom (1995)* udtalte EMD i præmis 71:

"This case raises the issue whether or not the respondent State has failed to comply with a positive obligation to ensure the right of the applicant, a post-operative male to female transsexual, to respect for her private life, in particular through the lack of legal recognition given to her gender re-assignment."

I sagen *B. v. France (1992)* havde klageren indbragt sagen for EMD, idet den indklagede stat ikke ville ændre et tal i de offentlige registre, som kunne henføres til klagerens tidligere kønsidentifikation. Klageren havde siden sine unge år identificeret sig selv som værende af hunkøn, men var født og registreret som værende hankøn. EMD udtalte i præmis 63:

"The Court thus reaches the conclusion, on the basis of the above-mentioned factors which distinguish the present case from the Rees and Cossey cases and without it being necessary to consider the applicant's other arguments, that she finds herself daily in a situation which, taken as a whole, is not compatible with the respect due to her private life. Consequently, even having regard to the State's margin of appreciation, the fair balance which has to be struck between the general interest and the interests of the individual (see paragraph 44 above) has not been attained, and there has thus been a violation of Article 8 (art. 8)."

I sagen *Botta v. Italy (1998)* udtalte EMD i præmis 31:

"Private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings."

I sagen *Bensaid v. the United Kingdom (1998)* udtalte EMD i præmis 47, at:

"'Private life' is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8 […]. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world

[…]. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life."

For så vidt angår sager om udsendelse[4] af udlændinge vil der både i sager, hvor der foreligger familieliv, og i sager, hvor dette ikke er tilfældet, næsten altid være aspekter, som vedrører en persons privatliv.

EMD har i flere domme udtalt sig om selve privatlivsbegrebet i relation til udlændinges forhold til og i opholdslandet. I sagen *A.A. v. the United Kingdom (2011)* udtalte EMD i præmis 49:

"An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having 'family life'. However, it is not necessary to decide the question given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of 'private life' within the meaning of Article 8. Thus, regardless of the existence or otherwise of a 'family life', the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on 'family life' rather than 'private life', it observes that in practice the factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged." [Understreget her, red.]

Se for så vidt angår den understregede passus tilsvarende *Maslov v. Austria (2008)* præmis 63, *Miah v. United Kingdom (2010)* præmis 16 og *Osman v. Denmark (2011)* præmis 55.

I sagen *Slivenko and Others v. Latvia (2003)* udtalte EMD i præmis 96, at:

"[…] They were thus removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being."

I sagen *Miah v. United Kingdom (2010)* udtalte EMD i præmis 17, at:

"On the basis of that finding, the Court is unable to accept the Tribunals finding that, because the applicant had spent eleven years either in prison or abusing drugs, his deportation would not engage Article 8. There is nothing in the case file to indicate that all the applicant´s ties with his family and others were severed when he was in prison or abusing drugs. Moreover, the Court considers that, in the sixteen years that he was in the United Kingdom as a settled migrant, the applicant must have accumulated social ties to the community in which he lived. It is clear, therefore, that he enjoyed private life in the United Kingdom. It is equally clear that the applicant's deportation has an impact on his ability to develop the family relationships, friendships and other social ties he had in the United Kingdom; indeed it will be a rare case where a settled migrant will be

[4] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

unable to demonstrate that his or her deportation has interfered with his or her private life as guaranteed by Article 8. Not all settled migrants will have equally strong family or social ties in the Contracting State where they reside but the comparative strength or weakness of those ties is, in the majority of cases, more appropriately considered in assessing the proportionality of the applicant's deportation under Article 8 § 2." [Understreget her, red.]

EMD har gentaget den understregede passus i sagen *A.H. Khan v. the United Kingdom (2011)*, præmis 32, og i sagen *Levakovic v. Denmark (2018)*, præmis 34.

EMD har som generelt princip vedrørende betydningen af længden af en udlændings ophold i opholdslandet udtalt, at:

"Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there."

Se herved fx *Üner v. the Nederlands (2006)*, præmis 58.

Vedrørende betydningen af, hvilken periode i ansøgerens liv, der er tilbragt i opholdslandet, og dermed betydningen af udlændingens alder ved ankomst til opholdslandet udtalte EMD i *Maslov v. Austria (2007)*, præmis 73 - 75:

"73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec(2000)15 and Rec(2002)4 (see paragraphs 34-35 above).

74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see Üner, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there (see Üner, § 58 in fine).

75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

Ved EMD's vurdering af vægten af privatliv bliver længden af en udlændings ophold i opholdslandet og alderen ved indrejse sammenholdt med blandt andet graden af den pågældendes "integration" i landet og styrken af den pågældendes bånd ("links", "ties") til opholdslandet, herunder i form af netværk af personlige, sociale og kulturelle relationer.

I sagen *Emre v. Schweiz (2008)* gentog EMD i præmis 69 det ovennævnte princip om betydningen af længden af opholdet, som blandt andet kom til udtryk i Üner-dommens præmis 58, og uddybede i forlængelse heraf i præmis 70 (uofficiel dansk oversættelse): *"Domstolen har understreget vigtigheden af dette sidste punkt med hensyn til immigranter, der har tilbragt størstedelen af deres liv i værtslandet. I et sådant tilfælde bør det reelt bemærkes, at de modtog deres uddannelse der, fik størstedelen af deres sociale tilknytninger der og derfor udviklede deres identitet der. Da de er født eller ankommet til værtslandet på grund af deres forældres emigration, har de normalt deres vigtigste familiemæssige tilknytning der. Nogle af disse immigranter har endog kun bevaret nationalitetstilknytningen til fødelandet (Benhebba mod Frankrig, nr. 53441/99, præmis 33, 10. juli 2003, Mehemi, nævnt ovenfor, præmis 36, og Boujlifa, nævnt ovenfor, s. 2264, præmis 44, og, a contrario, Bouchelkia mod Frankrig, dom af 29. januar 1997, Samlingen af domme og afgørelser 1997- I, og Baghli mod Frankrig, nr. 34374/97, EMD 1999-VIII, nævnt ovenfor, henholdsvis præmis 50 og præmis 48)."*

I sagen *Slivenko v. Latvia (2003)*, hvor klagerne havde tilbragt stort set hele deres liv i opholdslandet og var blevet nægtet fortsat ophold, uden at de havde begået kriminelle forhold, udtalte EMD i præmis 123 og 125 blandt andet, at *"[…] However, the applicants also developed personal, social and economic ties in Latvia unrelated to their status as relatives of Soviet (and later Russian) military officers. […]" og "[…] In short, the Court finds that at the relevant time the applicants were sufficiently integrated into Latvian society."*

I *Maslov v. Austria (2007)* var klageren indrejst i opholdslandet som seks-årig og havde, mens han stadig var mindreårig, begået mindre alvorlig kriminalitet, for hvilken han blev udvist og siden udsendt i en alder af 19 år. EMD udtalte i præmis 96, at *"The Court observes that the applicant spent the formative years of his childhood and youth in Austria. He speaks German and received his entire schooling in Austria where all his close family members live. He therefore has his principal social, cultural and family ties in Austria."*

I sagen *Salija v. Switzerland (2017),* hvor klageren var indrejst i opholdslandet som ni-årig, og havde begået alvorlig kriminalitet, da han var 20 år, for hvilken han blev udvist ti år senere, udtalte EMD i præmis 51 vedrørende betydningen af længden af klagerens ophold i opholdslandet: *"As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. […]"*

Se også sagen *Pormes v. the Netherlands (2020)* , hvor klageren, der var nægtet opholdstilladelse som følge af, at han gentagne gange var dømt for overfald, var indrejst i opholdslandet som knap fire-årig og først som 17-årig var blevet opmærksom på, at han aldrig havde fået opholdstilladelse. EMD udtalte i præmis 62: *"The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that*

time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there."

Omvendt udtalte EMD, hvor klageren også havde levet det meste af sit liv i opholdslandet og var blevet udvist på grund af alvorlig kriminalitet: *"[…] Moreover, and importantly, the Court recalls that under its case-law, the evaluation of the applicant's "social" and "cultural ties" with the host country, here Denmark, is a criteria to be included in the analysis (see paragraph 36 above). On this basis, the Court considers it of importance that the City Court examined the particular situation of the applicant and found that although he has lived most of his life in Denmark he "must be considered very poorly integrated into Danish society". […]"* (præmis 44)

I sagen *Nguyen v. Denmark (2024)*, der handlede om udvisning på grund af alvorlig kriminalitet, havde Østre Landsret om klagerens alder på 13 år ved indrejsen i opholdslandet udtalt:

"13. In respect of the expulsion order, the High Court reduced the re-entry ban to twelve years, and found as follows: "[The applicant] entered Denmark at the age of 13 and thus spent her childhood in Vietnam. […]"

Heroverfor udtalte EMD i præmis 28:

"28. […] The Court recognises that the domestic courts examined the relevant criteria thoroughly given that very serious reasons were required to justify the expulsion of the applicant, a settled migrant who had entered Denmark at the age of 13 and had been lawfully resident in the host country for most of her childhood and youth […]"

EMD fandt i den konkrete sag, at der var sket en krænkelse af EMRK artikel 8.

Se for så vidt angår knap så langvarige ophold sagen *Yildiz v. Austria (2002)*, hvor klageren var ankommet til opholdslandet som 14-årig og havde opholdt sig syv år i landet på det tidspunkt, hvor han blev udvist med indrejseforbud på grund af mindre alvorlig kriminalitet. EMD henviste i præmis 43 blandt andet til, at *"[…], the Austrian authorities issuing the residence ban acknowledged that the first applicant had reached a high degree of integration in Austria. […]"*

Se endvidere for så vidt angår knap så langvarige ophold sagen *Jakupovic v. Austria (2003)*, hvor klageren gjorde gældende, at et indrejseforbud på ti år, som var pålagt ham i forbindelse med udvisning på grund af mindre alvorlig kriminalitet, var i strid med artikel 8. EMD udtalte i præmis 28 blandt andet: *"The Court observes that at the time of the expulsion the applicant had not been in Austria for a long time – just four years. Furthermore his situation was not comparable to that of a second generation immigrant, as he had arrived in Austria at the age of eleven, had previously attended school in his country of origin and must therefore have been well acquainted with its language and culture. However, the residence prohibition seriously upset his private and family life: he had arrived in Austria with his brother to join his mother and the new family she had founded there and has apparently no close relatives in Bosnia."* Efter en konstatering af den mindre alvorlige og ikke-voldelige karakter af den pådømte kriminalitet, udtalte EMD i præmis 32: *"Taking all the above elements into account, the Court finds that by imposing the residence prohibition in the particular circumstances of the case, the Austrian authorities have overstepped their margin of appreciation under Article 8 as the reasons in support of the necessity of the residence prohibition are not sufficiently weighty. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued."*
I sagen *Jeunesse v. the Netherlands (2014)*, som vedrørte ulovligt ophold, udtalte EMD i præmis 116, at: *"[…] The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to*

the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities."

I sagen *Radovanovic v. Austria (2004)*, hvor klageren var udvist på baggrund af mindre alvorlig kriminalitet, udtalte EMD i præmis 33, at: *"The Court notes that the applicant, a single young adult at the time of his expulsion, is not a second generation immigrant as, despite his birth in Austria, he did not permanently live there until the age of ten. Given the young age at which he arrived, the Court will nevertheless assess the necessity of the interference by applying the same criteria it usually applies in cases of second generation immigrants who have not yet founded a family of their own in the host country. These criteria, so far as material, are the nature and gravity of the offence committed by the applicant and the length of his stay in the host country. In addition the applicant's family ties and the social ties he established in the host country by receiving his schooling and by spending the decisive years of his youth there are to be taken into account (see Benhebba v. France, no. 53441/99, §§ 32-33, 15 June 2003). "*

I sagen *Bajsultanov v. Austria (2012)*, hvor klageren var blevet udvist på baggrund af alvorlig kriminalitet, sammenholdt EMD varigheden af klagerens ophold i medlemsstaten med hans tilknytning til landet og udtalte i præmis 85, at: *"As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there."*

Ligesom i *Bajsultanov* fandt EMD i sagen *Loy v. Germany (2014)*, som ligeledes vedrørte udvisning på baggrund af alvorlig kriminalitet, at klageren ikke havde godtgjort, at han havde en stærk tilknytning til opholdslandet på grund af personlige eller sociale relationer. EMD udtalte i præmis 37, at: *"The Court also looks for significant relations within the society of the host country […] and notes that apart from mentioning that he went to school and completed a vocational training in Germany in his submissions the applicant submits nothing by way of evidence of his participation in social life apart from the length of his residence. Apart from referring to his children and his former spouse he made reference to the fact that his father, stepmother and siblings live in Germany. He claims that he has contact with his sister, but gives no further details. No information on other social contacts was provided. Therefore, in the present case only few significant relations can be established."*

De enkelte elementer, som tilsammen udgør privatliv i henhold til EMD's praksis, er nærmere gennemgået nedenfor under afsnit 4.2. Som anført i afsnit 3.3.3.2 har EMD i dommene Boultif og Üner (begge vedrørende kriminelle udlændinge) oplistet mange af de elementer både vedrørende privat- og familieliv, som det ifølge EMD er nødvendigt at inddrage i proportionalitetsafvejningen mellem på den ene side det eller de hensyn, som staten påberåber sig, jf. undtagelsesbestemmelserne i artikel 8, stk. 2, og på den anden side individets ret til respekt for privat- og/eller familielivet, jf. artikel 8, stk. 1.

Som ligeledes anført i afsnit 3.3.3.2 afhænger vægtningen af de enkelte elementer i proportionalitetsafvejningen af de konkrete omstændigheder i hver enkelt sag, se f.eks. Maslov v. Austria (2008), hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

EMD har i kammerafgørelsen i sagen *Shevanova v. Latvia (2006)* fremhævet, at klageren i den konkrete sag ikke havde begået egentlig kriminalitet, hvorved sagen adskilte sig fra de fleste af de lignende artikel 8-sager, EMD hidtil havde behandlet, hvor klagerne var blevet udvist på grund af begået kriminalitet:

"77. The Court reiterates that most of the similar applications it has examined to date under Article 8 of the Convention concerned cases in which the alien deported or about to be deported had committed crimes or serious offences (see, among other authorities, the Moustaquim, El Boujaïdi, Dalia and Baghli judgments, cited above; see also Beldjoudi v. France, judgment of 26 March 1992, Series A no. 234-A; Nasri v. France, judgment of 13 July 1995, Series A no. 320-B; Boughanemi v. France, judgment of 24 April 1996, Reports 1996-II; Bouchelkia v. France, judgment of 29 January 1997, Reports 1997-I; Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI; Boujlifa v. France, judgment of 21 October 1997, Reports 1997-VI; and Ezzouhdi v. France, no. 47160/99, 13 February 2001). In some of these cases, the Court found that there had been a violation of Article 8 of the Convention notwithstanding the seriousness of the applicants' criminal convictions. In the present case, on the other hand, the actions of which the applicant was accused did not constitute a criminal offence in the strict sense, but merely a regulatory offence attracting a relatively small fine – which, moreover, was never enforced.

78. In sum, and having weighed up on the one hand the seriousness of the actions of which the applicant was accused and, on the other, the severity of the measure taken against her, the Court concludes that the Latvian authorities exceeded the margin of appreciation left to the Contracting States in this sphere and did not strike a fair balance between the legitimate aim of preventing disorder and the applicant's interest in having her right to respect for her private life protected. The Court is therefore unable to find that the interference complained of was "necessary in a democratic society".
Accordingly, there has been a violation of Article 8 of the Convention."

Endvidere henledes opmærksomheden på, at Storkammeret i sagen *Savran v. Denmark (2021)* i præmis 194 udtalte:

"194. In its recent case-law dealing with the expulsion of settled migrants under Article 8 of the Convention (see, for example, paragraph 189 above), the Court has held that serious criminal offences can, assuming that the other Maslov criteria are adequately taken into account by the national courts in an overall balancing of interests, constitute a "very serious reason" such as to justify expulsion. However, the first Maslov criterion, with its reference to the "nature and seriousness" of the offence perpetrated by the applicant, presupposes that the competent criminal court has determined whether the settled migrant suffering from a mental illness has demonstrated by his or her actions the required level of criminal culpability. The fact that his or her criminal culpability was officially recognised at the relevant time as being excluded on account of mental illness at the point in time when the criminal act was perpetrated may have the effect of limiting the weight that can be attached to the first Maslov criterion in the overall balancing of interests required under Article 8 § 2 of the Convention."

Se også sagen *Azzaqui mod Nederlandene (2023).* I sagen var klageren indrejst i opholdslandet som tiårig. Da han var mellem 15 og 24 år, blev han idømt fængselsstraf for en række lovovertrædelser. Som 24-årig blev han i 1996 idømt to års fængsel for voldtægt, og den nationale domstol fandt, at det skulle tillægges betydning i vurdering af skyldsspørgsmålet, at klageren på gerningstidspunktet led af en personlighedsforstyrrelse med skizotypiske og antisociale karaktertræk og episodiske psykotiske oplevelser. På baggrund af ekspertudtalelser, hvorefter der var en betydelig risiko for ny kriminalitet, blev han af hensyn til "the general safety of persons" i tillæg til sin fængselsstraf idømt retspsykiatrisk behandling. Hans behandlingsdom blev de følgende 20 år løbende fornyet. Klageren udviste god opførsel og blev 20 år efter dommen vurderet egnet til løsladelse fra tilbageholdelsen på betingelse af blandt andet fortsat god opførsel, tilsyn og indkvartering på et bosted, indtil han 22 år efter dommen for voldtægt fik sin opholdstilladelse inddraget under henvisning til, at han på baggrund af den tidligere begåede kriminalitet fandtes at udgøre en trussel for den offentlige orden, ligesom han blev meddelt indrejseforbud i ti år.

EMD udtalte i præmis 48-50 og 54-57:

"48. Where appropriate, other elements relevant to the case, such as, for instance, its medical aspects, should also be taken into account (see Savran, cited above, § 184, with further references), including the availability and accessibility of medical treatment in the country of destination (ibid., §§ 191-92).

49. The Court reiterates that the criterion of the "nature and seriousness of the offence committed by the applicant" is to be considered by reference to the totality of a person's criminal history and the circumstances under which the crime or crimes giving rise to expulsion were committed. Accordingly, under this criterion account must be taken of the nature and the effects of the crime on society as a whole (see Akbulut v. the United Kingdom (dec.), no. 53586/08, § 18, 10 April 2012; Unuane v. the United Kingdom, no. 80343/17, § 87, 24 November 2020, with further references; and Üner, cited above, § 63), the severity of the criminal penalty (see Unuane, § 86, and Azerkane, § 73, both cited above), the risk of reoffending (see Ndidi v. the United Kingdom, no. 41215/14, §§ 29, 78 and 81, 14 September 2017; Levakovic v. Denmark, no. 7841/14, §§ 19 and 44, 23 October 2018; and Azerkane, cited above, §§ 22, 78 and 84), whether the offences were committed as a juvenile or as an adult (see, for example, Maslov, cited above, § 81).

50. In Savran (cited above, §§ 193-96), the Court added that this criterion presupposes that the competent criminal courts have determined whether the settled immigrant suffering from a mental illness had demonstrated by his or her actions the required level of criminal culpability and, taking note of the fact that the applicant in that case was, in the national courts' view, exempt from punishment under domestic criminal law when convicted, held that this may have an impact of limiting the weight that can be attached to this criterion in the overall balancing of interests required under Article 8 § 2 of the Convention. The Court observed that it was not called upon to make general findings in this regard in the case at hand, but only to determine whether the manner in which the national authorities, including the domestic courts, assessed the "nature and seriousness" of the applicant's offence adequately took into account the fact that he was, according to the national authorities, suffering from a serious mental illness at the moment when he perpetrated the act in question.

[…]

54. In determining whether those revocation proceedings were in compliance with Article 8 of the Convention, the Court will assess whether the national authorities, including the domestic courts, applied the relevant criteria established in the Court's case-law, and adequately balanced the interests of the applicant against those of the general public (see paragraph 52 above). In this connection the Court notes at the outset that, on account of his mental condition, the applicant was more vulnerable than an average "settled migrant" facing expulsion (compare Savran, cited above, § 191). The state of his health was required to be taken into account as one of the balancing factors (see paragraph 48 above).

55. As regards the criterion "nature and seriousness of the offence committed by the applicant", the Court notes that the applicant was convicted between 1987 and 1996 of multiple crimes and of rape in 1996 (see paragraphs 6 and 7 above). Those convictions included crimes of a violent and of a sexual nature which can, assuming that the other relevant criteria are adequately taken into account by the national authorities in an overall balancing of interests, constitute a "very serious reason" such as to justify expulsion (see Savran, cited above, § 194).

56. In determining whether the other relevant criteria were adequately taken into account in the present case, the Court cannot overlook the fact that in the criminal proceedings that led to the applicant's last conviction, reports were drawn up by a psychiatrist and a psychologist which revealed that at the time when he had committed that offence, the applicant was suffering from a personality disorder with schizotypal and antisocial traits and episodic psychotic experiences to such an extent that the offence could only be attributed to him to a reduced extent. The Arnhem Regional Court made that conclusion of reduced criminal culpability its own when it convicted the applicant of rape and imposed the TBS order (see paragraph 7 above).

57. The Court observes that the Deputy Minister in the decision revoking the applicant's residence permit, only referred to the seriousness of the multiple crimes that the applicant had committed and the extensions of his TBS order, and noted further that there remained a risk of reoffending and thus a threat to public order (see paragraph 16 above). Upholding those findings, the Regional Court held in its judgment of 6 November 2018 that the Deputy Minister had rightly given "decisive weight" to the serious crimes that had repeatedly been committed by the applicant (see paragraph 24 above). It follows from the foregoing that neither the Deputy Minister nor the administrative court, when assessing the "nature and seriousness of the applicant's offence", took into account the fact that he was, in the view of the criminal court, suffering from a serious mental illness, which had reduced his criminal culpability, at the moment when he perpetrated the act in question (see Savran, cited above, § 195)."

Herefter udtalte EMD i præmis 60:

"[…]In reaching their conclusion about the existence of a threat to public order in the revocation proceedings, the authorities thus failed to sufficiently consider the applicant's personal circumstances, and particularly the relevant conclusions of the criminal courts, supported as they were by medical evidence (compare Savran, cited above, § 197)."

I sagen *Pormes v. the Netherlands (2020),* som vedrørte ulovligt ophold og kriminalitet, udtalte EMD i præmis 52-53:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already

been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105)."

4.1.1. Forhold mellem familiemedlemmer, der som minimum udgør privatliv

I sagen *A.W. Khan v. the United Kingdom (2010)* fandt EMD, at klagerens tilknytning til familiemedlemmer, som ikke kunne anses som "familieliv" efter EMRK artikel 8, idet klageren var myndig, kunne udgøre "privatliv" efter bestemmelsen.

Klageren var indrejst i opholdslandet som treårig og var meddelt tidsubegrænset opholdstilladelse. Klageren blev som 28-årig idømt syv års fængsel for narkotikakriminalitet, men blev løsladt efter tre år på grund af god opførsel. Myndighederne traf efterfølgende afgørelse om at udvise klageren på baggrund af den begåede kriminalitet.

Klageren anførte for EMD, at en udvisning ville udgøre en krænkelse af hans ret til familieliv både med hensyn til hans mor og søskende og med hensyn til hans kæreste og deres fælles barn.

EMD udtalte i præmis 31-32:

"31. The Government have accepted that the applicant's deportation would interfere with his private life as reflected in his relationship with his mother and brothers, and the Court endorses this view. The Court also recalls that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants such as the applicants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", and having regard to the considerable period of time he has lived in the United Kingdom, the expulsion of the applicant would therefore constitute an interference with his right to respect for his private life. The Court recalls that it will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect (see Maslov v. Austria [GC], no. 1638/03, ECHR 2008 § 63).

32. In immigration cases the Court has held that there will be no family life between parents and adult children unless they can demonstrate additional elements of dependence (Slivenko v. Latvia [GC], no. 48321/99, § 97, ECHR 2003 X; Kwakye-Nti and Dufie v. the Netherlands (dec.), no. 31519/96, 7 November 2000). The Court does not accept that the fact that the applicant was living with his mother and brothers, or the fact that the entire family suffered from different health complaints, constitutes a sufficient degree of dependence to result in the existence of family life. In particular, the Court notes that in addition to his two brothers, the applicant also has three married sisters who live in the United Kingdom. It does not, therefore, accept that the applicant is necessarily the sole carer for his mother and brothers. Moreover, while his mother and brothers undoubtedly suffer from health complaints, there is no evidence before the Court which would suggest that these conditions are so severe as to entirely incapacitate them."

I præmis 42-43 udtalte EMD om klagerens personlige forhold, herunder hans tilknytning til sin mor og søskende i opholdslandet:

"42. As regards the applicant's private life, the Court accepts that the applicant has lived most of his life in the United Kingdom, having arrived there at the age of three, and no longer has any real social, cultural or family ties to Pakistan. The applicant has not returned to Pakistan, even for a short visit, and he has no immediate family in Pakistan.

43. In the United Kingdom the applicant has established close ties with his mother and two brothers, with whom he has lived for most of his life. The relationship clearly entails an additional degree of dependence which results from the relative ill-health of all of the parties. Although there is no evidence to suggest that the family would not be able to cope without the applicant, his removal would likely cause greater difficulties than would otherwise be the case."

Også i andre sager har EMD vurderet, om forholdet mellem myndige børn og deres forældre og søskende udgjorde familieliv og/eller privatliv. Som eksempler herpå kan nævnes dommene i sagerne *El Boujaïdi v. France (1997)*, *Moustaquim v. Belgium (1991)*, *A.A. v. the United Kingdom (2011)*, *Levakovic v. Denmark (2018)*, *Maslov v. Austria (2008)*, *Osman v. Denmark (2011)*, *Butt v. Norway (2012)*, *Nacic and others v. Sweden (2012)*, *I.M. v. Switzerland (2019)*, *Zakharchuk v. Russia (2019)* , *Pormes v. the Netherlands (2020)* og *Savran v. Denmark (2021)*.

I sagen *Moustaquim v. Belgium (1991)*, som er gennemgået nærmere i kapitel 5, blev klageren udvist fra opholdslandet, da han var 20 år gammel, med indrejseforbud gældende for 10 år. Alle klagerens nære familiemedlemmer – hans forældre og søskende – boede i opholdslandet. EMD fandt, at der var en krænkelse af klagerens ret til respekt for familieliv og fandt herefter ikke anledning til at vurdere, om udvisningen også udgjorde en krænkelse af hans ret til respekt for privatliv. EMD udtalte i præmis 45-47:

"44. Mr Moustaquim's alleged offences in Belgium have a number of special features. They all go back to when the applicant was an adolescent (see paragraphs 10-15 above). Furthermore, proceedings were brought in the criminal courts in respect of only 26 of them, which were spread over a fairly short period - about eleven months -, and on appeal the Liège Court of Appeal acquitted Mr Moustaquim on 4 charges and convicted him on the other 22. The latest offence of which he was convicted dated from 21 December 1980. There was thus a relatively long interval between then and the deportation order of 28 February 1984. During that period the applicant was in detention for some sixteen months but at liberty for nearly twenty-three months.

45. Moreover, at the time the deportation order was made, all the applicant's close relatives - his parents and his brothers and sisters - had been living in Liège for a long while; one of the older children had acquired Belgian nationality and the three youngest had been born in Belgium. Mr Moustaquim himself was less than two years old when he arrived in Belgium. From that time on he had lived there for about twenty years with his family or not far away from them. He had returned to Morocco only twice, for holidays. He had received all his schooling in French.

46. Having regard to these various circumstances, it appears that, as far as respect for the applicant's family life is concerned, a proper balance was not achieved between the interests involved, and that the means employed was therefore disproportionate to the legitimate aim pursued. Accordingly, there was a violation of Article 8 (art. 8).

47. This conclusion makes it unnecessary for the Court to consider whether the deportation was also a breach of the applicant's right to respect for his private life."

I sagen *A.A. v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som 13-årig sammen med sine to søstre som familiesammenført til deres mor. To år senere blev han som 15-årig idømt fire års tilbageholdelse på en ungdomsinstitution for voldtægt begået mod en mindreårig, men blev løsladt tidligere på grund af god opførsel. Fem år efter den begåede kriminalitet blev klagerens udvisningsafgørelse endelig. Da EMD behandlede sagen, havde klageren opholdt sig i opholdslandet i 11 år. Han boede hos sin mor og besøgte sine to søstre regelmæssigt. EMD udtalte i præmis 46-49:

"46. The Court recalls that in Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I, when considering whether there was an interference with Article 8 rights in a deportation case, it found that "family life" existed in respect of an applicant who was 20 years old and living with his mother, step-father and siblings. In Boujlifa v. France, 21 October 1997, § 36, Reports 1997-VI, the Court considered that there was "family life" where an applicant aged 28 when deportation proceedings were commenced against him had arrived in France at the age of five and received his schooling there, had lived there continuously with the exception of a period of imprisonment in Switzerland and where his parents and siblings lived in France. In Maslov, cited above, § 62, the Court recalled, in the case of an applicant who had reached the age of majority by the time the exclusion order became final but was living with his parents, that it had accepted in a number of cases that the relationship between young adults who had not founded a family of their own and their parents or other close family members also constituted "family life".

47. However, in two recent cases against the United Kingdom the Court has declined to find "family life" between an adult child and his parents. Thus in Onur v. the United Kingdom, no. 27319/07, §§ 43-45, 17 February 2009, the Court noted that the applicant, aged around 29 years old at the time of his deportation, had not demonstrated the additional element of dependence normally required to establish "family life" between adult parents and adult children. In A.W. Khan v. the United Kingdom, no. 47486/06, § 32, 12 January 2010, the Court reiterated the need for additional elements of dependence in order to establish family life between parents and adult children and found that the 34-year old applicant in that case did not have "family life" with his mother and siblings, notwithstanding the fact that he was living with them and that they suffered a variety of different health problems. It is noteworthy, however, that both applicants had a child or children of their own following relationships of some duration.

48. Most recently, in Bousarra, cited above, §§ 38-39, the Court found "family life" to be established in a case concerning a 24-year old applicant, noting that the applicant was single and had no children and recalling that in the case of young adults who had not yet founded their own families, their ties with their parents and other close family members could constitute "family life".

49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life". However, it is not necessary to decide the question given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Thus, regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on "family life" rather than "private life", it observes that in practice the factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged (Üner, cited above, §§ 57-60)."

I sagen *Maslov v. Austria (2008)* var klageren indrejst i opholdslandet som seksårig og var blevet udvist på grund af kriminalitet i form af mere end 40 kvalificerede indbrud, nogle i forbindelse med banderelationer, brugstyveri af køretøj og et enkelt tilfælde af vold. Klageren var mindreårig, da han begik disse forhold, og da afgørelsen om udvisning blev endelig. Medlemsstaten havde begrundet udvisningen med hensynet til forebyggelse af uro og forbrydelse. EMD udtalte i præmis 62-64:

"62. The applicant was a minor when the exclusion order was imposed. He had reached the age of majority, namely 18 years, when the exclusion order became final in November 2002 following the Constitutional Court's decision, but he was still living with his parents. In any case, the Court has accepted in a number of cases concerning young adults who had not yet founded a family of their own that their relationship with their parents and other close family members also constituted "family life" (see Bouchelkia v. France, 29 January 1997, § 41, Reports 1997-I; El Boujaïdi, cited above, § 33; and Ezzouhdi, cited above, § 26).

63. Furthermore, the Court observes that not all settled migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy "family life" there within the meaning of Article 8. However, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant therefore constitutes an interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect (see Üner, cited above, § 59).

64. Accordingly, the measures complained of interfered with both the applicant's "private life" and his "family life"."

Se tilsvarende EMD i sagen *Osman v. Denmark (2011)*, præmis 55-56.

I sagen *Nacic and others v. Sweden (2012)* var familien indrejste sammen i Sverige og havde søgt om asyl. Familien bestod af to forældre og deres to sønner. Den ældste søn blev meddelt opholdstilladelse på baggrund af hans helbred, mens de tre andre personer fik afslag på asyl. Sønnen, som fik opholdstilladelse, var på dette tidspunkt fyldt 18 år. EMD udtalte i præmis 75-76:

"75. The question in the present case is whether, in view of the circumstances, the applicants still had a family life in Sweden within the meaning of Article 8 of the Convention after the third applicant had reached the age of majority and, if so, whether the Migration Court of Appeal's decision to deport the first, second and fourth applicants amounted to an unjustified interference with this right.

76. The Court notes that the applicants have lived together as a family ever since arriving in Sweden in 2006 and that they presumably lived together in Kosovo before that. The fact that the third applicant reached the age of majority during the domestic proceedings did not change the fact that he was still a dependent member of the applicant family, in particular considering his state of health. In these circumstances the Court considers that the applicants' situation amounted to family life within the meaning of Article 8 § 1 of the Convention even after the third applicant had reached the age of majority. It further finds that the impugned decision to remove the first, second and fourth applicants from Sweden interfered with the applicants' right to family life."

I sagen *I.M. v. Switzerland (2019)* blev klageren udvist af opholdslandet efter at være blevet dømt for voldtægt ti år forinden. Klagerens tidligere ægtefælle og deres fællesbørn, hvoraf tre var myndige, havde alle ophold i opholdslandet, og klageren, der var vurderet 80% invalid, var afhængig af hjælp fra de myndige børn i form af pleje og økonomiske bistand.

EMD udtalte i præmis 62 (uofficiel dansk oversættelse):

"Klagers myndige børn er i øvrigt henholdsvis 23, 26 og 28 år gamle. Domstolen henviser til, at eksistensen af et familieliv, i henhold til Konventionens artikel 8, ikke kan lægges til grund mellem forældre og deres voksne børn eller mellem søskende, uden at eksistensen af supplerende afhængighed er påvist (Slivenko mod Letland [Storkammeret], nr. 48321/99, præmis 97, EMD 2003-X, og Danelyan mod Schweiz (dec.), nr. 76424/14 og 76435/14, præmis 29, 29. maj 2018). Domstolen vurderer imidlertid i den foreliggende sag, at klager kan påberåbe sig supplerende afhængighed af sine børn, idet han er afhængig af ekstern hjælp for at klare dagligdagen. Klager gør endvidere gældende, at hans tre myndige børn siden ophævelsen af invalidepensionen i februar 2016 har forsøget ham økonomisk. Han skulle endvidere have boet sammen med to af sine myndige børn, der tog sig af husholdningen, handlede, plejede ham, vaskede ham, klædte ham på og dermed var hans primære referencepersoner. Domstolen har ingen gyldig grund til at betvivle, at disse påstande skulle være usande, og de bestrides heller ikke af Regeringen. De schweiziske domstole har endvidere i deres evaluering af det hensigtsmæssige i udsendelse af klager taget højde for, at familiemedlemmerne ville kunne bidrage til medicinudgifterne (ovenstående præmis 25). Det faktum, at disse bidrag ville kunne udtales til klager i Kosovo og stamme fra familien, der bor i Schweiz og i Tyskland, skaber ikke tvivl om selve eksistensen af et relevant

afhængighedsforhold, der ville kunne lade området "familieliv" i artikel 8 finde anvendelse. Domstolen vurderer herefter, at klagers relationer med børnene ligeledes henhører under retten til respekt for familielivet."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Da klageren var 17 år gammel, fandt man ud af, at han ikke havde opholdstilladelse. Han blev efterfølgende nægtet opholdstilladelse under henvisning til gentagen kriminalitet.

EMD udtalte i præmis 47-49:

"47. The Court has further laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, for instance, Konstatinov v. the Netherlands, no. 16351/03, § 52, 26 April 2007, and Z. and T. v. the United Kingdom (dec.), no. 27034/05, ECHR 2006-III). However, it has not insisted on such further elements of dependency in a number of cases concerning young adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; Osman v. Denmark, no. 38058/09, §§ 55-56, 14 June 2011; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019).

48. Even if a person of 26 years of age could still be considered a "young adult", the Court notes that at least in 2011 the applicant was not living full-time with his foster parents anymore (see paragraph 21 above). Moreover, it has not been argued and there is no indication that there are any further elements of dependency between the applicant and his foster parents.

49. The above notwithstanding, the Court deems it not necessary to decide on the question whether or not the ties between the applicant and his foster parents constituted family life within the meaning of Article 8. It reiterates that, in practice, the factors to be examined in order to assess the compatibility with Article 8 of a denial of a right of residence – in so far as those factors are relevant in a particular case – are the same regardless of whether family or private life is engaged (see, mutatis mutandis, A.A. v. the United Kingdom, no. 8000/08, §§ 49 and 57, 20 September 2011).

50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

I sagen *Savran v. Denmark (2021)* var klageren indrejst i opholdslandet som seksårig sammen med sin mor og sine søskende som familiesammenført til sin far. Klageren var som 16-årig blevet idømt et år og tre måneders fængsel, heraf ni måneder betinget, for røveri. Som 24-årig blev han fundet skyldig i vold med døden til følge begået tre år forinden, men fundet straffri som følge af psykisk sygdom. Han blev idømt retspsykiatrisk behandling samt udvist for bestandig. Fem år senere blev udvisningen prøvet og opretholdt, og klageren blev udsendt til sit hjemland. Storkammeret udtalte i præmis 174-178:

"174. Whilst in some cases the Court has held that there will be no family life between parents and adult children or between adult siblings unless they can demonstrate additional elements of dependence (see, for instance, A.W. Khan v. the United Kingdom, no. 47486/06, § 32, 12 January 2010, and Narjis v. Italy, no. 57433/15, § 37, 14 February 2019), in a number of other cases it has not insisted on such further elements of dependence with respect to young adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019). As already stated above, whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect will depend on the circumstances of the particular case.

175. In the present case, the applicant arrived in Denmark at the age of six; he was educated and spent his formative years there; he was issued with a residence permit and remained lawfully resident in the country for fourteen years and eight months (see paragraphs 27 and 30 above). The Court thus accepts that he was a "settled migrant" and therefore Article 8 under its "private life" aspect is engaged.

176. The applicant also alleged that, prior to his expulsion, he had had a close relationship with his mother, his four siblings and their children, who all lived in Denmark. In particular, while he had remained in forensic psychiatric care, they had visited him and he had visited them. The applicant also stressed his particular vulnerability on account of his mental condition, which, in his view, was an additional element of his dependence on them, and argued that he had had a "family life" with them, which had been interrupted by his expulsion (see paragraph 152 above).

177. The Court observes that, at the time when the applicant's expulsion order became final, he was 24 years old (see paragraph 30 above). Even if the Court may be prepared to accept that a person of this age can still be considered a "young adult" (see paragraph 174 above), the facts of the case reveal that from his childhood the applicant was removed from home and placed in foster care, and that, at various times over the years, he lived in socio-educational institutions (see paragraph 18 above). It is thus clear that from his early years the applicant was not living full time with his family (compare Pormes v. the Netherlands, no. 25402/14, § 48, 28 July 2020, and compare and contrast Nasri, cited above, § 44).

178. The Court is further not convinced that the applicant's mental illness, albeit serious, can in itself be regarded as a sufficient evidence of his dependence on his family members to bring the relationship between them within the sphere of "family life" under Article 8 of the Convention. In particular, it has not been demonstrated that the applicant's health condition incapacitated him to the extent that he was compelled to rely on their care and support in his daily life (compare and contrast Emonet and Others v. Switzerland, no. 39051/03, § 35, 13 December 2007; Belli and ArquierMartinez v. Switzerland, no. 65550/13, § 65, 11 December 2018; and I.M. v. Switzerland, cited above, § 62). Moreover, it has not been argued that the applicant was dependent on any of his relatives financially (compare and contrast I.M. v. Switzerland, cited above, § 62); it is noteworthy in this connection that the applicant has been and remains in receipt of a disability pension from the Danish authorities (see paragraphs 27, 30 and 72 above). Moreover, there is no indication that there were any further elements of dependence between the applicant and his family members. In these circumstances, whilst the Court sees no reason to doubt that the applicant's relationship with his mother and siblings involved

normal ties of affection, it considers that it would be appropriate to focus its review on the "private life" rather than the "family life" aspect under Article 8."

I sagen *Bierski v. Poland (2022)* forholdt EMD sig til forholdet mellem en far og hans voksne søn, der havde et mentalt handicap. EMD udtalte i præmis 47:

"47. In this respect, the Court notes that the applicant is D.B.'s biological father with whom he lived for the first two years of his life. Following that, they had regular contact throughout D.B.'s childhood and youth and enjoyed a father-son relationship. Moreover, before D.B. turned 18 years of age, the applicant took the necessary steps to have contact with him secured by way of interim measure (see paragraph 7 above). On the basis of this measure, he continued to have contact with his son until A.R. was appointed as D.B.'s guardian and the measure was lifted (see paragraphs 9 and 12 above). Already against this background, the Court finds that even after he had reached the age of 18, D.B. was part of the applicant's core family. In addition, D.B. suffers from Down syndrome and is fully incapacitated. Indeed, according to the findings of the Wrocław Regional Court in its decision of 18 January 2019 (see paragraph 14 above) D.B. did not react to questions posed to him and communication between him and people not known to him was impossible. In view of this, it is clear to the Court that there existed "additional factors of dependence" between the applicant and his son, as the applicant was one of the close persons who could communicate with D.B. Taking into account the above considerations, the Court finds that, even though D.B. was no longer a minor at the relevant time, there existed "family life" between the applicant and his son within the meaning of Article 8 of the Convention and that, therefore, Article 8 is applicable to the present case."

Se endvidere sagen *Zakharchuk v. Russia (2019)*, hvor klageren, der efter at være blevet løsladt som 30-årig gjorde gældende, at forholdet til moren udgjorde familieliv, da han altid havde boet sammen med hende. EMD udtalte i præmis 53:

"As for the applicant's allegation concerning the adverse effect of his exclusion on his family life with his mother, the Court notes that the applicant furnished no documents, financial, medical or otherwise, substantiating the alleged dependency on him of his mother, who was resident in Russia. On the basis of the case file, and given that the applicant was thirty years old at the time of the issuance of the exclusion order, the Court does not find that there are any elements of dependency apart from the normal emotional ties between the applicant and his mother capable of bringing their relationship into the protective sphere of family life under Article 8 of the Convention (see, for comparison, Sapondzhyan, cited above)."

I sagen *Katsikeros v. Greece (2022)* forholdt EMD sig til forholdet mellem en far og hans mindreårige datter i en tvist vedrørende retten til samvær. Vedrørende spørgsmålet om, om der forelå "familieliv" i artikel 8's forstand, udtalte EMD i præmis 46-47:

"46. In the present case, the Court must first determine whether the decision of the Court of Appeal, upheld by the Court of Cassation, to put certain restrictions on the applicant's contact with M. disregarded the applicant's existing "family life" with his child within the meaning of Article 8. It notes at the outset that, despite K.P.'s initial refusal to acknowledge that the applicant was the biological father of M., it was then established that that was indeed the case; the applicant's paternity is now uncontested between the parties. In examining whether there is, in addition, a close personal relationship between him and the child which must be regarded as an established "family life" for the purposes of Article 8, the Court observes on the one hand, that the applicant cohabited with M.'s mother for a short period of time and they intended to get married; on the other hand, the applicant has never cohabited with M. and, despite the contact rights granted by the domestic decisions, he had only met M. once on 7 March 2015 until the end of the domestic proceedings in question, when M. was around three and a half years old. There are no signs of any commitment on the part of the applicant towards M. before she was born. In these circumstances, their relationship does not have sufficient constancy to be characterised as an existing "family life".

47. However, the Court has found that intended family life may, exceptionally, fall within the ambit of Article 8 in cases in which the fact that family life has not been established is not attributable to the applicant (see the references in paragraph 44 above). This applies, in particular, to the relationship between a child born out of wedlock and the child's biological father, who are inalterably linked by a natural bond while their actual relationship may be determined, for practical and legal reasons, by the child's mother and, if married, by her husband (see Anayo v. Germany, no. 20578/07, § 60, 21 December 2010). In the present case, the Court notes that the applicant expressed his wish to be recognised as M.'s father, to share parental responsibility with K.P. and to have regular contact with M. through his applications to the domestic courts. However, after his paternity was established and his contact rights were granted by the domestic courts, the applicant refused to exercise his rights under the conditions that had been set out in the decisions and, as a result, he only saw M. once during the period covered by the domestic decisions in question. In the Court's view, that conduct was not sufficient to demonstrate the applicant's interest in his child. Thus, the present case should be distinguished from Anayo (cited above), in which the applicant had not had any contact with his biological children because their mother and their legal father had refused his requests to allow contact with them. It follows that in the circumstances of the present case, the fact that there was not any established family relationship between the applicant and M. can be attributed to the applicant."

Herefter udtalte EMD i præmis 48:

"*48. Having regard to the foregoing, the Court considers that the applicant's intended relationship with his biological child does not attract the protection of "family life" under Article 8. It notes, however, that in any event, the issue of whether the applicant's contact schedule with M. was excessively restrictive, even if it fell short of falling within "family life", concerned an important part of the applicant's identity and thus his "private life" within the meaning of Article 8 § 1 (see paragraph 45 above).*"

4.2. Afvejningen i praksis

De enkelte elementer, som tilsammen udgør privatliv i henhold til EMD's praksis, er nærmere gennemgået nedenfor. Som anført i afsnit 3.3.3.2 afhænger vægtningen af de enkelte elementer i proportionalitetsafvejningen af de konkrete omstændigheder i hver enkelt sag, se fx Maslov v. Austria (2008), hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

I den forbindelse henledes opmærksomheden også på betydningen af, om klageren har begået kriminalitet m.v. i opholdslandet og alvoren heraf, se f.eks. Shevanova v. Latvia (2006), pr. 77:

"The Court reiterates that most of the similar applications it has examined to date under Article 8 of the Convention concerned cases in which the alien deported or about to be deported had committed crimes or serious offences (see, among other authorities, the Moustaquim, El Boujaïdi, Dalia and Baghli judgments, cited above; see also Beldjoudi v. France, judgment of 26 March 1992, Series A no. 234-A; Nasri v. France, judgment of 13 July 1995, Series A no. 320-B; Boughanemi v. France, judgment of 24 April 1996, Reports 1996-II; Bouchelkia v. France, judgment of 29 January 1997, Reports 1997-I; Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI; Boujlifa v. France, judgment of 21 October 1997, Reports 1997-VI; and Ezzouhdi v. France, no. 47160/99, 13 February 2001). In some of these cases, the Court found that there had been a violation of Article 8 of the Convention notwithstanding the seriousness of the applicants' criminal convictions. In the present case, on the other hand, the actions of which the applicant was accused did not constitute a criminal offence in the strict sense, but merely a regulatory offence attracting a relatively small fine – which, moreover, was never enforced."

Endvidere henledes opmærksomheden på, at Storkammeret i sagen *Savran v. Denmark (2021)* i præmis 194 udtalte:

"194. In its recent case-law dealing with the expulsion of settled migrants under Article 8 of the Convention (see, for example, paragraph 189 above), the Court has held that serious criminal offences can, assuming that the other Maslov criteria are adequately taken into account by the national courts in an overall balancing of interests, constitute a "very serious reason" such as to justify expulsion. However, the first Maslov criterion, with its reference to the "nature and seriousness" of the offence perpetrated by the applicant, presupposes that the competent criminal court has determined whether the settled migrant suffering from a mental illness has demonstrated by his or her actions the required level of criminal culpability. The fact that his or her criminal culpability was officially recognised at the relevant time as being excluded on account of mental illness at the point in time when the criminal act was perpetrated may have the effect of limiting the weight that can be attached to the first Maslov criterion in the overall balancing of interests required under Article 8 § 2 of the Convention."

Se også sagen *Azzaqui mod Nederlandene (2023).* I sagen var klageren indrejst i opholdslandet som tiårig. Da han var mellem 15 og 24 år, blev han idømt fængselsstraf for en række lovovertrædelser. Som 24-årig blev

han i 1996 idømt to års fængsel for voldtægt, og den nationale domstol fandt, at det skulle tillægges betydning i vurdering af skyldsspørgsmålet, at klageren på gerningstidspunktet led af en personlighedsforstyrrelse med skizotypiske og antisociale karaktertræk og episodiske psykotiske oplevelser. På baggrund af ekspertudtalelser, hvorefter der var en betydelig risiko for ny kriminalitet, blev han af hensyn til "the general safety of persons" i tillæg til sin fængselsstraf idømt retspsykiatrisk behandling. Hans behandlingsdom blev de følgende 20 år løbende fornyet. Klageren udviste god opførsel og blev 20 år efter dommen vurderet egnet til løsladelse fra tilbageholdelsen på betingelse af blandt andet fortsat god opførsel, tilsyn og indkvartering på et bosted, indtil han 22 år efter dommen for voldtægt fik sin opholdstilladelse inddraget under henvisning til, at han på baggrund af den tidligere begåede kriminalitet fandtes at udgøre en trussel for den offentlige orden, ligesom han blev meddelt indrejseforbud i ti år.

EMD udtalte i præmis 48-50 og 54-57:

"48. Where appropriate, other elements relevant to the case, such as, for instance, its medical aspects, should also be taken into account (see Savran, cited above, § 184, with further references), including the availability and accessibility of medical treatment in the country of destination (ibid., §§ 191-92).

49. The Court reiterates that the criterion of the "nature and seriousness of the offence committed by the applicant" is to be considered by reference to the totality of a person's criminal history and the circumstances under which the crime or crimes giving rise to expulsion were committed. Accordingly, under this criterion account must be taken of the nature and the effects of the crime on society as a whole (see Akbulut v. the United Kingdom (dec.), no. 53586/08, § 18, 10 April 2012; Unuane v. the United Kingdom, no. 80343/17, § 87, 24 November 2020, with further references; and Üner, cited above, § 63), the severity of the criminal penalty (see Unuane, § 86, and Azerkane, § 73, both cited above), the risk of reoffending (see Ndidi v. the United Kingdom, no. 41215/14, §§ 29, 78 and 81, 14 September 2017; Levakovic v. Denmark, no. 7841/14, §§ 19 and 44, 23 October 2018; and Azerkane, cited above, §§ 22, 78 and 84), whether the offences were committed as a juvenile or as an adult (see, for example, Maslov, cited above, § 81).

50. In Savran (cited above, §§ 193-96), the Court added that this criterion presupposes that the competent criminal courts have determined whether the settled immigrant suffering from a mental illness had demonstrated by his or her actions the required level of criminal culpability and, taking note of the fact that the applicant in that case was, in the national courts' view, exempt from punishment under domestic criminal law when convicted, held that this may have an impact of limiting the weight that can be attached to this criterion in the overall balancing of interests required under Article 8 § 2 of the Convention. The Court observed that it was not called upon to make general findings in this regard in the case at hand, but only to determine whether the manner in which the national authorities, including the domestic courts, assessed the "nature and seriousness" of the applicant's offence adequately took into account the fact that he was, according to the national authorities, suffering from a serious mental illness at the moment when he perpetrated the act in question.

[…]

54. In determining whether those revocation proceedings were in compliance with Article 8 of the Convention, the Court will assess whether the national authorities, including the domestic courts, applied the relevant criteria established in the Court's case-law, and adequately balanced the interests of the applicant against

those of the general public (see paragraph 52 above). In this connection the Court notes at the outset that, on account of his mental condition, the applicant was more vulnerable than an average "settled migrant" facing expulsion (compare Savran, cited above, § 191). The state of his health was required to be taken into account as one of the balancing factors (see paragraph 48 above).

55. As regards the criterion "nature and seriousness of the offence committed by the applicant", the Court notes that the applicant was convicted between 1987 and 1996 of multiple crimes and of rape in 1996 (see paragraphs 6 and 7 above). Those convictions included crimes of a violent and of a sexual nature which can, assuming that the other relevant criteria are adequately taken into account by the national authorities in an overall balancing of interests, constitute a "very serious reason" such as to justify expulsion (see Savran, cited above, § 194).

56. In determining whether the other relevant criteria were adequately taken into account in the present case, the Court cannot overlook the fact that in the criminal proceedings that led to the applicant's last conviction, reports were drawn up by a psychiatrist and a psychologist which revealed that at the time when he had committed that offence, the applicant was suffering from a personality disorder with schizotypal and antisocial traits and episodic psychotic experiences to such an extent that the offence could only be attributed to him to a reduced extent. The Arnhem Regional Court made that conclusion of reduced criminal culpability its own when it convicted the applicant of rape and imposed the TBS order (see paragraph 7 above).

57. The Court observes that the Deputy Minister in the decision revoking the applicant's residence permit, only referred to the seriousness of the multiple crimes that the applicant had committed and the extensions of his TBS order, and noted further that there remained a risk of reoffending and thus a threat to public order (see paragraph 16 above). Upholding those findings, the Regional Court held in its judgment of 6 November 2018 that the Deputy Minister had rightly given "decisive weight" to the serious crimes that had repeatedly been committed by the applicant (see paragraph 24 above). It follows from the foregoing that neither the Deputy Minister nor the administrative court, when assessing the "nature and seriousness of the applicant's offence", took into account the fact that he was, in the view of the criminal court, suffering from a serious mental illness, which had reduced his criminal culpability, at the moment when he perpetrated the act in question (see Savran, cited above, § 195)."

Herefter udtalte EMD i præmis 60:

"[…]In reaching their conclusion about the existence of a threat to public order in the revocation proceedings, the authorities thus failed to sufficiently consider the applicant's personal circumstances, and particularly the relevant conclusions of the criminal courts, supported as they were by medical evidence (compare Savran, cited above, § 197)."

4.2.1. Længden af klagerens ophold i opholdslandet

Som anført ovenfor under afsnit 4.1 kan længden af en udlændings ophold i opholdslandet sammen med andre faktorer have betydning for vurderingen af klagerens tilknytning til opholdslandet og til hjemlandet.

I sagen *Üner v. the Netherlands (2006),* fandt EMD, at længden af opholdet i opholdslandet havde betydning for vurderingen af klagerens tilknytning både til opholdslandet og til hjemlandet. Efter at have henvist til Boultif-kriterierne, som EMD havde oplistet i sagen *Boultif v. Switzerland (2001)* som de relevante kriterier,

den ville anvende for at vurdere, om et udvisningstiltag var nødvendigt i et demokratisk samfund og proportionalt med det påberåbte legitime hensyn, udtalte EMD i præmis 58:

"The Court would wish to make explicit two criteria which may already be implicit in those identified in Boultif:

- *[…]*
- *the solidity of social, cultural and family ties with the host country and with the country of destination.*

[…]

As to the second point, it is to be noted that, although the applicant in Boultif was already an adult when he entered Switzerland, the Court has held the "Boultif criteria" to apply all the more so (à plus forte raison) to cases concerning applicants who were born in the host country or who moved there at an early age (see Mokrani v. France, no. 52206/99, § 31, 15 July 2003). Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there."

Ved EMD's vurdering af vægten af privatliv bliver længden af en udlændings ophold i opholdslandet og alderen ved indrejse sammenholdt med blandt andet graden af den pågældendes "integration" i landet og styrken af den pågældendes bånd ("links", "ties") til opholdslandet, herunder i form af netværk af personlige, sociale og kulturelle relationer.

Der henvises til afsnit 4.1 for en gennemgang af eksempler herpå fra EMD's praksis samt til afsnit 3.3.3 vedrørende proportionalitetsafvejningen, hvoraf det fremgår, at vægtningen af de enkelte elementer i proportionalitetsafvejningen afhænger af de konkrete omstændigheder i hver enkelt sag.

EMD har i dommen *Bajsultanov v. Austria (2012)* behandlet spørgsmålet om, hvilken periode, der skal medregnes i beregningen af længden af opholdet. I sagen var en udlænding, som var meddelt asyl i opholdslandet, udvist på grund af alvorlig kriminalitet. EMD fastsatte længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen i sommeren 2012, jf. præmis 85. Da klageren indrejste og søgte om asyl i sommeren 2003 (præmis 8) og blev meddelt opholdstilladelse i form af asyl to år senere i sommeren 2005 (præmis 13), har EMD således regnet længden af hans ophold fra tidspunktet for hans indrejse i 2003. De østrigske myndigheder lagde ved afgørelsen om asyl blandt andet vægt på, at sikkerhedssituationen i Tjetjenien var forværret fra maj 2004 og frem, og fandt klagerens forklaringer troværdige og tilstrækkeligt underbyggede.

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[5] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er

[5] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse

således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

4.2.1.1. Alvorlig kriminalitet

I sagen *Üner v. the Netherlands (2006)* blev klageren idømt syv års fængsel for drab og udvist for bestandig. Klageren var indrejst som 12-årig sammen med sin mor og sine søskende som familiesammenført til faren. På tidspunktet, hvor afgørelsen om udvisning blev endelig, havde han opholdt sig 17 år i opholdslandet og havde to mindreårige børn med sin nederlandske partner. Han var flyttet fra partneren efter halvandet års samliv, da det ældste barn var omkring ni måneder gammel, men forblev i tæt kontakt med partneren og barnet i de følgende omkring otte måneder indtil fængslingen. Partneren og det ældste barn besøgte klageren i fængslet mindst en gang om ugen og ofte hyppigere. Mens klageren var fængslet, fik parret endnu et barn, som klageren ligeledes så hver uge. Klageren havde på tidspunktet for EMD´s afgørelse opholdt sig 25 år i opholdslandet.

EMD fastslog i præmis 61, at der forelå et indgreb både i klagerens ret til respekt for familieliv og hans ret til respekt for privatliv. EMD udtalte imidlertid:

"[...] Even so, having regard to the particular issues at stake in the present case and the positions taken by the parties, the Court will pay special attention to the applicant's right to respect for his family life."

EMD udtalte i præmis 62, at:

"The Court considers at the outset that the applicant lived for a considerable length of time in the Netherlands, the country that he moved to at the age of 12 together with his mother and brothers in order to join his father, and where he held a permanent residence status. Moreover, he subsequently went on to found a family there. In these circumstances, the Court does not doubt that the applicant had strong ties with the Netherlands. That said, it cannot overlook the fact that the applicant 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. As the Chamber put it in paragraph 46 of its judgment, '... the disruption of their family life would not have the same impact as it would [have had] if they had been living together as a family for a much longer time'. Moreover, while it is true that the applicant came to the Netherlands at a relatively young age, the Court is not prepared to accept that he had spent so little time in Turkey that, at the time he was returned to that country, he no longer had any social or cultural (including linguistic) ties with Turkish society."

I præmis 63-65 forholdt EMD sig til den begåede kriminalitet, tidspunktet for prøveløsladelse, klagerens børns alder og deres og partnerens statsborgerskab i opholdslandet i forhold til muligheden for at følge med klageren til dennes hjemland samt det pålagte indrejseforbuds varighed. Herefter konkluderede EMD i præmis 67:

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pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

"In the light of the above, the Court finds that a fair balance was struck in this case in that the applicant's expulsion and exclusion from the Netherlands were proportionate to the aims pursued and therefore necessary in a democratic society.

Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Sezen v. the Netherlands (2006)* var den første klager indrejst i opholdslandet som 23-årig og havde fået opholdstilladelse som familiesammenført til sin ægtefælle (den anden klager), som havde boet i opholdslandet siden hun var syv år, og deres fælles barn. Tre år efter indrejsen blev den første klager idømt fire års fængsel for narkotikakriminalitet. Efter løsladelsen genoptog han samlivet med ægtefælle og barn, men fraflyttede senere det fælles hjem i en periode på omkring syv måneder. Knap fire måneder efter genoptagelse af samlivet fik klagerne endnu et barn. Den første klagers opholdstilladelse som familiesammenført blev omkring otte måneder senere nægtet forlænget under henvisning til samlivsafbrydelsen og straffedommen.

EMD udtalte i præmis 44-45:

"44. At the time the first applicant was arrested, i.e. on 31 July 1992, he had been residing lawfully in the Netherlands for less than one and a half years, having been granted a residence permit in February 1991. Applying the "sliding scale" principle, the authorities of the respondent State attached weight to this undeniably short duration of the first applicant's lawful stay in the Netherlands before he committed the offence. It is nevertheless to be noted that, following his conviction on 20 January 1993, it was not until more than four years later, namely on 5 June 1997, that the decision was taken to refuse the first applicant continued residence. Following his early release from prison in April 1995, the first applicant had thus been allowed to build up even closer ties with the Netherlands for a further two years. In addition, it appears that the first applicant has not re-offended and that he has been gainfully employed ever since his release from prison.

45. As to the first applicant's connections with his country of origin, the Court considers that his situation is not comparable to that of a second-generation immigrant, given that he arrived in the Netherlands at the age of twenty-three. Not having been informed otherwise, the Court assumes that he received his schooling in Turkey and that he is conversant with the Turkish language. Thus, he undoubtedly has ties with Turkey. His ties to the Netherlands are mainly connected to his wife – the second applicant – and their two children."

I præmis 46-49 gennemgik EMD indgrebets mulige betydning for klagerens familieliv, herunder ægtefællens tilknytning til opholdslandet og manglende tilknytning til hjemlandet, familielivets etablering forud for kriminaliteten, børnenes tilknytning til opholdslandet og klagerens og ægtefællens hjemland og vanskelighederne for ægtefællen og børnene ved at følge klageren til hjemlandet samt klagerens mulighed for at besøge familien i opholdslandet og for på ny opnå opholdstilladelse i opholdslandet.

I præmis 50 udtalte EMD:

"In conclusion, the Court is of the opinion that, in the particular circumstances of the present case, the respondent State failed to strike a fair balance between the applicants' interests on the one hand and its own interest in preventing disorder or crime on the other.

There has, accordingly, been a violation of Article 8 of the Convention."

I sagen *A.W. Khan v. the United Kingdom (2010)* var klageren indrejst i opholdslandet som treårig og var meddelt tidsubegrænset opholdstilladelse. Han blev som 28-årig idømt syv års fængsel for narkotikakriminalitet, men blev løsladt efter tre år på grund af god opførsel. Myndighederne traf efterfølgende afgørelse om udvisning på baggrund af den begåede kriminalitet. Klageren havde dels sin mor og sine søskende i opholdslandet, dels en kæreste, som han havde fået et barn med. På tidspunktet for sagens behandling for EMD var klageren 34 år gammel.

I præmis 31-32 gennemgik EMD klagerens forhold til sin mor og sine søskende, som fandtes at udgøre privatliv. I præmis 33-35 gennemgik EMD klagerens forhold til sin kæreste og deres fælles barn, som fandtes at udgøre familieliv. Herefter konkluderede EMD i præmis 36, at der var tale om et ingreb både i klagerens privatliv og hans familieliv.

Herefter gennemgik EMD i præmis 37-42 om indgrebet var i overensstemmelse med loven, om det skete til varetagelse af et af de legitime hensyn og om det var nødvendigt i et demokratisk samfund. EMD henviste i denne forbindelse til de relevante kriterier som sammenfattet i Üner-dommen og udtalte i præmis 40-43:

"40. The Court reiterates that in view of the devastating effects of drugs on people's lives, it understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge (Dalia v France, cited above, § 54; Bhagli v France, cited above, § 48). The applicant's offence was particularly serious as it involved the importation of a significant quantity of heroin. The severity of the offence is reflected in the fact that the applicant was sentenced to seven years' imprisonment, taking account of his decision to plead guilty at a very early stage. The severity of this offence must therefore weigh heavily in the balance.

41. Nevertheless, the Court must also take into account the fact that the applicant had not previously committed any serious criminal offences in the United Kingdom, and has committed no further offences following his release in June 2006. Under the approach taken in the Boultif judgment (cited above, §51), the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has a certain impact on the assessment of the risk which the applicant poses to society.

42. As regards the applicant's private life, the Court accepts that the applicant has lived most of his life in the United Kingdom, having arrived there at the age of three, and no longer has any real social, cultural or family ties to Pakistan. The applicant has not returned to Pakistan, even for a short visit, and he has no immediate family in Pakistan.

43. In the United Kingdom the applicant has established close ties with his mother and two brothers, with whom he has lived for most of his life. The relationship clearly entails an additional degree of dependence which results from the relative ill-health of all of the parties. Although there is no evidence to suggest that the family would not be able to cope without the applicant, his removal would likely cause greater difficulties than would otherwise be the case."

I præmis 44-47 gennemgik EMD, hvorvidt klagerens familieliv med sin kæreste og deres fælles barn kunne tillægges vægt i proportionalitetsafvejningen, hvilket ikke fandtes at være tilfældet henset til omstændighederne på tidspunktet for etableringen af familielivet. I præmis 48 udtalte EMD, at der også måtte tages hensyn til varigheden af indrejseforbuddet, som var højst ti år.

Herefter udtalte EMD i præmis 50-51:

"50. In light of the above, having particular regard to the length of time that the applicant has been in the United Kingdom and his very young age at the time of his entry, the lack of any continuing ties to Pakistan, the strength of his ties with the United Kingdom, and the fact that the applicant has not reoffended following his release from prison in 2006, the Court finds that the applicant's deportation from the United Kingdom would not be proportionate to the legitimate aim pursued and would therefore not be necessary in a democratic society.

51. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Pakistan."

I sagen vedrørende A.W. Khans bror, *A.H. Khan v. the United Kingdom (2011)*, var klageren indrejst i opholdslandet som syvårig og var tidligere blevet dømt for samleje med en mindreårig, to forsøg på røveri samt overfald. Som 30-årig blev han ydermere idømt fem års fængsel for røveri og udvist. Klageren blev udsendt ni år efter sin sidste dom. På tidspunktet for EMD´s afgørelse af sagen var han far til seks børn i alderen fra 12 til 17 år. Klageren var på daværende tidspunkt ikke i et forhold med mødrene til sine børn.

EMD udtalte i præmis 37, at:

"[…] the Court finds that, on balance, the applicant lived in the United Kingdom from 1978, when he was aged seven, returning to Pakistan only for visits. It is therefore accepted that he has lived in the United Kingdom since an early age, a factor which means that serious reasons would be required before his deportation could be found to be proportionate (see Maslov v. Austria [GC], no. 1638/03, § 75, 23 June 2008)."

EMD fandt den af klageren begåede kriminalitet alvorlig og fremhævede, at det forhold, at han havde begået kriminalitet igen kort tid efter løsladelsen, viste, at han ikke var rehabiliteret og derfor fortsat udgjorde en fare for offentligheden, hvorfor der var gode grunde til at udsende ham (præmis 38).

I præmis 39 udtalte EMD:

"The Court must now consider the applicant's circumstances in the United Kingdom, with a view to determining whether his family and private life, and his consequent level of integration into British society, were such as to outweigh the seriousness of his criminal history. […]"

Herefter gennemgik EMD klagerens familieforhold, hvorefter EMD udtalte i præmis 41:

" Finally, the Court turns to the question of the respective solidity of the applicant's ties to the United Kingdom and to Pakistan. The Court notes that, unlike his younger brother, the applicant returned to Pakistan for visits following his arrival in the United Kingdom and also married there. In the absence of any evidence to the contrary, the Court assumes that this marriage is still, legally at least, subsisting. The applicant therefore

maintained some level of connection to his country of origin and was not deported as a stranger to the country. As regards his ties to the United Kingdom, the Court has addressed the question of his family life, both with his parents and siblings and with his various partners and children, above, and found it to be limited in its extent. Furthermore, the applicant's private life in the United Kingdom, as observed by the Tribunal, has been constrained by his convictions and spells in prison. Whilst he was mainly educated in the United Kingdom and has worked, he does not appear to have established a lengthy or consistent employment history. In short, and despite the length of his stay, the applicant did not achieve a significant level of integration into British society. The Court is aware that, as a settled migrant who spent much of his childhood in the United Kingdom, serious reasons would be required to render the applicant's deportation proportionate (see Maslov, cited above, § 75). However, having regard to his substantial offending history, including offences of violence and recidivism following the commencement of deportation proceedings against him, the Court is of the view that such serious reasons are present in the applicant's case. His private and family life in the United Kingdom were not such as to outweigh the risk he presented of future offending and harm to the public and his deportation was therefore proportionate to the legitimate aim of preventing crime. As such, the applicant's deportation to Pakistan did not amount to a violation of Article 8."

I sagen *A.A. v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som 13-årig sammen med sine to søstre som familiesammenført til deres mor. To år senere blev han som 15-årig idømt fire års tilbageholdelse på en ungdomsinstitution for voldtægt begået mod en mindreårig, men blev løsladt tidligere på grund af god opførsel. Fem år efter den begåede kriminalitet blev klagerens udvisningsafgørelse endelig. Da EMD behandlede sagen, havde klageren opholdt sig i opholdslandet i 11 år. Han boede hos sin mor og besøgte sine to søstre regelmæssigt.

I præmis 46-50 gennemgik EMD sin hidtidige praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem myndige børn og forældre udgør privatliv og/eller familieliv. EMD udtalte i præmis 49:

"49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life". However, it is not necessary to decide the question given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Thus, regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on "family life" rather than "private life", it observes that in practice the factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged (Üner, cited above, §§ 57-60)."

EMD konstaterede i præmis 51-55, at indgrebet var i overensstemmelse med loven og forfulgte et af de legitime hensyn.

Ved vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund, gennemgik EMD i præmis 56 kriterierne som sammenfattet i Üner-dommen og udtalte på den baggrund i præmis 57-58, at de nationale

domstole i hver enkelt sag må vurdere, hvilken vægt der skal tillægges de enkelte elementer i foretagelsen af den konkrete afvejning, indenfor staternes margin of appreciation. Om de relevante elementer i den foreliggende sag udtalte EMD i præmis 59-64:

"59. In the present case, the Court considers the relevant factors to be the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in United Kingdom; the time which has elapsed since the offence was committed and the applicant's conduct during that period; and the solidity of social, cultural and family ties with the host country and with the country of destination.

60. The Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Maslov, cited above, § 85). There can be no doubt that the applicant's offence was a serious one and the Court considers the comments of the sentencing judge as to the applicant's conduct and the effect of the attack on the victim to be relevant factors to be taken into account (see paragraph 8 above). The sentence imposed – four years in a Young Offenders' Institution – demonstrates the gravity of the offence. However, the fact that the applicant was a minor at the time the offence was committed is a relevant consideration in assessing the proportionality of a deportation (see Maslov, cited above, § 72). In this regard, the Court recalls that where offences committed by a minor underlie an exclusion order, regard must be had to the best interests of the child. In particular, the obligation to take the best interests of the child into account includes an obligation to facilitate his reintegration, an aim that the Court has previously held will not be achieved by severing family or social ties through expulsion (see Maslov, cited above, §§ 82-83).

61. The Court observes that the total length of the applicant's stay in the United Kingdom to date is eleven years. He arrived in the country at the age of 13 and has therefore now spent almost half his life in the United Kingdom. The Court notes that the applicant committed the offence which rendered him liable to deportation less than two years after his arrival in the United Kingdom. Further, following his conviction, he spent some two years in detention, during which time he was served with a deportation order. While the applicant was granted Indefinite Leave to Remain during this period, the Court is persuaded by the Government's submissions that leave was granted in ignorance of the applicant's conviction and, as a result, considers that no significance can be attached to the fact that Indefinite Leave to Remain was granted following the conviction (compare and contrast Omojudi, cited above, § 42). It is also true that the applicant has been aware since July 2003 of the fact that he was liable to be deported on account of his conviction. However, the Court nonetheless observes that he has now spent seven years at liberty in the United Kingdom following his release and despite having exhausted appeal rights in January 2008, no steps appear to have been taken in respect of his deportation until September 2010 (see paragraphs 23-25 above).

62. As to the lapse of time and the applicant's conduct since commission of the offence in 2002, the Court observes at the outset that the applicant has committed no further offences. While in detention, the applicant took advantage of the educational opportunities available to him and obtained a number of high school qualifications (see paragraph 11 above). At the time of his release from detention in August 2004, his risk of reoffending was assessed to be low (see paragraph 11 above), an assessment subsequently reiterated by his probation officer in 2005 and accepted by the AIT in 2007 (see paragraphs 15 and 20 above). Since his release, the applicant's conduct appears to have been exemplary. He enrolled in college in September 2004 in order

to sit his A-level examinations, which he obtained in summer 2005 (see paragraph 14 above). He was subsequently offered a place at university to study towards an undergraduate degree, which he obtained in 2008, followed by a postgraduate degree, which he completed in 2009 (see paragraphs 18 and 24 above). He commenced stable employment with a local authority in 2010 (see paragraph 24 above).

63. The Government have not pointed to any concern regarding the applicant's conduct in the seven years since his release from prison and rely solely on the seriousness of the offence to justify concerns as to his continued presence in the United Kingdom and his risk to the public (see paragraphs 41-42 and 44 above). The Court reiterates that the factors to be taken into consideration in cases involving deportation following a criminal offence are partially designed to evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities (see paragraph 57 above). In particular, the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has an impact on the assessment of the risk which the applicant poses to society (see Boultif, cited above, § 51; Maslov, cited above, § 90; and A.W. Khan, cited above, § 41). Accordingly, the Court considers the present factor to be of particular importance when assessing whether the seriousness of the offence in itself is sufficient to justify the applicant's deportation for the prevention of disorder or crime.

64. Finally, as regards the applicant's ties with the United Kingdom and with Nigeria, the Court observes that the applicant continues to reside with his mother and has close relationships with his two sisters and an uncle, all of whom reside in England. He has completed the majority of his high school and further education in the United Kingdom and has now commenced a career with a local authority in London. He is also a member of a church community. While he spent a significant period of his childhood in Nigeria, he has now not visited the country for eleven years. He has had no contact with his father since 1991".

I præmis 65-68 gennemgik EMD betydningen af opholdslandets passivitet i forhold til at udsende klageren i overensstemmelse med den trufne udvisningsafgørelse og redegjorde for baggrunden for at inddrage forhold indtruffet og klagerens opførsel i perioden efter denne afgørelse i sin afvejning, herunder vigtigheden af at facilitere reintegration af unge lovovertrædere i samfundet.

Herefter konkluderede EMD i præmis 69-70:

"69. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's deportation from the United Kingdom would be disproportionate to the legitimate aim of the "prevention of disorder and crime" and would therefore not be necessary in a democratic society.

70. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Nigeria."

I sagen *El Boujaïdi v. France (1997)* var klageren indrejst i opholdslandet som syvårig. Han blev idømt seks års fængsel og udvist med indrejseforbud for bestandig for narkotikakriminalitet begået da han var 19 år. Efter at være blevet løsladt da han var 24 år, blev klageren på ny anholdt og idømt et års fængsel for forsøg på røveri og for ikke at være udrejst i overensstemmelse med udvisningen. Klageren blev udsendt, da han var 26 år gammel. På dette tidspunkt boede han sammen med en statsborger i opholdslandet, med hvem han

havde fået et barn nogle måneder forud for udsendelsen. Mens der på tidspunktet, hvor udvisningsbeslutningen blev endelig, endnu ikke var etableret et forhold mellem klageren og samleversken og derfor ifølge EMD ikke bestod et "familieliv", der kunne tages i betragtning, udtalte EMD i præmis 33:

"However, the Court observes that he arrived in France in 1974 at the age of 7 and lived there until 26 August 1993. He received most of his schooling there and worked there for several years. In addition, his parents, his three sisters and his brother – with whom it was not contested that he had remained in contact – live there (see paragraph 7 above). Consequently, the Court is in no doubt that enforcement of the exclusion order amounted to interference with the applicant's right to respect for his private and family life."

Ved vurderingen af, om indrejseforbuddet var nødvendigt i et demokratisk samfund, udtalte EMD i præmis 40-41:

"40. The Court's task therefore consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

The Court notes that Mr El Boujaïdi arrived in France at the age of 7 and lived there lawfully from 1974 until 19 June 1991 (the date of his release – see paragraph 13 above). He received most of his education there, he worked there and his parents, his three sisters and his brother live there (see paragraph 7 above).

However, while he asserted that he had no close family in Morocco, he did not claim that he knew no Arabic or that he had never returned to Morocco before the exclusion order was enforced. It also seems that he has never shown any desire to acquire French nationality. Accordingly, even though most of his family and social ties are in France, it has not been established that he has lost all links with his country of origin other than his nationality. In addition, the applicant had a previous conviction – a sentence of thirty months' imprisonment having been imposed on him by the Annecy Criminal Court for heroin dealing in 1987 – when the Lyons Court of Appeal sentenced him to six years' imprisonment and ordered his permanent exclusion from French territory for drug use and drug trafficking (see paragraphs 10 and 11 above). Once he was released, and at a time when he was unlawfully present in France, he continued to lead a life of crime and committed an attempted robbery (see paragraph 13 above). The seriousness of the offence on account of which the measure in issue was imposed on the applicant and his subsequent conduct count heavily against him.

41. Having regard to the foregoing, the Court does not find that enforcement of the order for the applicant's permanent exclusion from French territory was disproportionate to the legitimate aims pursued. There has accordingly been no breach of Article 8."

I sagen *Loy v. Germany (2014)* var klageren indrejst i opholdslandet som femårig. Som 26-årig blev han idømt fire måneders betinget fængsel for vold mod sine børns mor og tre år senere blev han idømt et års betinget fængsel for vold på en natklub. To år senere blev han idømt to et halvt års fængsel for narkotikakriminalitet. Det år, han fyldte 32 år, blev klageren udvist af opholdslandet med indrejseforbehold uden fastsat tidsbegrænsning, og to år senere blev han udsendt til hjemlandet. På udvisningstidspunktet var klageren skilt fra sin tidligere ægtefælle, som var statsborger i opholdslandet, og med hvem klageren havde fået to børn, som ligeledes var statsborgere i opholdslandet og 21 og 17 år gamle på tidspunktet for klagerens udvisning. Han giftede sig igen efter udvisningsdommen.

EMD konstaterede i præmis 28, at indgrebet var i overensstemmelse med lovgivningen og tjente et legitimt formål. Til brug for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund og proportionalt med det forfulgte hensyn, gennemgik EMD i præmis 30 kriterierne som sammenfattet i Üner- og Maslov-dommene og konstaterede derefter i præmis 31, at den af klageren begåede kriminalitet, som også omfattede narkotikakriminalitet, var alvorlig. I præmis 32 konstaterede EMD, at klageren havde boet næsten 30 år i opholdslandet og havde tidsubgrænset opholdstilladelse, da udvisningsafgørelsen blev endelig.

I præmis 34-36 fandt EMD med hensyn til karakteren af klagerens familieliv med henholdsvis børnene af det tidligere ægteskab, "that the applicant's family ties with his children were not very developed" og med den nuværende ægtefælle, at "Their family life, such as it was, was thus always against the background of pending expulsion proceedings. They separated soon after the marriage. In these circumstances, no decisive weight can be attached to the family relationship with his spouse."

Herefter udtalte EMD i præmis 37 om klagerens tilknytning til opholdslandet:

"The Court also looks for significant relations within the society of the host country (see Trabelsi, cited above, § 62; Mutlag, cited above, § 58; Lukic v. Germany (dec.), no. 25021/08, 20 September 2011) and notes that apart from mentioning that he went to school and completed a vocational training in Germany in his submissions the applicant submits nothing by way of evidence of his participation in social life apart from the length of his residence. Apart from referring to his children and his former spouse he made reference to the fact that his father, stepmother and siblings live in Germany. He claims that he has contact with his sister, but gives no further details. No information on other social contacts was provided. Therefore, in the present case only few significant relations can be established."

I præmis 38 gennemgik EMD klagerens tilknytning til hjemlandet og konstaterede, at han havde boet der, til han var fem år gammel, og at han angiveligt talte noget serbisk. I præmis 39 konstaterede EMD, at indrejseforbuddet ikke nødvendigvis behøvede at være permanent, idet klageren kunne søge om at få det tidsbegrænset.

I præmis 40 udtalte EMD, at:

"Against the background of the gravity of the applicant's drug related offence, together with the earlier crimes of violence committed by the applicant, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family and his private life reasonably against the State's interest in preventing disorder and crime. Appreciating the consequences of the expulsion for the applicant, the Court cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to impose this measure."

EMD afviste derefter sagen som *inadmissable*, idet klagen blev vurderet *manifestly ill-founded*.

I sagen *Bajsultanov v. Austria (2012)* var klageren meddelt asyl i opholdslandet. Han blev idømt i alt 20 måneders fængsel for bl.a. flere tilfælde af vold samt udvist. EMD fastsatte længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen. Klagerens ægtefælle var meddelt asyl afledt af klagerens forhold og de havde to børn, der på tidspunktet for EMD's behandling af sagen var otte og fem år.

Efter i præmis 79-82 at have konstateret, at udvisningen af klageren udgjorde et indgreb i hans ret til respekt for familieliv, og at dette indgreb var i overensstemmelse med loven og forfulgte et af de legitime hensyn, gennemgik EMD i præmis 83 de generelle principper, som indgår i afvejningen af, om indgrebet var nødvendigt i et demokratisk samfund, jf. kriterierne som sammenfattet i Boultif- og Üner-dommene.

Om karakteren og alvorligheden af den begåede kriminalitet udtalte EMD i præmis 84:

"Turning to the first set of criteria relating to the criminal offences committed by the applicant, the Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks' imprisonment, suspended with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions."

I præmis 85-87 udtalte EMD, at:

"85. As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there.

86. On the other hand, the applicant lived in Chechnya for almost twenty-three years, went to school there and subsequently worked occasionally in different jobs. The applicant's parents and siblings still live in Chechnya, and the applicant has maintained regular contact with his father.

87. The Court therefore considers, in line with the Austrian authorities, that the applicant still has stronger social and cultural ties to his country of origin than to his host country."

EMD har i dommen fastsat længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen i sommeren 2012, jf. præmis 85. Da klageren indrejste og søgte om asyl i sommeren 2003 (præmis 8) og blev meddelt opholdstilladelse i form af asyl to år senere i sommeren 2005 (præmis 13), har EMD således regnet længden af hans ophold fra tidspunktet for klagerens indrejse i 2003. De østrigske myndigheder lagde ved afgørelsen om asyl blandt andet vægt på, at sikkerhedssituationen i Tjetjenien var forværret fra maj 2004 og frem, og fandt klagerens forklaringer troværdige og tilstrækkeligt underbyggede.

I præmis 88-90 gennemgik EMD klagerens familieforhold og familiens mulighed for at følge med klageren tilbage til hjemlandet i relation til artikel 3 og i forhold til, om der ville være uoverstigelige hindringer forbundet hermed. Herefter konkluderede EMD i præmis 91-92:

"91. Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention."

I sagen *Alam v. Denmark (2017)* var klageren indrejst fra Pakistan som halvandetårig som familiesammenført til sin far. Som 30-årig blev hun idømt 16 års fængsel for manddrab og brandstiftelse og udvist for bestandig. Hun talte udover dansk også engelsk, tysk, pashto, urdu og punjabi. Hendes far var død, men hendes mor og fem søskende boede i Danmark og var danske statsborgere. Klageren havde tidligere været i Pakistan, hvor hun havde to halvsøskende, og hendes mor rejste ofte til Pakistan, hvor hun ejede et hus. Klagerens børn var på tidspunktet for EMD's behandling af sagen 16 og 13 år gamle. De talte dansk og den ældste også lidt pashto.

EMD udtalte i præmis 33:

"The Court recognises that the City Court made a thorough assessment of the applicant's personal circumstances, carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law (see paragraph 18 above). It specifically noted the children's age, which had significant importance when compared with the sentence imposed (see paragraphs 25 above and 34 below), and found that considerations for the applicant's children could not lead to another decision. [(…])"

Om de nationale domstoles vurdering af klagerens tilknytning til opholdslandet, bl.a. på baggrund af skolegang og uddannelse, samt til hjemlandet udtalte EMD videre i præmis 33, at:

"[…] It made an overall assessment, taking into account especially that the applicant had had all her upbringing, schooling and education in Denmark, that she had maintained a real attachment to Pakistan and Pakistani culture, that she had two children in Denmark, and that she had been convicted of very serious crimes. That balancing and proportionality test was approved by the High Court in its judgment of 4 September 2014 (see paragraph 20 above)."

Efter at have gennemgået spørgsmålet om klagerens børns mulige fortabelse af opholdstilladelse i præmis 34, udtalte EMD i præmis 35, at:

"Having regard to the above, the Court has no reason to call into question the conclusions reached by the domestic courts on the basis of the balancing exercise which they carried out. Those conclusions were neither arbitrary nor manifestly unreasonable. The Court is thus satisfied that the interference with the applicant's private and family life was supported by relevant and sufficient reasons and that her expulsion would not be

disproportionate given all the circumstances of the case. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention."

I sagen *Levakovic v. Denmark (2018)* havde klageren haft opholdstilladelse i opholdslandet, siden han var otte måneder gammel. Da han var 25 år gammel, blev han idømt fem års fængsel og udvist på grund af mange tilfælde af grov kriminalitet, herunder flere væbnede røverier, narkotikakriminalitet, tyverier og besiddelse af både våben og stjålne effekter.

Efter at have gennemgået de generelle betragtninger bl.a. om begrebet "privatliv" og om forholdet mellem forældre og voksne børn og mellem voksne søskende samt redegjort for kriterierne som sammenfattet i Üner-dommen og om staternes margin of appreciation, konstaterede EMD i præmis 39, at udvisningen udgjorde et indgreb i klagerens ret til respekt for privatliv, at udvisningen var i overensstemmelse med loven og at den tjente et legitimt formål.

Herefter gennemgik EMD i præmis 40-45, hvorvidt udvisningen af klageren var nødvendig i et demokratisk samfund, og udtalte i præmis 41-46:

"41. As flows from the Court's case-law (see paragraph 33), the point of departure for the Court's analysis under Article 8 of the Convention in the present case is the fact that an alien does not have a Convention right to reside in a particular country, a rule which applies to settled migrants like the applicant. However, if a Member State's decision to expel a settled migrant, lawfully residing in the State in question, interferes with his or her family or privacy rights, protected by paragraph 1 of Article 8, the national authorities are under a duty, provided by paragraph 2 of the same provision, to evaluate the individual situation of the migrant in accordance with the criteria set out in the Court's case-law (see paragraph 36 above). In the application of these criteria, the Court has not qualified the relative weight to be accorded to each criteria in the individual assessment, as this analysis is, in the first place, for the national authorities subject to European supervision. However, in Maslov (cited above, § 75), the Court made clear that when a case concerns a settled migrant, who has lawfully spent all or major part of his or her childhood and youth in the host country, "very serious reasons are required to justify expulsion". It is clear that in the light of the facts in the present case, the Court is called upon to examine whether such "very serious reasons" were adequately adduced by the national authorities when assessing the applicant's case and, if so, whether the Court considers itself in a position to substitute its view for that of the domestic courts."

42. The Court recognises that the City Court made a thorough assessment of the applicant's personal circumstances, carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law (see paragraph 19 above). It was fully aware that very strong reasons are required to justify the deportation of settled migrants (see Maslov, cited above, § 75). It found, making an overall assessment, that although the applicant had no ties to Croatia, due to his criminal past, which included two convictions for three robberies committed when he was an adult, the nature and seriousness of the crimes committed, namely a robbery in a private home and an armed bank robbery, both committed during the probation period for the most recent suspended expulsion order, and the fact that the applicant had twice violated the conditions for suspended expulsion orders, there were such very serious reasons justifying expulsion.

43. That balancing and proportionality test was approved by the High Court in its judgment of 26 August 2013.

44. Thus assessing whether the national authorities adduced relevant and sufficient reasons for expelling the applicant, the Court observes that after entering adulthood, the applicant has been convicted twice for robbery which by the very nature of the crime in question is a serious act including elements of violence or the threat of violence. He has also been convicted of other offences against property. In the Court's view, when assessing the 'nature and seriousness' of the offences committed by the applicant, the national authorities were thus entitled to take the view that they attained a level of gravity warranting expulsion unless other counterbalancing criteria militated against imposing that measure in the light of the Court's case-law. In this regard, the Court attaches particular weight to the fact that the expulsion of the applicant did not interfere with his family rights as he is an adult and has not made any arguments to the effect that there are additional elements of dependence between himself and his parents or siblings (see paragraph 35 above). Therefore, the interference with the applicant's Article 8 rights was limited to his right to privacy. Furthermore, the applicant has no children, thus obviating the need to take into account weighty reasons directed at protecting a child's best interests. Moreover, and importantly, the Court recalls that under its case-law, the evaluation of the applicant's 'social' and 'cultural ties' with the host country, here Denmark, is a criteria to be included in the analysis (see paragraph 36 above). On this basis, the Court considers it of importance that the City Court examined the particular situation of the applicant and found that although he has lived most of his life in Denmark he 'must be considered very poorly integrated into Danish society'. In fact, it can be readily deduced from the file that the applicant has primarily lived a life of crime and consistently demonstrated a lack of will to comply with Danish law. The Court makes clear that unlike in Maslov (cited above), the national authorities based their decision to expel the applicant not on crimes perpetrated when the applicant was a juvenile.

45. In the light of the above, the Court reiterates that in the interpretation and application of Article 8 of the Convention in cases of the kind in question, emphasis must be placed on securing a fair balance between the public interest and the Article 8 rights of aliens residing in the Member States. Ascertaining whether 'very weighty reasons' justify the expulsion of a settled migrant, like the applicant, who has lived almost all his life in the host country, must inevitably require a delicate and holistic assessment of all the criteria flowing from the Court's case-law, an assessment that must be carried out by the national authorities under the final supervision of the Court. Taking account of all of the elements described above, the Court concludes that the interference with the applicant's private life was supported by relevant and sufficient reasons. There are no indications whatsoever that the domestic authorities may have based their decisions on stereotypes about Roma, as it appears to be alleged by the third party intervener, and the applicant never made such a complaint. The Court is also satisfied that the applicant's expulsion was not disproportionate given all the circumstances of the case. It notes that the City Court and the High Court explicitly assessed whether the expulsion order could be deemed to be contrary to Denmark's international obligations. The Court points out in this respect that, although opinions may differ on the outcome of a judgment, 'where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts' (see, Ndidi v. the United Kingdom (no. 41215/14, § 76, 14 September 2017; and, mutatis mutandis, Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012 and Axel Springer AG v. Germany [GC], no. 39954/08, § 88, 7 February 2012).

46. Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

EMD udtalte i præmis 45:

"As regards the length of the applicant's stay in Switzerland, the Court observes that he arrived in Switzerland in 1989 at the age of nine and lived in Switzerland for more than twenty years. His stay in Switzerland was, thus, of a considerable length of time."

I præmis 46-50 gennemgik EMD klagerens opførsel og domstolsbehandlingen af hans sag efter begåelsen af lovovertrædelsen samt klagerens families forhold, herunder muligheden for klagerens ægtefælle og børn for at tage ophold i klagerens hjemland.

Betydningen af længden af klagerens ophold blev gennemgået i præmis 51 og 52, hvor EMD vurderede hans tilknytning til henholdsvis opholdslandet og hjemlandet:

"51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'."

EMD udtalte herefter i præmis 53-55:

"53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to

Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

EMD gennemgik præmis 47-49 sin praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem (pleje)forældre og unge voksne udgør privatliv eller tillige familieliv, og udtalte i præmis 50, at:

"50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his

foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Savran v. Denmark (2021)* var klageren indrejst i opholdslandet som seksårig sammen med sin mor og sine søskende som familiesammenført til sin far. Klageren var som 16-årig blevet idømt et år og tre måneders fængsel, heraf ni måneder betinget, for røveri. Som 24-årig blev han fundet skyldig i vold med døden til følge begået tre år forinden, men fundet straffri som følge af psykisk sygdom. Han blev idømt retspsykiatrisk behandling samt udvist for bestandig. Fem år senere blev udvisningen prøvet og opretholdt, og klageren blev udsendt til sit hjemland.

Storkammeret udtalte i præmis 175:

"In the present case, the applicant arrived in Denmark at the age of six; he was educated and spent his formative years there; he was issued with a residence permit and remained lawfully resident in the country for fourteen years and eight months (see paragraphs 27 and 30 above). The Court thus accepts that he was a "settled migrant" and therefore Article 8 under its "private life" aspect is engaged."

I præmis 176-178 gennemgik EMD, om klagerens forhold til sin mor og sine søskende udgjorde familie- eller privatliv, og konkluderede, at der var tale om privatliv.

I præmis 179-180 udtalte Storkammeret, at afvisningen af at ophæve udvisningsbeslutningen udgjorde et indgreb i klagerens privatliv, og at indgrebet var hjemlet i lov og forfulgte et af de legitime hensyn, forebyggelse af uro og forbrydelse.

I præmis 181-189 gennemgik EMD de generelle principper vedrørende nødvendighedsvurderingen.

EMD bemærkede i præmis 190, at der var forløbet en betragtelig tid fra det tidspunkt, hvor udvisningsbeslutningen blev endelig, til tidspunktet for afgørelsen om eventuel ophævelse af udvisningsbeslutningen, og at det var op til de nationale domstole at lade alle relevante ændringer i klagerens forhold i denne periode indgå i vurderingen af, om det på tidspunktet for afgørelsen om eventuel ophævelse af udvisningsbeslutningen var proportionalt at udvise klageren, herunder særligt ændringer vedrørende hans opførsel og helbred.

EMD gennemgik i præmis 191-196 betydningen af klagerens helbredstilstand og i præmis 197 betydningen af de fremskridt, der var sket i klagerens opførsel i perioden mellem gerningstidspunktet og den endelige afgørelse vedrørende evt. ophævelse af udvisningen, jf. det tredje Maslov-kriterium, hvilket imidlertid ikke blev taget i betragtning ved de nationale domstoles vurdering af risikoen for gentagelseskriminalitet.
I præmis 198 udtalte EMD om fastheden af klagerens sociale, kulturelle og familiemæssige bånd til opholdslandet og til hjemlandet:

"A further issue to be considered is the solidity of the applicant's social, cultural and family ties with the host country and the country of destination (the fourth Maslov criterion). Whilst the applicant's ties with Turkey seem to have been limited, it cannot be said that he was completely unfamiliar with that country (see paragraphs 30, 59 and 65 above). However, it appears that the High Court gave little consideration to the length of the applicant's stay in and his ties to his host country Denmark (the second and fourth Maslov criteria respectively; see paragraph 182 above), stressing as it did the fact that he had not founded his own family and had no children in Denmark (see paragraph 66 above). As to the latter aspect, the Court reiterates its finding in paragraph 178 above that, even if he had no "family life", the applicant could still claim protection of his right to respect for his "private life" within the meaning of Article 8 (see Maslov, cited above, § 93). In this regard, the Court attaches particular weight to the fact, also noted by the domestic courts in the criminal proceedings and by the City Court in the revocation proceedings, that the applicant was a settled migrant who had been living in Denmark since the age of six (see paragraph 59 above). Although the applicant's child and young adulthood were clearly difficult, suggesting integration difficulties, he had received most of his education in Denmark and his close family members (mother and siblings) all live there. He had also been attached to the Danish labour market for about five years (see paragraphs 27 and 30 above). "

Afslutningsvis gennemgik EMD I præmis 199-200 betydningen af varigheden af indrejseforbuddet for den samlede proportionalitetsvurdering.

Herefter konkluderede EMD i præmis 201-202:

"201. In the light of the above, it appears that in the revocation proceedings, despite the significant period of time during which the applicant underwent medical treatment for his mental disorder, the High Court, apart from briefly referring to his lack of family ties in Denmark and to the serious nature and gravity of his criminal offence, did not consider the changes in the applicant's personal circumstances with a view to assessing the risk of his reoffending against the background of his mental state at the time of the commission of the offence and the apparent beneficial effects of his treatment. Nor did it have due regard to the strength of the applicant's ties to Denmark as compared to those to Turkey. The Court further notes that under the domestic law, the administrative and judicial authorities had no possibility of making an individual assessment of the duration of the applicant's exclusion from Danish territory, which was both irreducible and permanent. Therefore, and notwithstanding the respondent State's margin of appreciation, the Court considers that, in the particular circumstances of the present case, the domestic authorities failed to duly take into account and to properly balance the interests at stake (see paragraphs 182 and 183 above).

202. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Abdi v. Denmark (2021)* var klageren som fireårig indrejst i opholdslandet, hvor også hans forældre og søskende opholdt sig. Han var tidligere idømt tre måneders betinget fængsel for et røveri begået som 15-

årig og fire måneders fængsel, heraf tre måneder betinget, for indbrud begået som 17-årig. Efter det fyldte 18. år var han syv gange idømt bødestraf for overtrædelse af lov om euforiserende stoffer. Senest var klageren idømt to et halvt års fængsel og udvist for bestandig for besiddelse af et ladt skydevåben på offentligt sted begået i det år, hvor han fyldte 24 år. Klageren havde ingen familie i oprindelseslandet, talte kun grundlæggende somali og havde ikke besøgt oprindelseslandet siden udrejsen.

I præmis 39-41 udtalte EMD, at den ikke betvivlede, at klageren på tidspunktet for den kriminalitet, der havde ført til udvisningen, udgjorde en alvorlig trussel for den offentlige orden, men at bortset herfra indikerede den pådømte kriminalitet begået efter at klageren var fyldt 18 år ikke, at han generelt udgjorde en trussel for den offentlige orden, og at klageren ikke tidligere var blevet advaret om udvisning eller idømt betinget udvisning. EMD bemærkede videre i præmis 42, at ikke desto mindre – trods fraværet af relevante tidligere domfældelser og advarsler om udvisning og uanset at klageren var blevet idømt en relativt mild straf i den foreliggende sag – havde de danske domstole besluttet at kombinere udvisningen med et permanent indrejseforbud. Herefter udtalte EMD i præmis 43-45:

"43. This observation should also be seen in the light that the applicant arrived in Denmark at a very young age and had lawfully resided there for approximately twenty years. He thus had very strong ties with Denmark, whereas his ties with Somalia were virtually non-existing.

44. The Court is therefore of the view, given all the circumstances of the case, that the expulsion of the applicant combined with a life-long ban on returning was disproportionate (see, notably, Ezzouhdi v. France, cited above, §§ 34-35; Keles v. Germany, cited above, § 66, and Bousarra v. France, cited above, §§ 53-54).

45. There has accordingly been a violation of Article 8 of the Convention."

I sagen *Nguyen v. Denmark (2024)*, der handlede om udvisning på grund af alvorlig kriminalitet, havde Østre Landsret om klagerens alder på 13 år ved indrejsen i opholdslandet udtalt:

"13. In respect of the expulsion order, the High Court reduced the re-entry ban to twelve years, and found as follows: "[The applicant] entered Denmark at the age of 13 and thus spent her childhood in Vietnam. […]"

Heroverfor udtalte EMD i præmis 28:

"28. […] The Court recognises that the domestic courts examined the relevant criteria thoroughly given that very serious reasons were required to justify the expulsion of the applicant, a settled migrant who had entered Denmark at the age of 13 and had been lawfully resident in the host country for most of her childhood and youth […]"

EMD fandt i den konkrete sag, at der var sket en krænkelse af EMRK artikel 8.

Der kan endvidere henvises til følgende sager:

- *Loukili v. the Netherlands (2023)*.
- *Azzaqui v. the Netherlands (2023)*.
- *Sharifi v. Denmark (2023)*.
- *Al-Masudi v. Denmark (2023)*.
- *Noorzae v. Denmark (2023)*.
- *Goma v. Denmark (2023)*.

4.2.1.2. Mindre alvorlig kriminalitet

I sagen *Maslov v. Austria (2008)* var klageren indrejst i opholdslandet som seksårig og var blevet udvist på grund af kriminalitet i form af mere end 40 kvalificerede indbrud, nogle i forbindelse med banderelationer, brugstyveri af køretøj og et enkelt tilfælde af vold. Klageren var mindreårig, da han begik disse forhold, og da afgørelsen om udvisning blev endelig. Medlemsstaten havde begrundet udvisningen med hensynet til forebyggelse af uro og forbrydelse. Klageren blev efterfølgende udsendt i en alder af 19 år. Klageren havde på dette tidspunkt ikke stiftet egen familie.

Efter i præmis 66 og 67 at have fastslået, at udvisningen var i overensstemmelse med loven og forfulgte et af de legitime hensyn, vurderede EMD, om indgrebet var nødvendigt i et demokratisk samfund. EMD henviste til de fundamentale principper, som er sammenfattet i Üner-dommen, og udtalte i præmis 70-75:

"70. The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Moreover, it has to be borne in mind that where, as in the present case, the interference with the applicant's rights under Article 8 pursues, as a legitimate aim, the "prevention of disorder or crime" (see paragraph 67 above), the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities.

71. In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family of his own, the relevant criteria are
– the nature and seriousness of the offence committed by the applicant;
– the length of the applicant's stay in the country from which he or she is to be expelled;
– the time elapsed since the offence was committed and the applicant's conduct during that period; and
– the solidity of social, cultural and family ties with the host country and with the country of destination.

72. The Court would also clarify that the age of the person concerned can play a role when applying some of the above criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult (see, for instance, Moustaquim v. Belgium, 18 February 1991, § 44, Series A no. 193, and Radovanovic v. Austria, no. 42703/98, § 35, 22 April 2004).

73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec(2000)15 and Rec(2002)4 (see paragraphs 34-35 above).

74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see Üner, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if

not all, of their childhood in the host country, were brought up there and received their education there (see Üner, § 58 in fine).

75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

Herefter gennemgik EMD i præmis 77-80 karakteren og alvorligheden af den af klageren begåede kriminalitet og udtalte i præmis 81 blandt andet:

"81. In the Court's view, the decisive feature of the present case is the young age at which the applicant committed the offences and, with one exception, their non-violent nature. This also clearly distinguishes the present case from Boultif and Üner […]."

I denne sammenhæng gennemgik EMD i præmis 82-83 de situationer, hvor princippet om barnets tarv skal finde anvendelse, og hvilke forpligtelser anvendelsen af dette princip indebærer.

I præmis 84-85 udtalte EMD om forskellen i vurderingen af sager, hvor en mindreårig har begået ikke-voldelig kriminalitet, over for sager, hvor mindreårige har begået meget alvorlige voldelige forbrydelser:

"84. In sum, the Court sees little room for justifying an expulsion of a settled migrant on account of mostly non-violent offences committed when a minor (see Moustaquim, cited above, § 44, concerning an applicant who had been convicted of offences committed as a juvenile, namely numerous counts of aggravated theft, one count each of handling stolen goods and destruction of a vehicle, two counts of assault and one count of threatening behaviour, and Jakupovic v. Austria, no. 36757/97, § 27, 6 February 2003, in which the exclusion order was based on two convictions for burglary committed when a minor and where, in addition, the applicant was still a minor when he was expelled).

85. Conversely, the Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Bouchelkia, cited above, § 51, where the Court found no violation of Article 8 as regards a deportation order made on the basis of the applicant's conviction of aggravated rape committed at the age of 17; in the decisions Hizir Kilic v. Denmark (dec.), no. 20277/05, and Ferhat Kilic v. Denmark (dec.), no. 20730/05, both of 22 January 2007, the Court declared inadmissible the applicants' complaints about exclusion orders imposed following their convictions for attempted robbery, aggravated assault and manslaughter committed at the age of 16 and 17 respectively)."

Om længden af klagerens ophold i opholdslandet konstaterede EMD i præmis 86:

"The applicant came to Austria in 1990, at the age of six, and spent the rest of his childhood and youth there. He was lawfully resident in Austria with his parents and siblings and was granted a permanent-settlement permit in March 1999."

I præmis 87-95 gennemgik EMD den forløbne tid efter begåelsen af kriminaliteten og klagernes opførsel i den periode.

Vedrørende fastheden af de sociale, kulturelle og familiære bånd i opholdslandet og i hjemlandet udtalte EMD i præmis 96-97:

"96. The Court observes that the applicant spent the formative years of his childhood and youth in Austria. He speaks German and received his entire schooling in Austria where all his close family members live. He therefore has his principal social, cultural and family ties in Austria.

97. As to the applicant's ties with his country of origin, the Court notes that he has convincingly explained that he did not speak Bulgarian at the time of his expulsion as his family belonged to the Turkish minority in Bulgaria. It was not disputed that he was unable to read or write Cyrillic as he had never gone to school in Bulgaria. It has not been shown, nor even alleged, that he had any other close ties with his country of origin."

Endelig forholdt EMD sig i præmis 98 til varigheden af det meddelte indrejseforbud.

EMD konkluderede i præmis 100-101:

"100. Having regard to the foregoing considerations, in particular the – with one exception – non-violent nature of the offences committed when a minor and the State's duty to facilitate his reintegration into society, the length of the applicant's lawful residence in Austria, his family, social and linguistic ties with Austria and the lack of proven ties with his country of origin, the Court finds that the imposition of an exclusion order, even of a limited duration, was disproportionate to the legitimate aim pursued, 'the prevention of disorder or crime'. It was therefore not 'necessary in a democratic society'.

101. Consequently, there has been a violation of Article 8 of the Convention."

I sagen *Miah v. the United Kingdom (2010)* indrejste klageren i opholdslandet som 11-årig og tog ophold hos sin far, dennes nye ægtefælle samt sine to brødre. Da klageren var 14 år gammel, døde faren. Som 19-årig blev han idømt to års fængsel på en institution for ungdomskriminelle for indbrud og tyveri. Klageren blev efterfølgende flere gange idømt bøder for bl.a. tyveri. Da klageren var 26 år gammel, blev han idømt 12 måneders fængsel for tyveri, og samme år blev han udvist. Klageren havde indtil fængslingen boet hjemme hos stedmoren og havde til hensigt at flytte hjem igen efter løsladelsen. Klageren blev året efter udsendt til Bangladesh.

Efter at have gengivet Storkammerets vurderinger i *Maslov*-dommen, udtalte EMD i præmis 25:

"Turning to the present case, the Court accepts that the applicant has spent a significant period of time in the United Kingdom and that the majority of his social, cultural and family ties are there rather than in Bangladesh. However, despite the relatively young age at which he arrived in the United Kingdom, the Court is not persuaded that he has severed all links to Bangladesh. His mother still lives Bangladesh and, as the Tribunal found, he would be able to rely on her and any extended family for support. In contrast to Mr Maslov, the present applicant speaks the language of his country of origin. Although both Mr Maslov and the applicant were convicted of mostly non-violent offences, the applicant's offences are of a quite different character. With the exception of the first burglary offence, they were all committed when the applicant was an adult and there cannot be the same duty to facilitate the reintegration of an adult offender rather than deport him as there would be for a juvenile offender who is convicted of the same offences. The applicant's offences appear to have been committed in order to fund a drug addiction, a factor which must go some way to mitigating if

not the seriousness of the offences then at least the sentences imposed. Indeed, the domestic courts have made efforts to rehabilitate the applicant by imposing a series of non-custodial sentences. Nonetheless, by the time of the final offence, they were entitled to take the view that further such efforts would be inappropriate. Therefore, while the applicant is correct to observe that his final sentence of twelve months' imprisonment was at the lower end of the scale to which a presumption in favour of deportation would apply, the domestic authorities were entitled to take into account that this was the last in a series of offences and that the applicant had failed to respond to other, less severe sentences. Finally, while the duration of the deportation imposed on the applicant is of the same duration as that imposed in Maslov, it does not exclude him from the United Kingdom for as much time as he spent there and does not do so for a decisive period in his life. The Court therefore finds that the domestic authorities have not exceeded the margin of appreciation afforded to them in such cases. A fair balance has been struck in this case and the Court therefore agrees with the Tribunal that the applicant's deportation was proportionate to the legitimate aim pursued. Accordingly, this part of the application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention."

EMD afviste derefter sagen som inadmissible.

I sagen *Radovanovic v. Austria (2004)* var klageren kort efter fødslen i opholdslandet flyttet til hjemlandet, hvor han boede hos sine bedsteforældre og gik i skole. Som tiårig vendte han tilbage til sine forældre og sin søster i opholdslandet, hvor han færdiggjorde skolen og blev udlært som slagter. Som mindreårig begik han kriminalitet i form af blandt andet groft røveri og indbrud og blev idømt 30 måneders fængsel, heraf 24 betinget, og udvist for bestandig. Efter at have afsonet fængselsstraffen blev klageren i det år, han fyldte 19 år, udsendt til hjemlandet.

EMD bemærkede i præmis 33:

"The Court notes that the applicant, a single young adult at the time of his expulsion, is not a second generation immigrant as, despite his birth in Austria, he did not permanently live there until the age of ten. Given the young age at which he arrived, the Court will nevertheless assess the necessity of the interference by applying the same criteria it usually applies in cases of second generation immigrants who have not yet founded a family of their own in the host country. These criteria, so far as material, are the nature and gravity of the offence committed by the applicant and the length of his stay in the host country. In addition the applicant's family ties and the social ties he established in the host country by receiving his schooling and by spending the decisive years of his youth there are to be taken into account (see Benhebba v. France, no. 53441/99, §§ 32-33, 15 June 2003)."

EMD sammenholdt i præmis 34 sagen med en række sager, hvor der ikke var sket krænkelse af artikel 8, om udvisning af second generation immigrants, som var ankommet til opholdslandet i en ung alder og var idømt langvarige ubetingede fængselsstraffe for alvorlig kriminalitet i form af narkotikakriminalitet, som EMD ser med alvor på. Trods den kortere varighed af klagerens ophold i opholdslandet tillagde EMD det stor vægt, at selvom der var tale om groft røveri, var klageren kun idømt seks måneders ubetinget fængsel. Uden at underkende kriminalitetens grovhed noterede EMD sig, at klageren havde været mindreårig, at han ikke var tidligere straffet og at hovedparten af den relativt lange straf var gjort betinget. Derfor kunne EMD ikke tilslutte sig de nationale myndigheders vurdering af, at klageren udgjorde en sådan fare for public order, at det nødvendiggjorde indgrebet, jf. præmis 35.

Herefter udtalte EMD i præmis 36-38:

"36. Given the applicant's birth in Austria, where he later also completed his secondary education and vocational training while living with his family, and also taking into account that his family had already lawfully stayed in Austria for a long time and that the applicant himself had an unlimited residence permit when he committed the offence, and considering that, after the death of his grandparents in Serbia and Montenegro, he no longer has any relatives there, the Court finds that his family and social ties with Austria were much stronger than with Serbia and Montenegro.

37. The Court therefore considers that, in the circumstances of the present case, the imposition of a residence prohibition of unlimited duration was an overly rigorous measure. A less intrusive measure, such as a residence prohibition of a limited duration would have sufficed. The Court thus concludes that the Austrian authorities, by imposing a residence prohibtion of unlimited duration against the applicant, have not struck a fair balance between the interests involved and that the means employed were disproportionate to the aim pursued in the circumstances of the case (see mutatis mutandis, Ezzouhdi, cited above, § 35; and Yilmaz, cited above, §§ 48-49).

38. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Emre v. Schweiz (2008)* var klageren indrejst i opholdslandet som femårig sammen med sine forældre. Klageren blev flere gange dømt for kriminalitet, herunder kriminalitet begået mens han var mindreårig, og blev som 22-årig udvist.

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EMD gentog i dommens præmis 69 det ovennævnte princip om betydningen af længden af opholdet, som blandt andet kom til udtryk i Üner-dommens præmis 58[6], og uddybede i forlængelse heraf i præmis 70 (uofficiel dansk oversættelse):

"Domstolen har understreget vigtigheden af dette sidste punkt med hensyn til immigranter, der har tilbragt størstedelen af deres liv i værtslandet. I et sådant tilfælde bør det reelt bemærkes, at de modtog deres uddannelse der, fik størstedelen af deres sociale tilknytninger der og derfor udviklede deres identitet der. Da de er født eller ankommet til værtslandet på grund af deres forældres emigration, har de normalt deres vigtigste

[6] *"Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there."*

familiemæssige tilknytning der. Nogle af disse immigranter har endog kun bevaret nationalitetstilknytningen til fødelandet (Benhebba mod Frankrig, nr. 53441/99, præmis 33, 10. juli 2003, Mehemi, nævnt ovenfor, præmis 36, og Boujlifa, nævnt ovenfor, s. 2264, præmis 44, og, a contrario, Bouchelkia mod Frankrig, dom af 29. januar 1997, Samlingen af domme og afgørelser 1997- I, og Baghli mod Frankrig, nr. 34374/97, EMD 1999-VIII, nævnt ovenfor, henholdsvis præmis 50 og præmis 48)."

EMD udtalte sig i præmis 73-76 om kriminalitetens alvor, herunder blandt andet at den samlede længde af frihedsstraffen på 18½ måned ikke var ubetydelig og at kriminaliteten strakte sig over en betydelig periode på 10 år, men at nogle af lovovertrædelserne faldt ind under ungdomskriminalitet, som ifølge FN's retningslinjer hos de fleste forsvinder ved overgangen til voksenlivet. Med hensyn til "arten" af kriminalitet kunne det ikke bestrides, at dommen for legemsbeskadigelse var til skade for ham. Det så derimod med hensyn til overtrædelse af våbenloven ud til, at den udelukkende bestod i besiddelse af en tåregasspray, ligesom det ikke var fastslået, at det var klager, der stak en sikkerhedsvagt ned under et felttog mod en natklub. Overtrædelserne af færdselsloven udgjorde utvivlsomt en potentiel fare, men skulle ikke desto mindre vurderes i lyset af de relativt milde sanktioner, der normalt ifaldes. I lyset af sammenlignelige sager skulle domfældelserne vurderes korrekt både mht deres alvor og de i sidste ende pålagte sanktioner.

EMD udtalte i præmis 78:

"78. Med hensyn til den tid, der er forløbet fra lovovertrædelserne blev begået, til det tidspunkt, hvor den anfægtede foranstaltning blev endelig, såvel som den pågældende persons adfærd i denne periode, bemærker Domstolen, at klagers kriminelle handlinger strakte sig over en betydelig periode. De nationale instanser har ligeledes gentagne gange konstateret, at han ikke udviste bevidsthed om sine kriminelle handlinger, og at han havde nægtet at følge psykoterapien (jf. i denne henseende Keles, citeret ovenfor, præmis 60)."

I præmis 77 udtalte EMD om varigheden af klagerens ophold i opholdslandet:

"For så vidt angår varigheden af opholdet i det land, hvorfra klager skal udvises, bemærker Domstolen, at klager, der er født den 18. december 1980, ankom til Schweiz den 21. september 1986, dvs. inden han var seks år gammel. På tidspunktet for forbundsdomstolens dom af 3. maj 2004 var han 23½ år gammel. Han havde dermed tilbragt mere end 17½ år i Schweiz."

I præmis 79-83 gennemgik EMD fastheden af hans sociale, kulturelle og familiemæssige tilknytning til værtslandet og modtagerlandet og "Særlige forhold i sagen: sagens medicinske aspekt".

Endelig gennemgik EMD i præmis 84-85 opholdsforbuddet i opholdslandet.

EMD konkluderede i præmis 86-87 (uofficiel dansk oversættelse):

"86. I betragtning af ovenstående og navnlig den relative grovhed [alvorlighed, red.] af domfældelserne mod klager, hans svage tilknytning til hjemlandet og den endelige karakter af udsendelsesforanstaltningen finder Domstolen, at den indklagede stat ikke kan anses for at have foretaget en rimelig afvejning mellem klagers og hans families interesser på den ene side og statens egen interesse i at kontrollere indvandringen på den anden.

87. Der er følgelig sket en krænkelse af artikel 8."

Nedenfor er indsat det af EMD offentliggjorte "Press Release issued by the Registrar" af 22. maj 2008:

"Emre v. Switzerland (no.42034/04)

The applicant, Emrah Emre, is a Turkish national who was born in 1980 and lives in Neuchâtel (Switzerland). He was born in Turkey and arrived in Switzerland with his parents in 1986.

In 1990 the canton of Neuchâtel issued him with a yearly residence permit, which was subsequently renewed. Between 1997 and 2005 he was convicted several times of various offences including serious road traffic offences, causing bodily harm, theft, breach of weapons legislation, damage to property, and other offences against public property. In June 2003 the Neuchâtel Canton Aliens Office ordered the applicant's deportation for an indefinite period. The Swiss courts considered, in particular, that he was a threat to public safety. The case concerned the applicant's complaints surrounding his deportation from Swiss territory. He alleged, among other things, that he had health problems that could not be treated adequately in Turkey, where he did not have a family or social support network. He relied on Articles 8 (right to respect for private and family life) and 3 (prohibition of inhuman or degrading treatment).

The Court observed in particular that at least some of the offences committed by the applicant came under the heading of juvenile delinquency. It also noted that his health problems were liable to further complicate matters if he were to return to his country of origin, where he had few social ties. Furthermore, given the degree of seriousness of the offences of which the applicant had been convicted, his weak ties with his country of origin and the final nature of the deportation order, the Court took the view that the Swiss authorities could not be said to have struck a fair balance between the interests of the applicant and his family on the one hand and their own interest in controlling immigration on the other. It held unanimously that there had been a violation of Article 8 and awarded Mr Emre EUR 3,000 for non-pecuniary damage and EUR 4,650 for costs and expenses. It declared the remainder of the application inadmissible. (The judgment is available only in French.)"

I sagen *Jakupovic v. Austria (2003)* blev klageren to gange idømt fængselsstraf af henholdsvis fem måneders og ti ugers varighed, begge udsat i en prøveperiode på tre år, for mindre alvorlig kriminalitet, herunder indbrud og tyveri. Han blev endvidere udvist med indrejseforbud i ti år. Klageren var indrejst i opholdslandet som 11-årig og var på tidspunktet, hvor udvisningsafgørelsen blev endelig, 16 år. Han blev udsendt det samme år, som han fyldte 18 år.

I præmis 28-30 udtalte EMD:

"28. The Court observes that at the time of the expulsion the applicant had not been in Austria for a long time – just four years. Furthermore his situation was not comparable to that of a second generation immigrant, as he had arrived in Austria at the age of eleven, had previously attended school in his country of origin and must therefore have been well acquainted with its language and culture. However, the residence prohibition seriously upset his private and family life: he had arrived in Austria with his brother to join his mother and the new family she had founded there and has apparently no close relatives in Bosnia. The applicant's father remained in Bosnia, a fact which is emphasised by the Government, but the applicant points out that he last

saw his father in 1988 and the father has been reported missing since the end of the armed conflict in that country.

29. Thus, the Court considers that very weighty reasons have to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which has recently experienced a period of armed conflict with all its adverse effects on living conditions and with no evidence of close relatives living there.

30. The Government rely in this respect on the applicant's criminal record. The Court finds that this record, which is the essential element of justification for the expulsion, must be examined very carefully. It consists of two convictions for burglary. The Court cannot find that these convictions – even taking into account a further set of criminal proceedings which were discontinued after the victim had been compensated by the applicant – for which the Austrian courts had only imposed conditional sentences of imprisonment can be considered particularly serious as these offences did not involve elements of violence. The only element which may indicate any tendency of the applicant towards violent behaviour was a prohibition to possess arms issued in May 1995. Although the seriousness of such a measure should not be underestimated, it cannot be compared to a conviction for an act of violence, and there is no indication that such charges have ever been brought against the applicant."

EMD udtalte i præmis 32:

"Taking all the above elements into account, the Court finds that by imposing the residence prohibition in the particular circumstances of the case, the Austrian authorities have overstepped their margin of appreciation under Article 8 as the reasons in support of the necessity of the residence prohibition are not sufficiently weighty. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued."

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis 5 og 6 måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden.

EMD udtalte i præmis 56 vedrørende klagerens alder ved ankomsten til opholdslandet:

"The Court notes that the applicant is not a so-called "second generation immigrant" as he first entered Germany at the age of ten. Given the relatively young age at which he arrived, the Court will nevertheless assess the necessity of the interference by applying criteria which are similar to those it usually applies in cases of second generation immigrants (see Radovanovic v. Austria, no. 42703/98, § 33, 22 April 2004; Üner v. the Netherlands, no. 46410/99, § 40, 5 July 2005)."

EMD gennemgik herefter i præmis 57 Boultif-kriterierne og udtalte i præmis 58:

"In addition, the Court will also take into account the particular ties which these immigrants have developed with the host country where they will have spent most of their life (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, § 36; Radovanovic, cited above, § 33; Üner, cited above, § 40)"

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som f.eks. narkotikahandel.

Vedrørende tilknytningen til opholdslandet udtalte EMD i præmis 61, at:

"With regard to the applicant's personal and family situation, the Court notes that the applicant, at the time of the expulsion order of 22 January 1999, had been lawfully residing in Germany for 27 years, having moved to that country at the age of ten in order to live there with his parents and brother and where he received his secondary school education. While the parties do not agree on the extent of the applicant's professional work, he had been employed for a certain period of that time. Since 1988 he had been in possession of a permanent residence permit. While it is true that the applicant and his wife had been separated during the first five years of their marriage as the applicant's wife and their first son did not follow the applicant to Germany until 1989, the family had been living together in Germany for ten years and there is no indication that their marriage and family life was anything less than effective."

I præmis 62 udtalte EMD om klagerens tilknytning til hjemlandet:

"On the other hand, the Court is not persuaded that the applicant has become so estranged from the country where he spent the first ten years of his life that he would no longer be able to settle in Turkey, having regard to the fact that the applicant married his Turkish wife in Turkey, where their first son was born and that his wife and son did not follow him to Germany until 1989. It follows that the applicant must have entertained certain links to his country of origin at least until 1989. It can further be presumed that the applicant is familiar with the Turkish language, as he married a Turkish wife."

EMD gennemgik herefter i præmis 63-64 spørgsmålet om, hvorvidt klagerens ægtefælle og børn med rimelighed kunne forventes at følge med klageren til hjemlandet, og fandt, at børnene ville møde store vanskeligheder ved omplantning til det tyrkiske skolesystem. I præmis 65 gennemgik EMD spørgsmålet om den manglende tidsbegrænsning i klagerens indrejseforbud. Endelig udtalte EMD i præmis 66:

"The Court considers that the applicant's expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant's children could be expected to face if they followed him to Turkey, the Court considers that an unlimited exclusion from the German territory violates the applicant's rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention."

I sagen *Yildiz v. Austria (2002)* var den første klager indrejst i opholdslandet som 14-årig for at bo sammen med sine forældre og sine søskende. Han indledte et forhold til den anden klager, som var statsborger i den

første klagers hjemland, men født og opvokset i opholdslandet. Nogle måneder senere traf opholdslandet afgørelse om udvisning af den første klager med indrejseforbud i fem år på baggrund af flere bødestraffe for tyveri og færdselslovsovertrædelser. Da udvisningsafgørelsen blev endelig, havde klagerne sammen fået et barn, den tredje klager. Klageren udrejste til hjemlandet, da barnet var knap to år gammelt. På tidspunktet for EMD's behandling af sagen boede han fortsat i hjemlandet. Den anden og tredje klager besøgte ham jævnligt, indtil parret blev skilt.

EMD udtalte i præmis 43:

"The Court will first examine the applicants' family situation and the length of their stay in Austria. It observes that the first applicant is not a second generation immigrant, i.e. a person who was born or has lived the main part of his life in the country from which he is going to be removed. He only came to Austria in 1989 at the age of fourteen and must therefore have links with his country of origin and in particular be able to speak Turkish. On the other hand, he was still an adolescent when he came to Austria, where his close family was and is still living. In December 1996, when the Administrative Court confirmed the residence ban against him, he had been living in Austria for seven years, he had been working there and had been co-habiting for a little less than three years with the second applicant, who is also a Turkish national but was born in Austria and has lived there all her life. Their daughter, the third applicant, was one year and four months old at the material time. In fact, the Austrian authorities issuing the residence ban acknowledged that the first applicant had reached a high degree of integration in Austria. Nevertheless, the Court considers that, as regards the possible effects of the residence ban on his family life, the authorities failed to establish whether the second applicant could be expected to follow him to Turkey, in particular whether she spoke Turkish and maintained any links, other than her nationality, with that country."

I præmis 44 fastslog EMD, at vurderingen af, om indrejseforbuddet udgjorde en krænkelse af artikel 8, skulle foretages på baggrund af de forhold, der gjorde sig gældende, da indrejseforbuddet blev endeligt, uanset at klagerne efterfølgende var blevet skilt, og deres familiesituation således var anderledes på tidspunktet for EMD's behandling af sagen. I præmis 45- 46 udtalte EMD:

"45. Next, the Court will turn to the offences committed by the first applicant, as their gravity is an essential element for assessing the proportionality of the interference with the applicants' family life. The Court notes that in 1993 the first applicant, who was then still a minor, was convicted twice by the criminal courts, once for shop-lifting with a sentence of three days' imprisonment suspended on probation, and once for theft without a sentence being pronounced. Between 1992 and April 1994 he was convicted seven times of traffic offences, in particular driving without a license and once ignoring a red light and high speeding. The fines imposed on him amounted to a total sum of ATS 28,000 (equivalent to EUR 2,035). In sum, the Court finds that these offences were not negligible. However, as is shown by the modest penalties imposed, the domestic authorities considered them to be of a minor nature. Moreover, the first applicant did not commit any further offences between April 1994 and December 1996, when the residence ban proceedings were terminated. Thus, in the Court's view the authorities' fear that he constituted a danger to public order and security in that would commit further offences is mitigated by the particular circumstances of the case (see Boultif v. Switzerland, cited above, § 51, with further references).

46. Having regard to all these elements, the Court considers that the authorities failed to strike a fair balance between the different interests involved and that the interference with the applicants' right to respect for their family life was not proportionate to the legitimate aim pursued.

Accordingly, there has been a breach of Article 8 of the Convention."

4.2.1.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Nunez v. Norway (2009)* havde klageren opnået sin opholdstilladelse på baggrund af svig. Da opholdstilladelsen blev inddraget, havde hun opholdt sig i opholdslandet fra hun var 21 til hun var 26 år, i alt 5 år, og havde stiftet familie i opholdslandet ved at gifte sig og få børn.

EMD slog indledningsvis fast, at forholdet mellem klageren og hendes børn udgjorde "familieliv" i artikel 8's forstand. I præmis 67 konstaterede EMD, at:

"In the case under consideration the applicant, after having first been deported from Norway in March 1996 with a two-year-prohibition on re-entry due to a criminal conviction, defied that prohibition by re-entering the country in July 1996 with the use of a false identity and travel document. In October 1996 she married a Norwegian national and obtained a residence permit having informed the immigration authorities that she had not previously resided in Norway and had no criminal record. On the basis of her misleading information, she was granted a work permit in January 1997 and a settlement permit in April 2000. Thus, her successive permits to reside in Norway had all been granted on the basis of information that had been false to begin with and which remained false. As found by the Norwegian authorities and was undisputed by the applicant, at no time had her residence in Norway been lawful."

EMD udtalte i præmis 71-73, at henset til hensynene bag den nationale lovgivning og de nationale myndigheders afgørelse i sagen fandt EMD, at statens interesse i at udsende klageren vejede tungt i proportionalitetsafvejningen. EMD fastslog i præmis 74, at klageren ikke på noget tidspunkt kunne have haft en berettiget forventning om at have mulighed for at forblive i landet, og udtalte i præmis 76 om tilknytningen til hjemlandet og opholdslandet:

"76. Moreover, when the applicant arrived in Norway at the age of twenty-one, she had lived all her life in the Dominican Republic. During her stay in Norway she co-habited from the spring of 2001 to October 2005 with Mr O. who was also a national of her home country. Her links to Norway could hardly be said to outweigh her attachment to her home country and, as noted above, had in any event been formed through unlawful residence and without any legitimate expectation of being able remain in the country."

Herefter gennemgik EMD i præmis 78-82 hensynet til barnets bedste og de nationale myndigheders lange sagsbehandlingstid og udtalte i præmis 83-85:

"83. In light of the above, the Court shares the view of the Supreme Court's minority that the applicant's expulsion with a two-year re-entry ban would no doubt constitute a very far-reaching measure vis-à-vis the children.

84. Having regard to all of the above considerations, notably the children's long lasting and close bonds to their mother, the decision in the custody proceedings, the disruption and stress that the children had already

experienced and the long period that elapsed before the immigration authorities took their decision to order the applicant's expulsion with a re-entry ban, the Court is not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention. Reference is made in this context also to Article 3 of the UN Convention on the Rights of the Child, according to which the best interests of the child shall be a primary consideration in all actions taken by public authorities concerning children (see Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, § 135, ECHR 2010-...). The Court is therefore not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicant's need to be able to remain in Norway in order to maintain her contact with her children in their best interests, on the other hand.

85. In sum, the Court concludes that the applicant's expulsion from Norway with a two-year re-entry ban would entail a violation of Article 8 of the Convention."

I sagen *Antwi and others v. Norway (2012)* havde klageren ligeledes opnået sin opholdstilladelse på baggrund af svig. Klageren var i opholdslandet blevet gift og havde fået et barn. Syv år efter indrejsen fik opholdslandet kendskab til hans reelle identitet og året efter blev han udvist fra opholdslandet.

EMD udtalte i præmis 90:

"In applying the above principles [fra Nunez-dommen, red.] to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Nunez, cited above, § 71, and Darren Omoregie and Others v. Norway, no. 265/07, § 67, 31 July 2008; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Nunez and Darren Omoregie and Others, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Nunez, cited above, § 73)."

EMD udtalte ikke specifikt, om længden af klagerens ophold havde nogen betydning, men udtalte i præmis 91-92:

"91. Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country.

92. Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country."

Efter at have gennemgået ægtefællens og datterens forhold, udtalte EMD i præmis 103-105:

"103. There being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion.

104. The above considerations are not altered by the duration of the prohibition on re-entry – five years. In this connection, the Court reiterates that in a comparable case, Darren Omoregie (cited above, §§ 63-68), it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case.

105. In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand.

Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban would not entail a violation of Article 8 of the Convention."

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende klagernes opholdstilladelse, da de var blevet myndige.

EMD udtalte i præmis 76:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 No-

vember 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

[citat af præmis 68-70 i Nunez-dommen, red.]"

På den baggrund udtalte EMD i præmis 79-87:

"79. In this regard the Court has noted the general approach of the Borgarting High Court that strong immigration policy considerations would in principle militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that parents exploited the situation of their children in order to secure a residence permit for themselves and for the children (see paragraph 34 above). The Court, seeing no reason for disagreeing with this general approach, observes that during a police interview on 15 November 1996 the applicants' mother conceded that she had previously given incorrect information to the police and other institutions about her own and her children's stay in Pakistan during this period. Thus, it seems that her children's family life was created in Norway at a time when she was aware that their immigration status in the country was such that the persistence of that family life would, since their return in 1996, be precarious (see Nunez, cited above, §§ 71-76). That was also the case of their private life in the country. From the above considerations, it follows that the removal of the applicants would be incompatible with Article 8 only in exceptional circumstances.

80. In assessing whether there were such exceptional circumstances, the Court observes in the first place that, as also held by the High Court, the need to identify children with the conduct of their parents could not always

be a decisive factor; in the concrete case there had been no such risk of exploitation as mentioned above since the applicants had reached the age of majority and their mother had died (see paragraph 34 above).

81. Furthermore, already in connection with the application for family reunion, submitted by applicant's father in 1996, the immigration authorities were informed of the mother and the applicants' stay in Pakistan for most of the period from the summer of 1992 to early 1996. During the said police interview of 15 November 1996 the mother conceded that she had previously given incorrect information to the police and to other institutions about this in 1996 (see paragraph 79 above). However, without enquiring into the justification for the Directorate of Immigration's decision of January 1999 (upheld by the Immigration Appeals Board in August 1999) to revoke the applicants' and their mother's settlement permit, the Court has noticed the lapse of time between the said discovery in 1996 and the revocation of the permit in 1999 (see Nunez, cited above, paragraph 82).

82. Moreover, as found by the High Court, it was not until their arrest in May 2001 that the applicants had become aware of the irregular character of their residence status and, presumably also, that they had exceed the time-limit for their voluntary repatriation (see paragraphs 29 to 31 above). It thus appears that their family- and other social ties in the host State had already been formed when it was brought to their attention that the persistence of those ties would be precarious. Therefore, at least until then, they cannot be reproached, as suggested by the Government, for having confronted the authorities with a fait accompli (compare Darren Omoregie and Others, cited above, § 64).

83. On the contrary, as noted by the High Court, since the applicants' mother had gone into hiding, the immigration police shortly after their arrest released the applicants, who were then minors, and refrained from implementing the deportation without their mother. The authorities omitted to take any steps to arrange for the applicants' obtaining the passports required for their travelling. Because their mother had gone under ground, the applicants had been dependent on such assistance until they passed the age of majority. The Court sees no reason for disagreeing with the High Court's assessment that until they reached the age of majority – in 2003 and 2004, respectively – the applicants could reasonably perceive the situation as one where the authorities did not expect them to leave the country on their own and that it was difficult to ascribe any responsibility to them for not having taken any steps to do so while their mother had gone into hiding from the police (see paragraphs 31 and 33 above).

84. Nor is it apparent that the applicants could no longer reasonably entertain the same perception after they reached the age of majority. The authorities did not make any attempt to implement the deportation when, after having found their mother in September 2005, they forcibly sent her to Pakistan. The stated reason was to enable the applicants to attend a hearing due to open later in the same month before the Oslo City Court (see paragraph 32 above), the outcome of which went in their favour (see paragraph 12 above).

85. Also, the Court cannot but note the observation made by the High Court (in 2008) that, in view of the unusually long duration of the applicants' unlawful stay in Norway, it was questionable whether general immigration policy considerations would carry sufficient weight to regard the refusal of residence "necessary in a democratic society" (see paragraph 37 above).

86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 og 89 gennemgik EMD klagernes tilknytning til hjemlandet og betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

4.2.1.4. Ulovligt ophold

I sagen *Jeunesse v. the Netherlands (2014)* var klageren indrejst i opholdslandet på et visum fra en tidligere hollandsk koloni og havde giftet sig med en statsborger i opholdslandet. Hun blev i landet efter udløbet af sit visum og fik med sin ægtefælle tre børn, som alle var statsborgere i opholdslandet. Klageren søgte flere gange om opholdstilladelse, hvilket hver gang blev afslået, da klageren som udgangspunkt skulle søge fra hjemlandet. Efter 16 års ophold blev klageren forsøgt udsendt fra opholdslandet under henvisning til, at hun ikke havde et lovligt opholdsgrundlag. Børnene var på tidspunktet for Storkammerets afgørelse 14, knap ni og knap fire år.

EMD gennemgik i præmis 115-120 de forskellige hensyn, som indgik i afvejningen, og udtalte om klagerens ophold i opholdslandet i præmis 116, at:

"The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for more than sixteen years and that she has no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Netherlands authorities, while she repeatedly submitted residence requests and awaited the outcome of appeals. The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities."

EMD udtalte i præmis 121-122:

"121. The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. 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.

122. The Court, whilst confirming the relevant principles set out above (see paragraphs 106-109), finds that, on the basis of the above considerations (see paragraphs 115-120) and viewing the relevant factors cumulatively, the circumstances of the applicant's case must be regarded as exceptional. Accordingly, the Court concludes that a fair balance has not been struck between the competing interests involved. There has thus been a failure by the Netherlands authorities to secure the applicant's right to respect for her family life as protected by Article 8 of the Convention."

Sagen *Gezginci v. Switzerland (2010)* omhandlede såvel ulovligt ophold som nægtelse af forlængelse af opholdstilladelse. EMD har i et *legal summary* karakteriseret klagerens ophold i opholdslandet som *long term illegal immigration*, hvorfor sagen er placeret i dette afsnit. Dommen foreligger ikke på engelsk i en officiel oversættelse, hvorfor hele EMD´s *legal summary* er citeret herunder:

"Judgment 9.12.2010 [Section I]
Article 8
Expulsion
Deportation order against long-term illegal immigrant: deportation would not constitute a violation
Facts – The applicant is a Turkish national who has lived in Switzerland since 1978, on the basis of residence permits from 1980 to 1998 and unlawfully during the remaining periods. In 1997 the national authorities decided not to renew his residence permit. A few months later they set March 1999 as the deadline for his deportation from Switzerland. However, the applicant did not leave the country. In 2003, after a serious work-related accident, he applied for a residence permit on humanitarian grounds. The authorities refused the application. Shortly afterwards his wife disappeared without trace, leaving him to care for their eleven-year-old daughter. The applicant lodged several unsuccessful appeals against the deportation order, which is still in force.
Law – Article 8: In view of the applicant's very long-standing residence in Switzerland, the refusal to grant him a residence permit on humanitarian grounds amounted to interference with his right to respect for his private life. That interference had been in accordance with the law and had pursued the legitimate aims of ensuring the economic well-being of the country, preventing disorder or crime and protecting the rights and freedoms of others. In order to determine whether it had been necessary in a democratic society, a number of factors had to be taken into consideration. First of all, the applicant's convictions between 1982 and 1992 had not been very serious and since 1993 his conduct did not appear to have been open to criticism from a purely criminal-law standpoint. Next, the applicant had lived in Switzerland for approximately thirty years, not counting periods spent abroad, thanks to the considerable tolerance shown by the authorities since 1999. Furthermore, some members of the applicant's family still lived in Turkey and would be able to help him resettle there and find work; he also spoke Turkish fluently. Similar considerations would apply were he to opt for Romania, a country which he knew from visits, where his wife lived and his daughter had spent much of her life, and

where he appeared to have been in gainful employment. Furthermore, it was clear from his attitude that he was unable and unwilling to find employment in Switzerland. As to his daughter, given that she had spent most of her life in Romania and Turkey, was a citizen of both countries and probably spoke both languages, she could reasonably be expected to be able to adjust if she returned there. Lastly, the applicant's health was not liable to significantly hinder his integration in Turkey, given that he would have access there to the necessary medicines and treatment and would undoubtedly receive an invalidity pension. Accordingly, regard being had in particular to the fact that the applicant had been residing unlawfully in Switzerland since 1997, his lack of willingness to integrate there, his failure to abide by the rules of the country and the fact that his ties with his country of origin did not appear to have been completely severed, the respondent State could be said to have struck a fair balance between the interests of the applicant and his daughter on the one hand and its own interest in controlling immigration on the other.
Conclusion: the applicant's deportation would not amount to a violation (five votes to two)." [Understreget her, red.]

I sagen *Nnyanzi v. the United Kingdom (2008)* var klagerens ansøgning om asyl blevet afvist, hvorefter opholdslandet gjorde tiltag med henblik på, at klageren skulle forlade landet. EMD udtalte i præmis 76-78:

"76. The Court does not consider it necessary to determine whether the applicant's accountancy studies, involvement with her church and friendship of unspecified duration with a man during her stay of almost ten years in the United Kingdom constitute private life within the meaning of Article 8 § 1 of the Convention. Even assuming this to be the case, it finds that her proposed removal to Uganda is "in accordance with the law" and is motivated by a legitimate aim, namely the maintenance and enforcement of immigration control. As to the necessity of the interference, the Court finds that any private life that the applicant has established during her stay in the United Kingdom when balanced against the legitimate public interest in effective immigration control would not render her removal a disproportionate interference. In this regard, the Court notes that, unlike the applicant in the case of Üner (cited above), the present applicant is not a settled migrant and has never been granted a right to remain in the respondent State. Her stay in the United Kingdom, pending the determination of her several asylum and human rights claims, has at all times been precarious and her removal, on rejection of those claims, is not rendered disproportionate by any alleged delay on the part of the authorities in assessing them.

77. Nor does the Court find there to be sufficient evidence that the applicant's removal with her asthma condition, which she asserts is exacerbated by stress, would have such adverse effects on her physical and moral integrity as to breach her rights under Article 8 of the Convention.

78. Accordingly, the applicant's removal to Uganda would not give rise to a violation of Article 8 of the Convention."

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende klagernes opholdstilladelse, da de var blevet myndige.

EMD udtalte i præmis 76:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

[citat af præmis 68-70 i Nunez-dommen, red.]"

"79. In this regard the Court has noted the general approach of the Borgarting High Court that strong immigration policy considerations would in principle militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that parents exploited the situation of their children in order to secure a residence permit for themselves and for the children (see paragraph 34 above). The Court, seeing no reason for disagreeing with this general approach, observes that during a police interview on 15 November 1996 the applicants' mother conceded that she had previously given incorrect information to the police and other institutions about her own and her children's stay in Pakistan during this period. Thus, it seems that her children's family life was created in Norway at a time when she was aware that their immigration status in the country was such that the persistence of that family life would, since their return in 1996,

be precarious (see Nunez, cited above, §§ 71-76). That was also the case of their private life in the country. From the above considerations, it follows that the removal of the applicants would be incompatible with Article 8 only in exceptional circumstances.

80. In assessing whether there were such exceptional circumstances, the Court observes in the first place that, as also held by the High Court, the need to identify children with the conduct of their parents could not always be a decisive factor; in the concrete case there had been no such risk of exploitation as mentioned above since the applicants had reached the age of majority and their mother had died (see paragraph 34 above).

81. Furthermore, already in connection with the application for family reunion, submitted by applicant's father in 1996, the immigration authorities were informed of the mother and the applicants' stay in Pakistan for most of the period from the summer of 1992 to early 1996. During the said police interview of 15 November 1996 the mother conceded that she had previously given incorrect information to the police and to other institutions about this in 1996 (see paragraph 79 above). However, without enquiring into the justification for the Directorate of Immigration's decision of January 1999 (upheld by the Immigration Appeals Board in August 1999) to revoke the applicants' and their mother's settlement permit, the Court has noticed the lapse of time between the said discovery in 1996 and the revocation of the permit in 1999 (see Nunez, cited above, paragraph 82).

82. Moreover, as found by the High Court, it was not until their arrest in May 2001 that the applicants had become aware of the irregular character of their residence status and, presumably also, that they had exceed the time-limit for their voluntary repatriation (see paragraphs 29 to 31 above). It thus appears that their family- and other social ties in the host State had already been formed when it was brought to their attention that the persistence of those ties would be precarious. Therefore, at least until then, they cannot be reproached, as suggested by the Government, for having confronted the authorities with a fait accompli (compare Darren Omoregie and Others, cited above, § 64).

83. On the contrary, as noted by the High Court, since the applicants' mother had gone into hiding, the immigration police shortly after their arrest released the applicants, who were then minors, and refrained from implementing the deportation without their mother. The authorities omitted to take any steps to arrange for the applicants' obtaining the passports required for their travelling. Because their mother had gone under ground, the applicants had been dependent on such assistance until they passed the age of majority. The Court sees no reason for disagreeing with the High Court's assessment that until they reached the age of majority – in 2003 and 2004, respectively – the applicants could reasonably perceive the situation as one where the authorities did not expect them to leave the country on their own and that it was difficult to ascribe any responsibility to them for not having taken any steps to do so while their mother had gone into hiding from the police (see paragraphs 31 and 33 above).

84. Nor is it apparent that the applicants could no longer reasonably entertain the same perception after they reached the age of majority. The authorities did not make any attempt to implement the deportation when, after having found their mother in September 2005, they forcibly sent her to Pakistan. The stated reason was to enable the applicants to attend a hearing due to open later in the same month before the Oslo City Court (see paragraph 32 above), the outcome of which went in their favour (see paragraph 12 above).

85. Also, the Court cannot but note the observation made by the High Court (in 2008) that, in view of the unusually long duration of the applicants' unlawful stay in Norway, it was questionable whether general immigration policy considerations would carry sufficient weight to regard the refusal of residence "necessary in a democratic society" (see paragraph 37 above).

86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 og 89 gennemgik EMD klagernes tilknytning til hjemlandet og betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

EMD gennemgik præmis 47-49 sin praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem (pleje)forældre og unge voksne udgør privatliv eller tillige familieliv, og udtalte i præmis 50, at:

"50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham

lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage

by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

4.2.1.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Slivenko v. Latvia (2003)* var klagerne, som var af russisk oprindelse, blevet udsendt fra Letland under henvisning til, at de var familiemedlemmer til en russisk militærperson og derfor forpligtede til at forlade Letland i forbindelse med tilbagetrækningen af de russiske tropper fra Letland som følge af landets opnåelse af uafhængighed fra USSR. Sagen vedrørte klagernes privatliv, idet de havde levet hele eller hovedparten af deres liv i Letland.

EMD udtalte vedrørende spørgsmålet om, hvorvidt der forelå et indgreb i klagernes privatliv, i præmis 96:

"As regards the facts of the present case, the first applicant arrived in Latvia in 1959, when she was only one month old. Until 1999, by which time she was 40 years of age, she continued to live in Latvia. She attended school there, found employment and married. Her daughter, the second applicant, was born in Latvia in 1981 and lived there until the age of 18, when she was compelled to leave the country together with her mother, having just completed her secondary education (see paragraphs 16 and 46 above). It is undisputed that the applicants left Latvia against their own will, as a result of the unsuccessful outcome of the proceedings concerning the legality of their stay in Latvia. They were thus removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being. Furthermore, as a result of the removal, the applicants lost the flat in which they had lived in Riga (see paragraphs 32 and 46 above). In these circumstances, the Court cannot but find that the applicants' removal from Latvia constituted an interference with their "private life" and their "home" within the meaning of Article 8 § 1 of the Convention."

EMD gennemgik i præmis 116-118 nogle overordnede betragtninger vedrørende tilbagetrækning af fremmede tropper fra en uafhængig stat i forhold til aktivt tjenestegørende og pensionerede militærpersoner og deres familier. I præmis 119 fastslog EMD, at klagernes ægtefælle/far var pensioneret på tidspunktet for

sagen om lovligheden af klagernes fortsatte ophold i Letland. I præmis 120-121 konstaterede EMD, at der i visse situationer var mulighed for dispensation fra kravet om at forlade Letland, og i præmis 122 udtalte EMD, at spørgsmålet om, hvorvidt en udsendelse i lyset af klagernes personlige situation var proportional med det legitime formål: statens sikkerhed, måtte afgøres på baggrund af sagens konkrete omstændigheder. EMD udtalte herom i præmis 123-125:

"123. The respondent Government argued that the applicants had not been sufficiently integrated into Latvian society (see paragraph 88 above). In this connection the Court observes that the applicants have spent virtually all their lives in Latvia (see paragraph 96 above). It is true that the applicants are not of Latvian origin, and that they arrived and lived in Latvia – then part of the USSR – in connection with the service of members of their family (the first applicant's father and her husband) in the Soviet armed forces. However, the applicants also developed personal, social and economic ties in Latvia unrelated to their status as relatives of Soviet (and later Russian) military officers. This is shown by the fact that the applicants did not live in army barracks or any other restricted area, but in a block of flats in which there were also civilians. Nor did they study or work in a military institution. The first applicant was able to find employment in Latvian companies after Latvia regained its independence in 1991.

124. As regards the respondent Government's argument about the level of the applicants' proficiency in Latvian, the Court observes that, in so far as this is a relevant consideration, it has not been shown that the degree of the applicants' fluency in the language – although the precise level is in dispute – was insufficient for them to lead a normal everyday life in Latvia. In particular, there is no evidence that the level of the applicants' knowledge of Latvian was in any way different from that of other native Russian speakers living in Latvia, including those who were able to obtain the status of "ex-USSR citizens" in order to remain in Latvia on a permanent basis.

125. Although in 1999 the applicants moved to Russia to join Nikolay Slivenko and eventually obtained Russian citizenship, by that time they had apparently not developed personal, social or economic ties in Russia similar to those they had established in Latvia. In short, the Court finds that at the relevant time the applicants were sufficiently integrated into Latvian society."

I præmis 126-127 gennemgik EMD det af regeringen påberåbte argument for forskelsbehandlingen af klagerne, at det havde betydning for den nationale sikkerhed, at den første klager var kommet til Letland som medlem af en familie til en sovjetisk militærofficer (den første klagers far/den anden klagers bedstefar).

EMD udtalte i præmis 128-129:

"128. Having regard to all the circumstances, the Court considers that the Latvian authorities overstepped the margin of appreciation enjoyed by the Contracting Parties in such a matter, and that they failed to strike a fair balance between the legitimate aim of the protection of national security and the interest of the protection of the applicants' rights under Article 8. Therefore, the applicants' removal from the territory of Latvia cannot be regarded as having been 'necessary in a democratic society'.

129. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Osman v. Denmark (2011)* ansås klagerens opholdstilladelse i medlemsstaten som bortfaldet som følge af hendes langvarige ophold i familiens tidligere opholdsland Kenya. Klageren, der var somalisk statsborger, havde boet i Kenya fra hun var tre-fire år, indtil hun som syvårig indrejste i opholdslandet som familiesammenført. Hun havde herefter opholdt sig i opholdslandet, indtil hun som 15-årig af forældrene blev sendt tilbage til Kenya. Kort tid før hun fyldte 18 år, kontaktede klageren den danske ambassade i Kenya med henblik på at kunne vende tilbage til sin familie i opholdslandet, hvilket blev afslået af de danske myndigheder. Hun indrejse herefter som 19-årig i medlemsstaten, hvor hun ikke længere havde lovligt ophold.

Vedrørende klagerens tidligere lovlige ophold i opholdslandet udtalte EMD i præmis 65 og 67-68, at:

"65. It also reiterates that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in a host country, very serious reasons are required to justify expulsion (see, Maslov v. Austria [GC], quoted above, § 75). In the present case the applicant was refused restoration of her lapsed residence permit, as opposed to being expelled due to having committed a crime. Nevertheless, it is undisputed that she spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old, that she spoke Danish, that she had received schooling in Denmark until August 2002, and that all her close family remained in Denmark. In these circumstances, the Court also considers that very serious reasons were required to justify the authorities' refusal to restore the applicant's residence permit, when she applied from Kenya in August 2005.

…

67. The Court does not question that the said legislation was accessible and foreseeable and pursued a legitimate aim. The crucial issue remains though whether, in the circumstances of the present case, the refusal to reinstate the applicant's residence permit was proportionate to the aim pursued.

68. The Court notes in particular that the applicant was granted a residence permit in Denmark in November 1994 and subsequently entered the country in February 1995, when she was seven year old. Moreover, at the relevant time the applicant had already legally spent more than eight formative years of her childhood and youth in Denmark before, at the age of fifteen, she was sent to Kenya, which was not her native country. The case thus differs significantly from Ebrahim and Ebrahim v. the Netherlands (dec.) of 18 March 2003, in which the first applicant entered the Netherlands with his family when he was ten years old and applied for asylum or a residence permit. When the boy was thirteen years old, serious tensions had developed between him and his stepfather who disapproved of the boy's behaviour in the Netherlands. Therefore, the boy was returned to Lebanon to stay with his maternal grandmother in a refugee camp to become acquainted with his native country. Neither the boy nor any members of his family had at that time been granted a residence permit in the Netherlands. After three years in Lebanon, having reached the age of sixteen, the boy applied in vain to return to the Netherlands. The Court stated specifically in that case that "that due consideration should be given to cases where a parent has achieved settled status in a country and wants to be reunited with her child who, for the time being, finds himself in the country of origin, and that it may be unreasonable to force the parent to choose between giving up the position which she has acquired in the country of settlement or to

renounce the mutual enjoyment by parent and child of each other's company, which constitutes a fundamental element of family life (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A no. 94, § 68). The issue must therefore be examined not only from the point of view of immigration and residence, but also with regard to the mutual interests of the applicants"."

I præmis 69-75 udtalte EMD sig om hensynet til børns ret til respekt for privat- og familieliv i forhold til den danske lovgivning om genopdragelsesrejser og forældremyndighedsindehaverens rolle, hvorefter EMD i præmis 76-77 udtalte:

"76. Having regard to all the above circumstances, it cannot be said that the applicant's interests have sufficiently been taken into account in the authorities' refusal to reinstate her residence permit in Denmark or that a fair balance was struck between the applicants' interests on the one hand and the State's interest in controlling immigration on the other.

77. There has accordingly been a violation of Article 8 of the Convention."

Sagen *Hasanbasic v. Switzerland (2013)* omhandlede en klager, hvis opholdstilladelse blev annulleret af de nationale myndigheder i opholdslandet, idet klageren over for disse myndigheder havde tilkendegivet, at han ville rejse tilbage til sit hjemland med henblik på permanent at bosætte sig der. Klageren genindrejste dog fire måneder senere i opholdslandet, hvorefter hans ægtefælle, som stadig opholdt sig i opholdslandet, indgav en ansøgning om ny opholdstilladelse på baggrund af familiesammenføring. EMD har kategoriseret sagen *som refusal to renew residence visa*, hvorfor den er medtaget under dette punkt.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor det komplette *legal summary* er indsat nedenfor. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

Vedrørende vurderingen af, om der med opholdslandets afvisning af at forny klagerens opholdstilladelse var sket indgreb i en af artikel 8 beskyttet rettighed, udtalte EMD i præmis 49 (uofficiel dansk oversættelse):

"Med hensyn til sagens omstændigheder vurderer Domstolen på grund af klagernes langvarige ophold i Schweiz, at afvisningen af at forny klagerens opholdstilladelse udgør et indgreb i retten til respekt for klagers "privatliv" (jf., mutatis mutandis, Gezginci mod Schweiz, nr. 16327/05, præmis 57, 9. december 2010). Såfremt denne afvisning kan medføre adskillelse fra klagers hustru samt fra deres fællesbørn, der bor i Schweiz og alle har opholdstilladelse i landet, vurderer Domstolen, at klagerne ligeledes har været udsat for et indgreb i deres ret til "familieliv"."

Efter i præmis 51 og 52 at have fastslået, at indgrebet var i overensstemmelse med loven og forfulgte et eller flere af de legitime hensyn, gennemgik EMD i præmis 53-56 de generelle principper, som var relevante i den konkrete sag for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund.

I præmis 57-63 udtalte EMD om anvendelsen af disse principper i den konkrete sag (uofficiel dansk oversættelse):

"57. Domstolen bemærker indledningsvist, at de to klagere længe har boet lovligt i Schweiz. Den mandlige klager ankom til Schweiz i 1986, den kvindelige klager ankom allerede i 1969. Varigheden af deres ophold udgør således på det tidspunkt, hvor Forbundsdomstolen afsagde sin dom i 2009, henholdsvis 23 og 40 år. Den kvindelige klager har endvidere haft en etableringstilladelse i Schweiz siden 1979, og dermed en tilladelse af en mere stabil karakter end en almindelig opholdstilladelse. Det er i øvrigt ikke bestridt, at Schweiz i en lang periode har været centrum for klagernes privat- og familieliv.

Domstolen konstaterer ligeledes, at klagerne har opholdt sig uafbrudt i Schweiz, bortset fra i en periode på fire måneder fra mellem august og december 2004, efter at de nationale myndigheder havde afvist den kvindelige klagers anmodning om familiesammenføring (ovenstående præmis 14). Den foreliggende sag adskiller sig på dette punkt væsentligt fra sagen Gezginci (nævnt ovenfor, præmis 69 og 70), hvori klager gentagne gange tog til udlandet i længerevarende perioder.

Domstolen vurderer under disse omstændigheder, at det tilkommer de nationale myndigheder på en overbevisende måde og ved hjælp af relevante og tilstrækkelige årsager at bevise, at der eksisterer et samfundsmæssigt bydende nødvendigt behov for at udvise den pågældende person, og navnlig, at denne foranstaltning står i forhold til det forfulgte legitime mål.

58. Med hensyn til først den mandlige klagers lovstridige adfærd henviser Domstolen til, at klager flere gange mellem 1995 og 2002 er dømt, herunder idømt bøder, der ikke overstiger beløb på 400 CHF, og en fængselsdom på 17 dage (i alt) for overtrædelse af færdselsloven og for krænkelse af husfreden. Domstolen bemærker, lige som klagerne, at disse forseelser ikke vejer tungt, og den konkluderer heraf, at det vil være passende at vurdere forseelserne ud fra en retfærdig afvejning. Domstolen finder det i øvrigt vigtigt, at klager ikke har begået nye forseelser siden 2002. Henset til ovenstående kan klager ikke anses for at udgøre en fare eller trussel for sikkerheden eller den schweiziske offentlige orden.

59. Det, der forekommer at have spillet en væsentlig rolle i de nationale instansers afvejning af interesserne, er opbygningen af den store gæld samt de betydelige beløb, som klagerne har modtaget i offentlig bistand fra 1994 til 2001 samt fra 2003 til 2008 (jf., mutatis mutandis, Gezginci, nævnt ovenfor, præmis 73). Det samlede beløb udgør 333.000 CHF (ca. 277.500 EUR). Idet der henvises til, at ophavsmændene til Konventionen udtrykkeligt har taget højde for landets økonomiske velvære som et legitimt mål for berettigelse af et indgreb i udøvelsen af retten til respekt for privat- og familielivet (jf. f.eks. Miailhe mod Frankrig (nr. 1), 25. februar 1993, præmis 33, serie A nr. 256-C; Hatton m.fl. mod Det Forenede Kongerige [Storkammeret], nr. 36022/97, præmis 121, EMD 2003-VIII; Mubilanzila Mayeka og Kaniki Mitunga mod Belgien, nr. 13178/03, præmis 79, EMD 2006-XI; Mengesha Kimfe mod Schweiz, nr. 24404/05, præmis 66, 29. juli 2010; Agraw mod Schweiz, nr. 3295/06, præmis 49, 29. juli 2010, og Orlić mod Kroatien, nr. 48833/07, præmis 62, 21. juni 2011), i modsætning til de rettigheder, der er beskyttet i medfør af Konventionens artikel 9-11, vurderer Domstolen, at de schweiziske myndigheder kunne tage højde for klagernes gæld og afhængighed af offentlig bistand, såfremt denne afhængighed måtte have indflydelse på landets økonomiske velvære. Domstolen vurderer ikke desto mindre, at disse forhold kun udgør et aspekt blandt flere, som Domstolen skal tage højde for.

60. Med hensyn til de forskellige berørte personers nationalitet er de to klagere statsborgere fra Bosnien-Hercegovina. Domstolen henviser ligeledes til, at parret har to fællesbørn, der er født i 1982 og 1984, og som

bor i Schweiz og har opholdstilladelse i dette land. Desuden bor ét af børnene, der er født i 1979 og stammer fra den mandlige klagers første ægteskab, ligeledes i Schweiz. Idet klagerne ikke over for Domstolen har påvist, at der mellem dem og børnene er supplerende afhængighedsforhold, ud over normale følelsesmæssige bånd, (Ezzouhdi mod Frankrig, nr. 47160/99, præmis 34, 13. februar 2001; og Kwakie-Nti og Dufie mod Nederlandene (dec.), nr. 31519/96, 7. november 2000), kan de naturligvis ikke påberåbe sig disse familieforhold med hensyn til artikel 8, idet børnene er voksne. Domstolen vurderer ikke desto mindre, at forholdene ikke er helt uden relevans for vurderingen af klagernes familiesituation.

61. Domstolen tager endvidere Regeringens argument til efterretning, ifølge hvilket klager, der ikke har indrejseforbud i Schweiz, regelmæssigt kan besøge sine børn og i givet fald sin hustru, hvis hun ikke følger med ham og bosætter sig i Bosnien-Hercegovina. Domstolen er i øvrigt underrettet om, at klager sporadisk kan rejse til Schweiz og opholde sig der i en periode på maksimalt tre måneder (ovenstående præmis 23). Domstolen vurderer i denne henseende, selv om de kompetente myndigheder måtte tage positivt imod sådanne anmodninger i fremtiden, at disse midlertidige foranstaltninger, der i givet fald måtte blive meddelt alene efter anmodning, under ingen omstændigheder ville kunne anses for at erstatte klagernes ret til at udøve rettigheden til at leve sammen, hvilket udgør ét af de grundlæggende aspekter ved retten til respekt for familielivet (jf., mutatis mutandis, dommene Agraw mod Schweiz, nr. 3295/06, præmis 51, og Mengesha Kimfe mod Schweiz, nr. 24404/05, præmis 69-72, begge af 29. juli 2010).

62. Et andet kriterium, der skal tages højde for i afvejningen af interesserne, er fastheden af de sociale, kulturelle og familiemæssige bånd med Schweiz og med Bosnien-Hercegovina. Forbundsdomstolen har selv i den foreliggende sag erkendt, at klagerne har et betydeligt socialt netværk i Schweiz, og at deres tilbagevenden til oprindelseslandet på grund af den betydelige varighed af deres ophold i Schweiz uden tvivl ville stille dem over for visse vanskeligheder (ovenstående præmis 20).

63. De schweiziske myndigheder har ganske vist ligeledes henvist til, at klagerne havde ladet et hus opføre i deres oprindelsesland, og at ét af børnene fra den mandlige klagers første ægteskab samt hans søster bor i oprindelseslandet. Domstolen tager ligeledes til efterretning, at den mandlige klager den 24. august 2003 havde meddelt de schweiziske myndigheder, at han definitivt ville vende tilbage til Bosnien-Hercegovina, hvilket er ét af de nationale myndigheders hovedargumenter for afvisning af en fornyelse af opholdstilladelsen. Domstolen vurderer, at dette argument skal bedømmes i lyset af de efterfølgende indtrufne forhold, dvs. efter Forbundsdomstolens dom af 6. marts 2009."

Herefter gennemgik EMD i præmis 64-65 betydningen af klagerens helbredsmæssige forhold og den risiko for en forværring heraf, en flytning til hjemlandet ville indebære.

EMD udtalte i præmis 66-67 (uofficiel dansk oversættelse):

"66. Domstolen vedgår henset til ovenstående, at landets økonomiske velfærd ganske vist kan tjene som et legitimt mål i forbindelse med en afvisning af at forny en opholdstilladelse. Denne årsag skal ikke desto mindre vurderes ud fra en retfærdig afvejning og i lyset af samtlige omstændigheder i sagen. Domstolen vurderer imidlertid ud fra den betydelige varighed af klagernes ophold i Schweiz og deres ubestridte sociale integration i landet, at den anfægtede foranstaltning ikke var berettiget ud fra et bydende nødvendigt samfundsmæssigt

behov og ikke stod i forhold til de påberåbte legitime formål. Den indklagede stat har følgelig overskredet sin skønsmargen i den foreliggende sag.

67. Der er følgelig sket en krænkelse af Konventionens artikel 8."

Af *legal summary* fremgår:

"Judgment 11.6.2013 [Section II]
Article 8
Expulsion
Refusal to renew residence visa because of applicant's debts and dependence on public funds: violation
Facts – The applicants are a couple from Bosnia and Herzegovina. The wife had lived in Switzerland since 1969 and the husband since 1986. They had two children together. In 2004 Mr Hasanbasic told the immigration authorities that he was leaving Switzerland for good to return to his home country, where he had had a house built. His settlement permit was accordingly cancelled. He returned to Switzerland four months later, with a tourist visa, and lived with his wife. Mrs Hasanbasic submitted an application for him to be allowed to stay in the country under the family reunion programme, but her request was rejected, inter alia because the family was dependent on welfare and had accumulated debts to the tune of some EUR 133,300, and Mr Hasanbasic had been convicted of nine criminal offences between 1995 and 2002.
Law – Article 8: The interference with the applicants' private and family life was in accordance with the law and pursued the legitimate aims of the country's economic well-being, the prevention of disorder or crime and the protection of the rights and freedoms of others. The fundamental principles applicable to the expulsion of a person for committing a criminal offence, when that person had spent a considerable length of time in the country, were well-established in the Court's case-law and had recently been brought to the fore, for example in the Üner, Maslov and Emre cases. The present case differed from these other cases in so far as the applicants' complaint about the Swiss authorities' refusal to renew the settlement permit relied firstly on the family's strong roots in Swiss society, considering that they had lived there for so long. The husband's criminal record seemed only to have played a secondary role in the domestic authorities' decision. In any event, the above-mentioned principles had to be applied, mutatis mutandis, in such a situation.*
At the time of the Federal Court's decision in 2009 the applicants had been living in Switzerland without interruption for forty and twenty-three years respectively, except for the four months in 2004. Furthermore, since 1979 Mrs Hasanbasic had held a permit of a more permanent type than a simple residence permit. For many years, therefore, Switzerland had been the centre of the applicants' private and family life.
The husband had been convicted several times between 1995 and 2002, and sentenced to fines not exceeding 400 Swiss francs (CHF) and to a total of seventeen days' imprisonment, for road-traffic offences and trespassing. These were not serious offences and had to be placed in perspective. In addition, the applicant had committed no other offences since 2002. He could therefore not be considered a danger or a threat to security or public order.
What seemed to have played a major role in the authorities' assessment of the interests in issue were the sizable debts the family had accrued and the considerable amount of money they had received in welfare benefits (a total of about CHF 333,000, or EUR 277,500). The economic well-being of the country was expressly provided for in the Convention as a legitimate aim justifying interference with the right to respect for private and family life. The Swiss authorities were therefore justified in taking into account the applicants' debts and

their dependence on the welfare system in so far as that dependence affected the country's economic well-being. However, this was only one factor among many to be taken into consideration by the Court.
It was true that, considering the children's ages, as the applicants had not shown that there were any further elements of dependency between them and their children, involving more than the normal emotional bonds, they could not rely on family ties under Article 8. Family ties were not completely devoid of relevance, however, when analysing the applicants' family situation. The fact that the husband was able to visit Switzerland from time to time, with the proper authorisation, could by no means be considered to replace the applicants' right to live together.
The applicants had a large social network in Switzerland and, considering how long they had lived there, to have to return to their country of origin would doubtless have placed them in some difficulty. It was true that they had had a house built back in their country of origin, and that one of the children from Mr Hasanbasic's former marriage, and his sister, were living there. And in August 2004 the applicant had told the Swiss authorities that he was returning permanently to Bosnia and Herzegovina, which was one of the domestic authorities' main reasons for refusing to renew his residence permit. That argument had to be assessed in the light of subsequent developments, however. Furthermore, Mr Hasanbasic's health had declined seriously, leaving him in need of constant treatment. The possibility that removing him from his familiar surroundings in Switzerland might adversely affect his already declining health and cause new medical complications could not be ruled out. Consequently, although the applicant's state of health was not sufficient in itself to compel the Swiss authorities to renew his residence permit, it could not be completely ignored in the general balance of interests in issue. Lastly, the fact that the applicant would not receive an invalidity pension if he returned to his country of origin might adversely affect his situation.
So, while the economic well-being of the country could indeed be a legitimate reason for refusing to renew a residence permit, that reason should be placed in perspective in the light of all the circumstances of the case. In this instance, regard being had in particular to the considerable length of time the applicants had spent in Switzerland and their undeniable social integration there, the measure in issue had not been justified by a pressing social need and was not proportionate to the legitimate aims pursued. The respondent State had therefore overstepped its margin of appreciation." [Understreget her, red.]

4.2.2. Klagerens alder ved ankomsten til opholdslandet

Som anført ovenfor under afsnit 4.1 kan alderen ved klagerens indrejse i opholdslandet sammenholdt med andre faktorer, herunder længden af opholdet, have betydning for vurderingen af klagerens tilknytning til opholdslandet og til hjemlandet.

I sagen *Maslov v. Austria (2008)* udtalte EMD i præmis 72-75:

"72. The Court would also clarify that the age of the person concerned can play a role when applying some of the above criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult (see, for instance, Moustaquim v. Belgium, 18 February 1991, § 44, Series A no. 193, and Radovanovic v. Austria, no. 42703/98, § 35, 22 April 2004).

73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec(2000)15 and Rec(2002)4 (see paragraphs 34-35 above).

74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see Üner, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there (see Üner, § 58 in fine).

75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

Som anført i afsnit 3.3.3.2 afhænger vægtningen af de enkelte elementer i proportionalitetsafvejningen af de konkrete omstændigheder i hver enkelt sag, se f.eks. Maslov v. Austria (2008), hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[7] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

4.2.2.1. Alvorlig kriminalitet

I sagen *Üner v. the Netherlands (2006)* blev klageren idømt syv års fængsel for drab og udvist for bestandig. Klageren var indrejst som 12-årig sammen med sin mor og sine søskende som familiesammenført til faren. På tidspunktet, hvor afgørelsen om udvisning blev endelig, havde han opholdt sig 17 år i opholdslandet og havde to mindreårige børn med sin nederlandske partner. Han var flyttet fra partneren efter halvandet års samliv, da det ældste barn var omkring ni måneder gammel, men forblev i tæt kontakt med partneren og barnet i de følgende omkring otte måneder indtil fængslingen. Partneren og det ældste barn besøgte klageren i fængslet mindst en gang om ugen og ofte hyppigere. Mens klageren var fængslet, fik parret endnu et barn, som klageren ligeledes så hver uge. Klageren havde på tidspunktet for EMD´s afgørelse opholdt sig 25 år i opholdslandet.

EMD fastslog i præmis 61, at der forelå et indgreb både i klagerens ret til respekt for familieliv og hans ret til respekt for privatliv. EMD udtalte imidlertid:

"[...] Even so, having regard to the particular issues at stake in the present case and the positions taken by the parties, the Court will pay special attention to the applicant's right to respect for his family life."

EMD udtalte i præmis 62:

"The Court considers at the outset that the applicant lived for a considerable length of time in the Netherlands, the country that he moved to at the age of 12 together with his mother and brothers in order to join his father, and where he held a permanent residence status. Moreover, he subsequently went on to found a family there. In these circumstances, the Court does not doubt that the applicant had strong ties with the Netherlands. That said, it cannot overlook the fact that the applicant 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. As the Chamber put it in paragraph 46 of its judgment, "... the disruption of their family life would not have the same impact as it would [have had] if they had been living together as a family for a much longer time". Moreover, while it is true that the applicant came to the Netherlands at a relatively young age, the Court is not prepared to accept that he had spent so little time in Turkey that, at the time he was returned to that country, he no longer had any social or cultural (including linguistic) ties with Turkish society."

[7] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

I præmis 63-65 forholdt EMD sig til den begåede kriminalitet, tidspunktet for prøveløsladelse, klagerens børns alder og deres og partnerens statsborgerskab i opholdslandet i forhold til muligheden for at følge med klageren til dennes hjemland samt det pålagte indrejseforbuds varighed. EMD udtalte i præmis 67, at:

"In the light of the above, the Court finds that a fair balance was struck in this case in that the applicant's expulsion and exclusion from the Netherlands were proportionate to the aims pursued and therefore necessary in a democratic society.

Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Sezen v. the Netherlands (2006)* var den første klager indrejst i opholdslandet som 23-årig og havde fået opholdstilladelse som familiesammenført til sin ægtefælle (den anden klager), som havde boet i opholdslandet siden hun var syv år, og deres fælles barn. Tre år efter indrejsen blev den første klager idømt fire års fængsel for narkotikakriminalitet. Efter løsladelsen genoptog han samlivet med ægtefælle og barn, men fraflyttede senere det fælles hjem i en periode på omkring syv måneder. Knap fire måneder efter genoptagelse af samlivet fik klagerne endnu et barn. Den første klagers opholdstilladelse som familiesammenført blev omkring otte måneder senere nægtet forlænget under henvisning til samlivsafbrydelsen og straffedommen.

EMD udtalte i præmis 44-45:

"44. At the time the first applicant was arrested, i.e. on 31 July 1992, he had been residing lawfully in the Netherlands for less than one and a half years, having been granted a residence permit in February 1991. Applying the "sliding scale" principle, the authorities of the respondent State attached weight to this undeniably short duration of the first applicant's lawful stay in the Netherlands before he committed the offence. It is nevertheless to be noted that, following his conviction on 20 January 1993, it was not until more than four years later, namely on 5 June 1997, that the decision was taken to refuse the first applicant continued residence. Following his early release from prison in April 1995, the first applicant had thus been allowed to build up even closer ties with the Netherlands for a further two years. In addition, it appears that the first applicant has not re-offended and that he has been gainfully employed ever since his release from prison.

45. As to the first applicant's connections with his country of origin, the Court considers that his situation is not comparable to that of a second-generation immigrant, given that he arrived in the Netherlands at the age of twenty-three. Not having been informed otherwise, the Court assumes that he received his schooling in Turkey and that he is conversant with the Turkish language. Thus, he undoubtedly has ties with Turkey. His ties to the Netherlands are mainly connected to his wife – the second applicant – and their two children."

I præmis 46-48 gennemgik EMD indgrebets mulige betydning for klagerens familieliv, herunder ægtefællens tilknytning til opholdslandet og manglende tilknytning til hjemlandet, familielivets etablering forud for kriminaliteten, børnenes tilknytning til opholdslandet og klagerens og partnerens hjemland og vanskelighederne for ægtefællen og børnene ved at følge klageren til hjemlandet.

EMD udtalte i præmis 49-50, at:

"49. It is true that, in theory at least, the first applicant is entitled to make occasional visits to the Netherlands, due to the fact that the exclusion order that was initially imposed on him was ultimately withdrawn without

having been enforced (paragraph 20 above). However, in this context the Court notes that the present case does not concern a divorced father with an access arrangement, but a functioning family unit where the parents and children are living together. The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 of the Convention and that to split up a family is an interference of a very serious order (see Mehemi v. France (no. 2), no. 53470/99, § 45, ECHR 2003-IV). Having regard to its finding at paragraph 47 above that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same as long as the first applicant continues to be denied the right to reside in the Netherlands. In this context the Court notes the Government's submission that the first applicant's criminal record would normally militate against a new residence permit being issued to him for a period of ten years. Although they also argued that Article 8 of the Convention would be taken into account in assessing whether his conviction would still be held against him, the Government failed to indicate when, and under what conditions, such an assessment would lead to a positive decision being taken on any future request for a residence permit being lodged by the first applicant.

50. In conclusion, the Court is of the opinion that, in the particular circumstances of the present case, the respondent State failed to strike a fair balance between the applicants' interests on the one hand and its own interest in preventing disorder or crime on the other.

There has, accordingly, been a violation of Article 8 of the Convention."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

EMD udtalte i præmis 45, at:

"As regards the length of the applicant's stay in Switzerland, the Court observes that he arrived in Switzerland in 1989 at the age of nine and lived in Switzerland for more than twenty years. His stay in Switzerland was, thus, of a considerable length of time."

I præmis 46-50 gennemgik EMD klagerens opførsel og domstolsbehandlingen af hans sag efter begåelsen af lovovertrædelsen samt klagerens families forhold, herunder muligheden for klagerens ægtefælle og børn for at tage ophold i klagerens hjemland.

Betydningen af længden af klagerens ophold blev gennemgået i præmis 51 og 52, hvor EMD vurderede hans tilknytning til henholdsvis opholdslandet og hjemlandet:

"51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'."

EMD udtalte herefter i præmis 53-55:

"53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

I sagen *A.W. Khan v. the United Kingdom (2010)* var klageren indrejst i opholdslandet som treårig og var meddelt tidsubegrænset opholdstilladelse. Han blev som 28-årig idømt syv års fængsel for narkotikakriminalitet, men blev løsladt efter tre år på grund af god opførsel. Myndighederne traf efterfølgende afgørelse om

udvisning på baggrund af den begåede kriminalitet. Klageren havde dels sin mor og sine søskende i opholdslandet, dels en kæreste, som han havde fået et barn med. På tidspunktet for sagens behandling for EMD var klageren 34 år gammel.

I præmis 31-32 gennemgik EMD klagerens forhold til sin mor og sine søskende, som fandtes at udgøre privatliv. I præmis 33-35 gennemgik EMD klagerens forhold til sin kæreste og deres fælles barn, som fandtes at udgøre familieliv. Herefter konkluderede EMD i præmis 36, at der var tale om et ingreb både i klagerens privatliv og hans familieliv.

Herefter gennemgik EMD i præmis 37-42 om indgrebet var i overensstemmelse med loven, om det skete til varetagelse af et af de legitime hensyn og om det var nødvendigt i et demokratisk samfund. EMD henviste i denne forbindelse til de relevante kriterier som sammenfattet i Üner-dommen og udtalte i præmis 40-43:

"40. The Court reiterates that in view of the devastating effects of drugs on people's lives, it understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge (Dalia v France, cited above, § 54; Bhagli v France, cited above, § 48). The applicant's offence was particularly serious as it involved the importation of a significant quantity of heroin. The severity of the offence is reflected in the fact that the applicant was sentenced to seven years' imprisonment, taking account of his decision to plead guilty at a very early stage. The severity of this offence must therefore weigh heavily in the balance.

41. Nevertheless, the Court must also take into account the fact that the applicant had not previously committed any serious criminal offences in the United Kingdom, and has committed no further offences following his release in June 2006. Under the approach taken in the Boultif judgment (cited above, §51), the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has a certain impact on the assessment of the risk which the applicant poses to society.

42. As regards the applicant's private life, the Court accepts that the applicant has lived most of his life in the United Kingdom, having arrived there at the age of three, and no longer has any real social, cultural or family ties to Pakistan. The applicant has not returned to Pakistan, even for a short visit, and he has no immediate family in Pakistan.

43. In the United Kingdom the applicant has established close ties with his mother and two brothers, with whom he has lived for most of his life. The relationship clearly entails an additional degree of dependence which results from the relative ill-health of all of the parties. Although there is no evidence to suggest that the family would not be able to cope without the applicant, his removal would likely cause greater difficulties than would otherwise be the case."

I præmis 44-47 gennemgik EMD, hvorvidt klagerens familieliv med sin kæreste og deres fælles barn kunne tillægges vægt i proportionalitetsafvejningen, hvilket ikke fandtes at være tilfældet henset til omstændighederne på tidspunktet for etableringen af familielivet. I præmis 48 udtalte EMD, at der også måtte tages hensyn til varigheden af indrejseforbuddet, som var højst ti år.

Herefter udtalte EMD i præmis 50-51:

"50. In light of the above, having particular regard to the length of time that the applicant has been in the United Kingdom and his very young age at the time of his entry, the lack of any continuing ties to Pakistan,

the strength of his ties with the United Kingdom, and the fact that the applicant has not reoffended following his release from prison in 2006, the Court finds that the applicant's deportation from the United Kingdom would not be proportionate to the legitimate aim pursued and would therefore not be necessary in a democratic society.

51. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Pakistan."

I sagen vedrørende A.W. Khans bror, *A.H. Khan v. the United Kingdom (2011)*, var klageren indrejst i opholdslandet som syvårig og var tidligere blevet dømt for samleje med en mindreårig, to forsøg på røveri samt overfald. Som 30-årig blev klageren ydermere idømt fem års fængsel for røveri og udvist. Klageren blev udsendt ni år efter sin sidste dom. På tidspunktet for EMD´s afgørelse af sagen var klageren far til seks børn i alderen fra 12 til 17 år. Klageren var på daværende tidspunkt ikke i et forhold med mødrene til hans børn.

I præmis 37 udtalte EMD, at:

"[…] the Court finds that, on balance, the applicant lived in the United Kingdom from 1978, when he was aged seven, returning to Pakistan only for visits. It is therefore accepted that he has lived in the United Kingdom since an early age, a factor which means that serious reasons would be required before his deportation could be found to be proportionate (see Maslov v. Austria [GC], no. 1638/03, § 75, 23 June 2008)."

EMD fandt den af klageren begåede kriminalitet alvorlig og fremhævede, at det forhold, at han havde begået kriminalitet igen kort tid efter løsladelsen, viste, at han ikke var rehabiliteret og derfor fortsat udgjorde en fare for offentligheden, hvorfor der var gode grunde til at udsende ham (præmis 38).

I præmis 39 udtalte EMD:

"The Court must now consider the applicant's circumstances in the United Kingdom, with a view to determining whether his family and private life, and his consequent level of integration into British society, were such as to outweigh the seriousness of his criminal history. […]"

Herefter gennemgik EMD klagerens familieforhold, hvorefter EMD i præmis 41 udtalte:

"Finally, the Court turns to the question of the respective solidity of the applicant's ties to the United Kingdom and to Pakistan. The Court notes that, unlike his younger brother, the applicant returned to Pakistan for visits following his arrival in the United Kingdom and also married there. In the absence of any evidence to the contrary, the Court assumes that this marriage is still, legally at least, subsisting. The applicant therefore maintained some level of connection to his country of origin and was not deported as a stranger to the country. As regards his ties to the United Kingdom, the Court has addressed the question of his family life, both with his parents and siblings and with his various partners and children, above, and found it to be limited in its extent. Furthermore, the applicant's private life in the United Kingdom, as observed by the Tribunal, has been constrained by his convictions and spells in prison. Whilst he was mainly educated in the United Kingdom and has worked, he does not appear to have established a lengthy or consistent employment history. In short, and despite the length of his stay, the applicant did not achieve a significant level of integration into British society. The Court is aware that, as a settled migrant who spent much of his childhood in the United Kingdom, serious reasons would be required to render the applicant's deportation proportionate (see Maslov, cited

above, § 75). However, having regard to his substantial offending history, including offences of violence and recidivism following the commencement of deportation proceedings against him, the Court is of the view that such serious reasons are present in the applicant's case. His private and family life in the United Kingdom were not such as to outweigh the risk he presented of future offending and harm to the public and his deportation was therefore proportionate to the legitimate aim of preventing crime. As such, the applicant's deportation to Pakistan did not amount to a violation of Article 8."

I sagen *A.A. v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som 13-årig sammen med sine to søstre som familiesammenført til deres mor. To år senere blev han som 15-årig idømt fire års tilbageholdelse på en ungdomsinstitution for voldtægt begået mod en mindreårig, men blev løsladt tidligere på grund af god opførsel. Fem år efter den begåede kriminalitet blev klagerens udvisningsafgørelse endelig. Da EMD behandlede sagen, havde klageren opholdt sig i opholdslandet i 11 år. Han boede hos sin mor og besøgte sine to søstre regelmæssigt.

I præmis 46-50 gennemgik EMD sin hidtidige praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem myndige børn og forældre udgør privatliv og/eller familieliv. EMD udtalte i præmis 49:

"49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life". However, it is not necessary to decide the question given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Thus, regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on "family life" rather than "private life", it observes that in practice the factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged (Üner, cited above, §§ 57-60)."

EMD konstaterede i præmis 51-55, at indgrebet var i overensstemmelse med loven og forfulgte et af de legitime hensyn.

Ved vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund, gennemgik EMD i præmis 56 kriterierne som sammenfattet i Üner-dommen og udtalte på den baggrund i præmis 57-58, at de nationale domstole i hver enkelt sag må vurdere, hvilken vægt der skal tillægges de enkelte elementer i foretagelsen af den konkrete afvejning, indenfor staternes margin of appreciation. Om de relevante elementer i den foreliggende sag udtalte EMD i præmis 59-64:

"59. In the present case, the Court considers the relevant factors to be the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in United Kingdom; the time which has elapsed since the offence was committed and the applicant's conduct during that period; and the solidity of social, cultural and family ties with the host country and with the country of destination.

60. The Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Maslov, cited above, § 85). There can be no doubt that the applicant's offence was a serious one and the Court considers the comments of the sentencing judge as to the applicant's conduct and the effect of the attack on the victim to be relevant factors to be taken into account (see paragraph 8 above). The sentence imposed – four years in a Young Offenders' Institution – demonstrates the gravity of the offence. However, the fact that the applicant was a minor at the time the offence was committed is a relevant consideration in assessing the proportionality of a deportation (see Maslov, cited above, § 72). In this regard, the Court recalls that where offences committed by a minor underlie an exclusion order, regard must be had to the best interests of the child. In particular, the obligation to take the best interests of the child into account includes an obligation to facilitate his reintegration, an aim that the Court has previously held will not be achieved by severing family or social ties through expulsion (see Maslov, cited above, §§ 82-83).

61. The Court observes that the total length of the applicant's stay in the United Kingdom to date is eleven years. He arrived in the country at the age of 13 and has therefore now spent almost half his life in the United Kingdom. The Court notes that the applicant committed the offence which rendered him liable to deportation less than two years after his arrival in the United Kingdom. Further, following his conviction, he spent some two years in detention, during which time he was served with a deportation order. While the applicant was granted Indefinite Leave to Remain during this period, the Court is persuaded by the Government's submissions that leave was granted in ignorance of the applicant's conviction and, as a result, considers that no significance can be attached to the fact that Indefinite Leave to Remain was granted following the conviction (compare and contrast Omojudi, cited above, § 42). It is also true that the applicant has been aware since July 2003 of the fact that he was liable to be deported on account of his conviction. However, the Court nonetheless observes that he has now spent seven years at liberty in the United Kingdom following his release and despite having exhausted appeal rights in January 2008, no steps appear to have been taken in respect of his deportation until September 2010 (see paragraphs 23-25 above).

62. As to the lapse of time and the applicant's conduct since commission of the offence in 2002, the Court observes at the outset that the applicant has committed no further offences. While in detention, the applicant took advantage of the educational opportunities available to him and obtained a number of high school qualifications (see paragraph 11 above). At the time of his release from detention in August 2004, his risk of reoffending was assessed to be low (see paragraph 11 above), an assessment subsequently reiterated by his probation officer in 2005 and accepted by the AIT in 2007 (see paragraphs 15 and 20 above). Since his release, the applicant's conduct appears to have been exemplary. He enrolled in college in September 2004 in order to sit his A-level examinations, which he obtained in summer 2005 (see paragraph 14 above). He was subsequently offered a place at university to study towards an undergraduate degree, which he obtained in 2008, followed by a postgraduate degree, which he completed in 2009 (see paragraphs 18 and 24 above). He commenced stable employment with a local authority in 2010 (see paragraph 24 above).

63. The Government have not pointed to any concern regarding the applicant's conduct in the seven years since his release from prison and rely solely on the seriousness of the offence to justify concerns as to his continued presence in the United Kingdom and his risk to the public (see paragraphs 41-42 and 44 above). The Court reiterates that the factors to be taken into consideration in cases involving deportation following a criminal offence are partially designed to evaluate the extent to which the applicant can be expected to cause

disorder or to engage in criminal activities (see paragraph 57 above). In particular, the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has an impact on the assessment of the risk which the applicant poses to society (see Boultif, cited above, § 51; Maslov, cited above, § 90; and A.W. Khan, cited above, § 41). Accordingly, the Court considers the present factor to be of particular importance when assessing whether the seriousness of the offence in itself is sufficient to justify the applicant's deportation for the prevention of disorder or crime.

64. Finally, as regards the applicant's ties with the United Kingdom and with Nigeria, the Court observes that the applicant continues to reside with his mother and has close relationships with his two sisters and an uncle, all of whom reside in England. He has completed the majority of his high school and further education in the United Kingdom and has now commenced a career with a local authority in London. He is also a member of a church community. While he spent a significant period of his childhood in Nigeria, he has now not visited the country for eleven years. He has had no contact with his father since 1991".

I præmis 65-68 gennemgik EMD betydningen af opholdslandets passivitet i forhold til at udsende klageren i overensstemmelse med den trufne udvisningsafgørelse og redegjorde for baggrunden for at inddrage forhold indtruffet og klagerens opførsel i perioden efter denne afgørelse i sin afvejning, herunder vigtigheden af at facilitere reintegration af unge lovovertrædere i samfundet.

Herefter konkluderede EMD i præmis 69-70:

"69. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's deportation from the United Kingdom would be disproportionate to the legitimate aim of the "prevention of disorder and crime" and would therefore not be necessary in a democratic society.

70. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Nigeria."

I sagen *El Boujaïdi v. France (1997)* var klageren indrejst i opholdslandet som syvårig. Han blev idømt seks års fængsel og udvist med indrejseforbud for bestandig for narkotikakriminalitet begået da han var 19 år. Efter at være blevet løsladt da han var 24 år, blev klageren på ny anholdt og idømt et års fængsel for forsøg på røveri og for ikke at være udrejst i overensstemmelse med udvisningen. Klageren blev udsendt, da han var 26 år gammel. På dette tidspunkt boede han sammen med en statsborger i opholdslandet, med hvem han havde fået et barn nogle måneder forud for udsendelsen. Mens der på tidspunktet, hvor udvisningsbeslutningen blev endelig, endnu ikke var etableret et forhold mellem klageren og samleversken og derfor ifølge EMD ikke bestod et "familieliv", der kunne tages i betragtning, udtalte EMD i præmis 33:

"However, the Court observes that he arrived in France in 1974 at the age of 7 and lived there until 26 August 1993. He received most of his schooling there and worked there for several years. In addition, his parents, his three sisters and his brother – with whom it was not contested that he had remained in contact – live there (see paragraph 7 above). Consequently, the Court is in no doubt that enforcement of the exclusion order amounted to interference with the applicant's right to respect for his private and family life."

Ved vurderingen af, om indrejseforbuddet var nødvendigt i et demokratisk samfund, udtalte EMD i præmis 40-41:

"40. The Court's task therefore consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

The Court notes that Mr El Boujaïdi arrived in France at the age of 7 and lived there lawfully from 1974 until 19 June 1991 (the date of his release – see paragraph 13 above). He received most of his education there, he worked there and his parents, his three sisters and his brother live there (see paragraph 7 above).

However, while he asserted that he had no close family in Morocco, he did not claim that he knew no Arabic or that he had never returned to Morocco before the exclusion order was enforced. It also seems that he has never shown any desire to acquire French nationality. Accordingly, even though most of his family and social ties are in France, it has not been established that he has lost all links with his country of origin other than his nationality. In addition, the applicant had a previous conviction – a sentence of thirty months' imprisonment having been imposed on him by the Annecy Criminal Court for heroin dealing in 1987 – when the Lyons Court of Appeal sentenced him to six years' imprisonment and ordered his permanent exclusion from French territory for drug use and drug trafficking (see paragraphs 10 and 11 above). Once he was released, and at a time when he was unlawfully present in France, he continued to lead a life of crime and committed an attempted robbery (see paragraph 13 above). The seriousness of the offence on account of which the measure in issue was imposed on the applicant and his subsequent conduct count heavily against him.

41. Having regard to the foregoing, the Court does not find that enforcement of the order for the applicant's permanent exclusion from French territory was disproportionate to the legitimate aims pursued. There has accordingly been no breach of Article 8."

I sagen *Alam v. Denmark (2017)* var klageren indrejst fra Pakistan som halvandetårig som familiesammenført til sin far. Som 30-årig blev hun idømt 16 års fængsel for manddrab og brandstiftelse og udvist for bestandig. Hun talte udover dansk også engelsk, tysk, pashto, urdu og punjabi. Hendes far var død, men hendes mor og fem søskende boede i Danmark og var danske statsborgere. Klageren havde tidligere været i Pakistan, hvor hun havde to halvsøskende, og hendes mor rejste ofte til Pakistan, hvor hun ejede et hus. Klagerens børn var på tidspunktet for EMD's behandling af sagen 16 og 13 år gamle. De talte dansk og den ældste også lidt pashto.

EMD udtalte i præmis 33, at:

"The Court recognises that the City Court made a thorough assessment of the applicant's personal circumstances, carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law (see paragraph 18 above). It specifically noted the children's age, which had significant importance when compared with the sentence imposed (see paragraphs 25 above and 34 below), and found that considerations for the applicant's children could not lead to another decision. [(…])"

Om de nationale domstoles vurdering af klagerens tilknytning til opholdslandet, bl.a. på baggrund af skolegang og uddannelse, samt til hjemlandet udtalte EMD videre i præmis 33, at:

"[…] It made an overall assessment, taking into account especially that the applicant had had all her upbringing, schooling and education in Denmark, that she had maintained a real attachment to Pakistan and Pakistani culture, that she had two children in Denmark, and that she had been convicted of very serious crimes. That balancing and proportionality test was approved by the High Court in its judgment of 4 September 2014 (see paragraph 20 above)."

Efter at have gennemgået spørgsmålet om klagerens børns mulige fortabelse af opholdstilladelse i præmis 34, udtalte EMD i præmis 35, at:

"Having regard to the above, the Court has no reason to call into question the conclusions reached by the domestic courts on the basis of the balancing exercise which they carried out. Those conclusions were neither arbitrary nor manifestly unreasonable. The Court is thus satisfied that the interference with the applicant's private and family life was supported by relevant and sufficient reasons and that her expulsion would not be disproportionate given all the circumstances of the case. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention."

I sagen *Levakovic v. Denmark (2018)* havde klageren haft opholdstilladelse i opholdslandet, siden han var otte måneder gammel. Da han var 25 år gammel, blev han idømt fem års fængsel og udvist på grund af mange tilfælde af grov kriminalitet, herunder flere væbnede røverier, narkotikakriminalitet, tyverier og besiddelse af både våben og stjålne effekter.

Efter at have gennemgået de generelle betragtninger bl.a. om begrebet "privatliv" og om forholdet mellem forældre og voksne børn og mellem voksne søskende samt redegjort for kriterierne som sammenfattet i Üner-dommen og om staternes margin of appreciation, konstaterede EMD i præmis 39, at udvisningen udgjorde et indgreb i klagerens ret til respekt for privatliv, at udvisningen var overensstemmelse med loven og at den tjente et legitimt formål.

Herefter gennemgik EMD i præmis 40-45, hvorvidt udvisningen af klageren var nødvendig i et demokratisk samfund, og udtalte i præmis 41-46:

"41. As flows from the Court's case-law (see paragraph 33), the point of departure for the Court's analysis under Article 8 of the Convention in the present case is the fact that an alien does not have a Convention right to reside in a particular country, a rule which applies to settled migrants like the applicant. However, if a Member State's decision to expel a settled migrant, lawfully residing in the State in question, interferes with his or her family or privacy rights, protected by paragraph 1 of Article 8, the national authorities are under a duty, provided by paragraph 2 of the same provision, to evaluate the individual situation of the migrant in accordance with the criteria set out in the Court's case-law (see paragraph 36 above). In the application of these criteria, the Court has not qualified the relative weight to be accorded to each criteria in the individual assessment, as this analysis is, in the first place, for the national authorities subject to European supervision. However, in Maslov (cited above, § 75), the Court made clear that when a case concerns a settled migrant, who has lawfully spent all or major part of his or her childhood and youth in the host country, "very serious reasons are required to justify expulsion". It is clear that in the light of the facts in the present case, the Court is called upon to examine whether such "very serious reasons" were adequately adduced by the national authorities when assessing the applicant's case and, if so, whether the Court considers itself in a position to substitute its view for that of the domestic courts."

42. The Court recognises that the City Court made a thorough assessment of the applicant's personal circumstances, carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law (see paragraph 19 above). It was fully aware that very strong reasons are required to justify the deportation of settled migrants (see Maslov, cited above, § 75). It found, making an overall assessment, that although the applicant had no ties to Croatia, due to his criminal past, which included two convictions for three robberies committed when he was an adult, the nature and seriousness of the crimes committed, namely a robbery in a private home and an armed bank robbery, both committed during the probation period for the most recent suspended expulsion order, and the fact that the applicant had twice violated the conditions for suspended expulsion orders, there were such very serious reasons justifying expulsion.

43. That balancing and proportionality test was approved by the High Court in its judgment of 26 August 2013.

44. Thus assessing whether the national authorities adduced relevant and sufficient reasons for expelling the applicant, the Court observes that after entering adulthood, the applicant has been convicted twice for robbery which by the very nature of the crime in question is a serious act including elements of violence or the threat of violence. He has also been convicted of other offences against property. In the Court's view, when assessing the 'nature and seriousness' of the offences committed by the applicant, the national authorities were thus entitled to take the view that they attained a level of gravity warranting expulsion unless other counterbalancing criteria militated against imposing that measure in the light of the Court's case-law. In this regard, the Court attaches particular weight to the fact that the expulsion of the applicant did not interfere with his family rights as he is an adult and has not made any arguments to the effect that there are additional elements of dependence between himself and his parents or siblings (see paragraph 35 above). Therefore, the interference with the applicant's Article 8 rights was limited to his right to privacy. Furthermore, the applicant has no children, thus obviating the need to take into account weighty reasons directed at protecting a child's best interests. Moreover, and importantly, the Court recalls that under its case-law, the evaluation of the applicant's 'social' and 'cultural ties' with the host country, here Denmark, is a criteria to be included in the analysis (see paragraph 36 above). On this basis, the Court considers it of importance that the City Court examined the particular situation of the applicant and found that although he has lived most of his life in Denmark he 'must be considered very poorly integrated into Danish society'. In fact, it can be readily deduced from the file that the applicant has primarily lived a life of crime and consistently demonstrated a lack of will to comply with Danish law. The Court makes clear that unlike in Maslov (cited above), the national authorities based their decision to expel the applicant not on crimes perpetrated when the applicant was a juvenile.

45. In the light of the above, the Court reiterates that in the interpretation and application of Article 8 of the Convention in cases of the kind in question, emphasis must be placed on securing a fair balance between the public interest and the Article 8 rights of aliens residing in the Member States. Ascertaining whether 'very weighty reasons' justify the expulsion of a settled migrant, like the applicant, who has lived almost all his life in the host country, must inevitably require a delicate and holistic assessment of all the criteria flowing from the Court's case-law, an assessment that must be carried out by the national authorities under the final supervision of the Court. Taking account of all of the elements described above, the Court concludes that the interference with the applicant's private life was supported by relevant and sufficient reasons. There are no indications whatsoever that the domestic authorities may have based their decisions on stereotypes about

Roma, as it appears to be alleged by the third party intervener, and the applicant never made such a complaint. The Court is also satisfied that the applicant's expulsion was not disproportionate given all the circumstances of the case. It notes that the City Court and the High Court explicitly assessed whether the expulsion order could be deemed to be contrary to Denmark's international obligations. The Court points out in this respect that, although opinions may differ on the outcome of a judgment, 'where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts' (see, Ndidi v. the United Kingdom (no. 41215/14, § 76, 14 September 2017; and, mutatis mutandis, Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012 and Axel Springer AG v. Germany [GC], no. 39954/08, § 88, 7 February 2012).

46. Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

EMD gennemgik præmis 47-49 sin praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem (pleje)forældre og unge voksne udgør privatliv eller tillige familieliv, og udtalte i præmis 50, at:

"50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many

authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive

weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Savran v. Denmark (2021)* var klageren indrejst i opholdslandet som seksårig sammen med sin mor og sine søskende som familiesammenført til sin far. Klageren var som 16-årig blevet idømt et år og tre måneders fængsel, heraf ni måneder betinget, for røveri. Som 24-årig blev han fundet skyldig i vold med døden til følge begået tre år forinden, men fundet straffri som følge af psykisk sygdom. Han blev idømt retspsykiatrisk behandling samt udvist for bestandig. Fem år senere blev udvisningen prøvet og opretholdt, og klageren blev udsendt til sit hjemland.

Storkammeret udtalte i præmis 175:

"In the present case, the applicant arrived in Denmark at the age of six; he was educated and spent his formative years there; he was issued with a residence permit and remained lawfully resident in the country for fourteen years and eight months (see paragraphs 27 and 30 above). The Court thus accepts that he was a "settled migrant" and therefore Article 8 under its "private life" aspect is engaged."

I præmis 176-178 gennemgik EMD, om klagerens forhold til sin mor og sine søskende udgjorde familie- eller privatliv, og konkluderede, at der var tale om privatliv.

I præmis 179-180 udtalte Storkammeret, at afvisningen af at ophæve udvisningsbeslutningen udgjorde et indgreb i klagerens privatliv, og at indgrebet var hjemlet i lov og forfulgte et af de legitime hensyn, forebyggelse af uro og forbrydelse.

I præmis 181-189 gennemgik EMD de generelle principper vedrørende nødvendighedsvurderingen.

EMD bemærkede i præmis 190, at der var forløbet en betragtelig tid fra det tidspunkt, hvor udvisningsbeslutningen blev endelig, til tidspunktet for afgørelsen om eventuel ophævelse af udvisningsbeslutningen, og at det var op til de nationale domstole at lade alle relevante ændringer i klagerens forhold i denne periode indgå i vurderingen af, om det på tidspunktet for afgørelsen om eventuel ophævelse af udvisningsbeslutningen var proportionalt at udvise klageren, herunder særligt ændringer vedrørende hans opførsel og helbred.

EMD gennemgik i præmis 191-196 betydningen af klagerens helbredstilstand og i præmis 197 betydningen af de fremskridt, der var sket i klagerens opførsel i perioden mellem gerningstidspunktet og den endelige afgørelse vedrørende evt. ophævelse af udvisningen, jf. det tredje Maslov-kriterium, hvilket imidlertid ikke blev taget i betragtning ved de nationale domstoles vurdering af risikoen for gentagelseskriminalitet.

I præmis 198 udtalte EMD om fastheden af klagerens sociale, kulturelle og familiemæssige bånd til opholdslandet og til hjemlandet:

"A further issue to be considered is the solidity of the applicant's social, cultural and family ties with the host country and the country of destination (the fourth Maslov criterion). Whilst the applicant's ties with Turkey

seem to have been limited, it cannot be said that he was completely unfamiliar with that country (see paragraphs 30, 59 and 65 above). However, it appears that the High Court gave little consideration to the length of the applicant's stay in and his ties to his host country Denmark (the second and fourth Maslov criteria respectively; see paragraph 182 above), stressing as it did the fact that he had not founded his own family and had no children in Denmark (see paragraph 66 above). As to the latter aspect, the Court reiterates its finding in paragraph 178 above that, even if he had no "family life", the applicant could still claim protection of his right to respect for his "private life" within the meaning of Article 8 (see Maslov, cited above, § 93). In this regard, the Court attaches particular weight to the fact, also noted by the domestic courts in the criminal proceedings and by the City Court in the revocation proceedings, that the applicant was a settled migrant who had been living in Denmark since the age of six (see paragraph 59 above). Although the applicant's child and young adulthood were clearly difficult, suggesting integration difficulties, he had received most of his education in Denmark and his close family members (mother and siblings) all live there. He had also been attached to the Danish labour market for about five years (see paragraphs 27 and 30 above). "

Afslutningsvis gennemgik EMD I præmis 199-200 betydningen af varigheden af indrejseforbuddet for den samlede proportionalitetsvurdering.

Herefter konkluderede EMD i præmis 201-202:

"201. In the light of the above, it appears that in the revocation proceedings, despite the significant period of time during which the applicant underwent medical treatment for his mental disorder, the High Court, apart from briefly referring to his lack of family ties in Denmark and to the serious nature and gravity of his criminal offence, did not consider the changes in the applicant's personal circumstances with a view to assessing the risk of his reoffending against the background of his mental state at the time of the commission of the offence and the apparent beneficial effects of his treatment. Nor did it have due regard to the strength of the applicant's ties to Denmark as compared to those to Turkey. The Court further notes that under the domestic law, the administrative and judicial authorities had no possibility of making an individual assessment of the duration of the applicant's exclusion from Danish territory, which was both irreducible and permanent. Therefore, and notwithstanding the respondent State's margin of appreciation, the Court considers that, in the particular circumstances of the present case, the domestic authorities failed to duly take into account and to properly balance the interests at stake (see paragraphs 182 and 183 above).

202. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Abdi v. Denmark (2021)* var klageren som fireårig indrejst i opholdslandet, hvor også hans forældre og søskende opholdt sig. Han var tidligere idømt tre måneders betinget fængsel for et røveri begået som 15-årig og fire måneders fængsel, heraf tre måneder betinget, for indbrud begået som 17-årig. Efter det fyldte 18. år var han syv gange idømt bødestraf for overtrædelse af lov om euforiserende stoffer. Senest var klageren idømt to et halvt års fængsel og udvist for bestandig for besiddelse af et ladt skydevåben på offentligt sted begået i det år, hvor han fyldte 24 år. Klageren havde ingen familie i oprindelseslandet, talte kun grundlæggende somali og havde ikke besøgt oprindelseslandet siden udrejsen.

I præmis 39-41 udtalte EMD, at den ikke betvivlede, at klageren på tidspunktet for den kriminalitet, der havde ført til udvisningen, udgjorde en alvorlig trussel for den offentlige orden, men at bortset herfra indikerede den pådømte kriminalitet begået efter at klageren var fyldt 18 år ikke, at han generelt udgjorde en trussel for

den offentlige orden, og at klageren ikke tidligere var blevet advaret om udvisning eller idømt betinget udvisning. EMD bemærkede videre i præmis 42, at ikke desto mindre – trods fraværet af relevante tidligere domfældelser og advarsler om udvisning og uanset at klageren var blevet idømt en relativt mild straf i den foreliggende sag – havde de danske domstole besluttet at kombinere udvisningen med et permanent indrejseforbud. Herefter udtalte EMD i præmis 43-45:

"43. This observation should also be seen in the light that the applicant arrived in Denmark at a very young age and had lawfully resided there for approximately twenty years. He thus had very strong ties with Denmark, whereas his ties with Somalia were virtually non-existing.

44. The Court is therefore of the view, given all the circumstances of the case, that the expulsion of the applicant combined with a life-long ban on returning was disproportionate (see, notably, Ezzouhdi v. France, cited above, §§ 34-35; Keles v. Germany, cited above, § 66, and Bousarra v. France, cited above, §§ 53-54).

45. There has accordingly been a violation of Article 8 of the Convention."

I sagen *Nguyen v. Denmark (2024)*, der handlede om udvisning på grund af alvorlig kriminalitet, havde Østre Landsret om klagerens alder på 13 år ved indrejsen i opholdslandet udtalt:

"13. In respect of the expulsion order, the High Court reduced the re-entry ban to twelve years, and found as follows: "[The applicant] entered Denmark at the age of 13 and thus spent her childhood in Vietnam. […]"

Heroverfor udtalte EMD i præmis 28:

"28. […] The Court recognises that the domestic courts examined the relevant criteria thoroughly given that very serious reasons were required to justify the expulsion of the applicant, a settled migrant who had entered Denmark at the age of 13 and had been lawfully resident in the host country for most of her childhood and youth […]"

EMD fandt i den konkrete sag, at der var sket en krænkelse af EMRK artikel 8.

Der kan endvidere henvises til følgende sager:

- *Loukili v. the Netherlands (2023).*
- *Sharifi v. Denmark (2023)*.
- *Al-Masudi v. Denmark (2023)*.
- *Noorzae v. Denmark (2023).*
- *Goma v. Denmark (2023).*

4.2.2.2. Mindre alvorlig kriminalitet

I sagen *Maslov v. Austria (2008)* var klageren indrejst i opholdslandet som seksårig og var blevet udvist på grund af kriminalitet i form af mere end 40 kvalificerede indbrud, nogle i forbindelse med banderelationer, brugstyveri af køretøj og et enkelt tilfælde af vold. Klageren var mindreårig, da han begik disse forhold, og da afgørelsen om udvisning blev endelig. Medlemsstaten havde begrundet udvisningen med hensynet til forebyggelse af uro og forbrydelse. Klageren blev efterfølgende udsendt i en alder af 19 år. Klageren havde på dette tidspunkt ikke stiftet egen familie.

Efter i præmis 66 og 67 at have fastslået, at udvisningen var i overensstemmelse med loven og forfulgte et af de legitime hensyn, vurderede EMD, om indgrebet var nødvendigt i et demokratisk samfund. EMD henviste til de fundamentale principper, som er sammenfattet i Üner-dommen, og udtalte i præmis 70-75:

"70. The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Moreover, it has to be borne in mind that where, as in the present case, the interference with the applicant's rights under Article 8 pursues, as a legitimate aim, the "prevention of disorder or crime" (see paragraph 67 above), the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities.

71. In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family of his own, the relevant criteria are
– the nature and seriousness of the offence committed by the applicant;
– the length of the applicant's stay in the country from which he or she is to be expelled;
– the time elapsed since the offence was committed and the applicant's conduct during that period; and
– the solidity of social, cultural and family ties with the host country and with the country of destination.

72. The Court would also clarify that the age of the person concerned can play a role when applying some of the above criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult (see, for instance, Moustaquim v. Belgium, 18 February 1991, § 44, Series A no. 193, and Radovanovic v. Austria, no. 42703/98, § 35, 22 April 2004).

73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec(2000)15 and Rec(2002)4 (see paragraphs 34-35 above).

74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see Üner, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there (see Üner, § 58 in fine).

75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

Herefter gennemgik EMD i præmis 77-80 karakteren og alvorligheden af den af klageren begåede kriminalitet og udtalte i præmis 81 blandt andet:

"81. In the Court's view, the decisive feature of the present case is the young age at which the applicant committed the offences and, with one exception, their non-violent nature. This also clearly distinguishes the present case from Boultif and Üner […]."

I denne sammenhæng gennemgik EMD i præmis 82-83 de situationer, hvor princippet om barnets tarv skal finde anvendelse, og hvilke forpligtelser anvendelsen af dette princip indebærer.

I præmis 84-85 udtalte EMD om forskellen i vurderingen af sager, hvor en mindreårig har begået ikke-voldelig kriminalitet, over for sager, hvor mindreårige har begået meget alvorlige voldelige forbrydelser:

"84. In sum, the Court sees little room for justifying an expulsion of a settled migrant on account of mostly non-violent offences committed when a minor (see Moustaquim, cited above, § 44, concerning an applicant who had been convicted of offences committed as a juvenile, namely numerous counts of aggravated theft, one count each of handling stolen goods and destruction of a vehicle, two counts of assault and one count of threatening behaviour, and Jakupovic v. Austria, no. 36757/97, § 27, 6 February 2003, in which the exclusion order was based on two convictions for burglary committed when a minor and where, in addition, the applicant was still a minor when he was expelled).

85. Conversely, the Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Bouchelkia, cited above, § 51, where the Court found no violation of Article 8 as regards a deportation order made on the basis of the applicant's conviction of aggravated rape committed at the age of 17; in the decisions Hizir Kilic v. Denmark (dec.), no. 20277/05, and Ferhat Kilic v. Denmark (dec.), no. 20730/05, both of 22 January 2007, the Court declared inadmissible the applicants' complaints about exclusion orders imposed following their convictions for attempted robbery, aggravated assault and manslaughter committed at the age of 16 and 17 respectively)."

Om klagerens alder ved indrejse i opholdslandet konstaterede EMD i præmis 86:

"The applicant came to Austria in 1990, at the age of six, and spent the rest of his childhood and youth there. He was lawfully resident in Austria with his parents and siblings and was granted a permanent-settlement permit in March 1999."

I præmis 87-95 gennemgik EMD den forløbne tid efter begåelsen af kriminaliteten og klagernes opførsel i den periode.

Vedrørende fastheden af de sociale, kulturelle og familiære bånd i opholdslandet og i hjemlandet udtalte EMD i præmis 96-97:

"96. The Court observes that the applicant spent the formative years of his childhood and youth in Austria. He speaks German and received his entire schooling in Austria where all his close family members live. He therefore has his principal social, cultural and family ties in Austria.

97. As to the applicant's ties with his country of origin, the Court notes that he has convincingly explained that he did not speak Bulgarian at the time of his expulsion as his family belonged to the Turkish minority in Bulgaria. It was not disputed that he was unable to read or write Cyrillic as he had never gone to school in Bulgaria. It has not been shown, nor even alleged, that he had any other close ties with his country of origin."

Endelig forholdt EMD sig i præmis 98 til varigheden af det meddelte indrejseforbud.

EMD konkluderede i præmis 100-101, at:

"100. Having regard to the foregoing considerations, in particular the – with one exception – non-violent nature of the offences committed when a minor and the State's duty to facilitate his reintegration into society, the length of the applicant's lawful residence in Austria, his family, social and linguistic ties with Austria and the lack of proven ties with his country of origin, the Court finds that the imposition of an exclusion order, even of a limited duration, was disproportionate to the legitimate aim pursued, 'the prevention of disorder or crime'. It was therefore not 'necessary in a democratic society'.

101. Consequently, there has been a violation of Article 8 of the Convention."

I sagen *Miah v. the United Kingdom (2010)* indrejste klageren i opholdslandet som 11-årig og tog ophold hos sin far, dennes nye ægtefælle samt sine to brødre. Da klageren var 14 år gammel, døde faren. Som 19-årig blev han idømt to års fængsel på en institution for ungdomskriminelle for indbrud og tyveri. Klageren blev efterfølgende flere gange idømt bøder for bl.a. tyveri. Da klageren var 26 år gammel, blev han idømt 12 måneders fængsel for tyveri, og samme år blev han udvist. Klageren havde indtil fængslingen boet hjemme hos stedmoren og havde til hensigt at flytte hjem igen efter løsladelsen. Klageren blev året efter udsendt til Bangladesh.

Efter at have gengivet Storkammerets vurderinger i *Maslov*-dommen, udtalte EMD i præmis 25:

"Turning to the present case, the Court accepts that the applicant has spent a significant period of time in the United Kingdom and that the majority of his social, cultural and family ties are there rather than in Bangladesh. However, despite the relatively young age at which he arrived in the United Kingdom, the Court is not persuaded that he has severed all links to Bangladesh. His mother still lives Bangladesh and, as the Tribunal found, he would be able to rely on her and any extended family for support. In contrast to Mr Maslov, the present applicant speaks the language of his country of origin. Although both Mr Maslov and the applicant were convicted of mostly non-violent offences, the applicant's offences are of a quite different character. With the exception of the first burglary offence, they were all committed when the applicant was an adult and there cannot be the same duty to facilitate the reintegration of an adult offender rather than deport him as there would be for a juvenile offender who is convicted of the same offences. The applicant's offences appear to have been committed in order to fund a drug addiction, a factor which must go some way to mitigating if not the seriousness of the offences then at least the sentences imposed. Indeed, the domestic courts have made efforts to rehabilitate the applicant by imposing a series of non-custodial sentences. Nonetheless, by the time of the final offence, they were entitled to take the view that further such efforts would be inappropriate. Therefore, while the applicant is correct to observe that his final sentence of twelve months' imprisonment was at the lower end of the scale to which a presumption in favour of deportation would apply, the domestic authorities were entitled to take into account that this was the last in a series of offences and that

the applicant had failed to respond to other, less severe sentences. Finally, while the duration of the deportation imposed on the applicant is of the same duration as that imposed in Maslov, it does not exclude him from the United Kingdom for as much time as he spent there and does not do so for a decisive period in his life. The Court therefore finds that the domestic authorities have not exceeded the margin of appreciation afforded to them in such cases. A fair balance has been struck in this case and the Court therefore agrees with the Tribunal that the applicant's deportation was proportionate to the legitimate aim pursued. Accordingly, this part of the application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention."

EMD afviste derefter sagen som inadmissible.

I sagen *Radovanovic v. Austria (2004)* var klageren kort efter fødslen i opholdslandet flyttet til hjemlandet, hvor han boede hos sine bedsteforældre og gik i skole. Som tiårig vendte han tilbage til sine forældre og sin søster i opholdslandet, hvor han færdiggjorde skolen og blev udlært som slagter. Som mindreårig begik han kriminalitet i form af blandt andet groft røveri og indbrud og blev idømt 30 måneders fængsel, heraf 24 betinget, og udvist for bestandig. Efter at have afsonet fængselsstraffen blev klageren i det år, han fyldte 19 år, udsendt til hjemlandet.

EMD bemærkede i præmis 33:

"The Court notes that the applicant, a single young adult at the time of his expulsion, is not a second generation immigrant as, despite his birth in Austria, he did not permanently live there until the age of ten. Given the young age at which he arrived, the Court will nevertheless assess the necessity of the interference by applying the same criteria it usually applies in cases of second generation immigrants who have not yet founded a family of their own in the host country. These criteria, so far as material, are the nature and gravity of the offence committed by the applicant and the length of his stay in the host country. In addition the applicant's family ties and the social ties he established in the host country by receiving his schooling and by spending the decisive years of his youth there are to be taken into account (see Benhebba v. France, no. 53441/99, §§ 32-33, 15 June 2003)."

EMD sammenholdt i præmis 34 sagen med en række sager, hvor der ikke var sket krænkelse af artikel 8, om udvisning af second generation immigrants, som var ankommet til opholdslandet i en ung alder og var idømt langvarige ubetingede fængselsstraffe for alvorlig kriminalitet i form af narkotikakriminalitet, som EMD ser med alvor på. Trods den kortere varighed af klagerens ophold i opholdslandet tillagde EMD det stor vægt, at selvom der var tale om groft røveri, var klageren kun idømt seks måneders ubetinget fængsel. Uden at underkende kriminalitetens grovhed noterede EMD sig, at klageren havde været mindreårig, at han ikke var tidligere straffet og at hovedparten af den relativt lange straf var gjort betinget. Derfor kunne EMD ikke tilslutte sig de nationale myndigheders vurdering af, at klageren udgjorde en sådan fare for public order, at det nødvendiggjorde indgrebet, jf. præmis 35.

Herefter udtalte EMD i præmis 36-38:

"36. Given the applicant's birth in Austria, where he later also completed his secondary education and vocational training while living with his family, and also taking into account that his family had already lawfully stayed in Austria for a long time and that the applicant himself had an unlimited residence permit when he

committed the offence, and considering that, after the death of his grandparents in Serbia and Montenegro, he no longer has any relatives there, the Court finds that his family and social ties with Austria were much stronger than with Serbia and Montenegro.

37. The Court therefore considers that, in the circumstances of the present case, the imposition of a residence prohibition of unlimited duration was an overly rigorous measure. A less intrusive measure, such as a residence prohibition of a limited duration would have sufficed. The Court thus concludes that the Austrian authorities, by imposing a residence prohibtion of unlimited duration against the applicant, have not struck a fair balance between the interests involved and that the means employed were disproportionate to the aim pursued in the circumstances of the case (see mutatis mutandis, Ezzouhdi, cited above, § 35; and Yilmaz, cited above, §§ 48-49).

38. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Jakupovic v. Austria (2003)* blev klageren to gange idømt fængselsstraf af henholdsvis fem måneders og ti ugers varighed, begge udsat i en prøveperiode på tre år, for mindre alvorlig kriminalitet, herunder indbrud og tyveri. Han blev endvidere udvist med indrejseforbud i ti år. Klageren var indrejst i opholdslandet som 11-årig og var på tidspunktet, hvor udvisningsafgørelsen blev endelig, 16 år. Han blev udsendt det samme år, som han fyldte 18 år.

I præmis 28-30 udtalte EMD:

"28. The Court observes that at the time of the expulsion the applicant had not been in Austria for a long time – just four years. Furthermore his situation was not comparable to that of a second generation immigrant, as he had arrived in Austria at the age of eleven, had previously attended school in his country of origin and must therefore have been well acquainted with its language and culture. However, the residence prohibition seriously upset his private and family life: he had arrived in Austria with his brother to join his mother and the new family she had founded there and has apparently no close relatives in Bosnia. The applicant's father remained in Bosnia, a fact which is emphasised by the Government, but the applicant points out that he last saw his father in 1988 and the father has been reported missing since the end of the armed conflict in that country.

29. Thus, the Court considers that very weighty reasons have to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which has recently experienced a period of armed conflict with all its adverse effects on living conditions and with no evidence of close relatives living there.

30. The Government rely in this respect on the applicant's criminal record. The Court finds that this record, which is the essential element of justification for the expulsion, must be examined very carefully. It consists of two convictions for burglary. The Court cannot find that these convictions – even taking into account a further set of criminal proceedings which were discontinued after the victim had been compensated by the applicant – for which the Austrian courts had only imposed conditional sentences of imprisonment can be considered particularly serious as these offences did not involve elements of violence. The only element which may indicate any tendency of the applicant towards violent behaviour was a prohibition to possess arms issued in May 1995. Although the seriousness of such a measure should not be underestimated, it cannot be compared to a

conviction for an act of violence, and there is no indication that such charges have ever been brought against the applicant."

EMD udtalte i præmis 32, at:

"Taking all the above elements into account, the Court finds that by imposing the residence prohibition in the particular circumstances of the case, the Austrian authorities have overstepped their margin of appreciation under Article 8 as the reasons in support of the necessity of the residence prohibition are not sufficiently weighty. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued."

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis 5 og 6 måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden.

EMD udtalte i præmis 56 vedrørende klagerens alder ved ankomsten til opholdslandet:

"The Court notes that the applicant is not a so-called "second generation immigrant" as he first entered Germany at the age of ten. Given the relatively young age at which he arrived, the Court will nevertheless assess the necessity of the interference by applying criteria which are similar to those it usually applies in cases of second generation immigrants (see Radovanovic v. Austria, no. 42703/98, § 33, 22 April 2004; Üner v. the Netherlands, no. 46410/99, § 40, 5 July 2005)."

EMD gennemgik herefter i præmis 57 Boultif-kriterierne og udtalte i præmis 58:

"In addition, the Court will also take into account the particular ties which these immigrants have developed with the host country where they will have spent most of their life (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, § 36; Radovanovic, cited above, § 33; Üner, cited above, § 40)"

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som f.eks. narkotikahandel.

Vedrørende tilknytningen til opholdslandet udtalte EMD i præmis 61, at:

"With regard to the applicant's personal and family situation, the Court notes that the applicant, at the time of the expulsion order of 22 January 1999, had been lawfully residing in Germany for 27 years, having moved to that country at the age of ten in order to live there with his parents and brother and where he received his secondary school education. While the parties do not agree on the extent of the applicant's professional work, he had been employed for a certain period of that time. Since 1988 he had been in possession of a permanent residence permit. While it is true that the applicant and his wife had been separated during the first five years

of their marriage as the applicant's wife and their first son did not follow the applicant to Germany until 1989, the family had been living together in Germany for ten years and there is no indication that their marriage and family life was anything less than effective."

I præmis 62 udtalte EMD om klagerens tilknytning til hjemlandet:

"On the other hand, the Court is not persuaded that the applicant has become so estranged from the country where he spent the first ten years of his life that he would no longer be able to settle in Turkey, having regard to the fact that the applicant married his Turkish wife in Turkey, where their first son was born and that his wife and son did not follow him to Germany until 1989. It follows that the applicant must have entertained certain links to his country of origin at least until 1989. It can further be presumed that the applicant is familiar with the Turkish language, as he married a Turkish wife."

EMD gennemgik herefter i præmis 63-64 spørgsmålet om, hvorvidt klagerens ægtefælle og børn med rimelighed kunne forventes at følge med klageren til hjemlandet, og fandt, at børnene ville møde store vanskeligheder ved omplantning til det tyrkiske skolesystem. I præmis 65 gennemgik EMD spørgsmålet om den manglende tidsbegrænsning i klagerens indrejseforbud. Endelig udtalte EMD i præmis 66:

"The Court considers that the applicant's expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant's children could be expected to face if they followed him to Turkey, the Court considers that an unlimited exclusion from the German territory violates the applicant's rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention."

I sagen *Yildiz v. Austria (2002)* var den første klager indrejst i opholdslandet som 14-årig for at bo sammen med sine forældre og sine søskende. Han indledte et forhold til den anden klager, som var statsborger i den første klagers hjemland, men født og opvokset i opholdslandet. Nogle måneder senere traf opholdslandet afgørelse om udvisning af den første klager med indrejseforbud i fem år på baggrund af flere bødestraffe for tyveri og færdselslovsovertrædelser. Da udvisningsafgørelsen blev endelig, havde klagerne sammen fået et barn, den tredje klager. Klageren udrejste til hjemlandet, da barnet var knap to år gammelt. På tidspunktet for EMD's behandling af sagen boede han fortsat i hjemlandet. Den anden og tredje klager besøgte ham jævnligt, indtil parret blev skilt.

EMD udtalte i præmis 43, at:

"The Court will first examine the applicants' family situation and the length of their stay in Austria. It observes that the first applicant is not a second generation immigrant, i.e. a person who was born or has lived the main part of his life in the country from which he is going to be removed. He only came to Austria in 1989 at the age of fourteen and must therefore have links with his country of origin and in particular be able to speak Turkish. On the other hand, he was still an adolescent when he came to Austria, where his close family was and is still living. In December 1996, when the Administrative Court confirmed the residence ban against him, he had been living in Austria for seven years, he had been working there and had been co-habiting for a little less than three years with the second applicant, who is also a Turkish national but was born in Austria and

has lived there all her life. Their daughter, the third applicant, was one year and four months old at the material time. In fact, the Austrian authorities issuing the residence ban acknowledged that the first applicant had reached a high degree of integration in Austria. Nevertheless, the Court considers that, as regards the possible effects of the residence ban on his family life, the authorities failed to establish whether the second applicant could be expected to follow him to Turkey, in particular whether she spoke Turkish and maintained any links, other than her nationality, with that country."

I præmis 44 fastslog EMD, at vurderingen af, om indrejseforbuddet udgjorde en krænkelse af artikel 8, skulle foretages på baggrund af de forhold, der gjorde sig gældende, da indrejseforbuddet blev endeligt, uanset at klagerne efterfølgende var blevet skilt, og deres familiesituation således var anderledes på tidspunktet for EMD's behandling af sagen. I præmis 45- 46 udtalte EMD:

"45. Next, the Court will turn to the offences committed by the first applicant, as their gravity is an essential element for assessing the proportionality of the interference with the applicants' family life. The Court notes that in 1993 the first applicant, who was then still a minor, was convicted twice by the criminal courts, once for shop-lifting with a sentence of three days' imprisonment suspended on probation, and once for theft without a sentence being pronounced. Between 1992 and April 1994 he was convicted seven times of traffic offences, in particular driving without a license and once ignoring a red light and high speeding. The fines imposed on him amounted to a total sum of ATS 28,000 (equivalent to EUR 2,035). In sum, the Court finds that these offences were not negligible. However, as is shown by the modest penalties imposed, the domestic authorities considered them to be of a minor nature. Moreover, the first applicant did not commit any further offences between April 1994 and December 1996, when the residence ban proceedings were terminated. Thus, in the Court's view the authorities' fear that he constituted a danger to public order and security in that would commit further offences is mitigated by the particular circumstances of the case (see Boultif v. Switzerland, cited above, § 51, with further references).

46. Having regard to all these elements, the Court considers that the authorities failed to strike a fair balance between the different interests involved and that the interference with the applicants' right to respect for their family life was not proportionate to the legitimate aim pursued.

Accordingly, there has been a breach of Article 8 of the Convention."

4.2.2.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Nunez v. Norway (2009)* havde klageren opnået sin opholdstilladelse på baggrund af svig. Da opholdstilladelsen blev inddraget, havde hun opholdt sig i opholdslandet fra hun var 21 til hun var 26 år, i alt fem år, og havde stiftet familie i opholdslandet ved at gifte sig og få børn.

EMD slog indledningsvis fast, at forholdet mellem klageren og hendes børn udgjorde "familieliv" i artikel 8's forstand.

EMD udtalte i præmis 71-73, at henset til hensynene bag den nationale lovgivning og de nationale myndigheders afgørelse i sagen fandt EMD, at statens interesse i at udsende klageren vejede tungt i proportionalitetsafvejningen.

I præmis 74 konstaterede EMD, at klageren ved sin indrejse i opholdslandet var voksen:

"The Court further observes that when the applicant re-entered Norway in breach of the re-entry ban in July 1996, she was an adult and had no links to the country. Whilst aware that she had re-entered illegally, she married a Norwegian national in October 1996. In April 2001 they separated. From the spring 2001 she co-habited with Mr O. and two daughters were born by the couple in June 2002 and December 2003, respectively. In the Court's view, at no stage from her re-entering Norway illegally in July 1996 until being put on notice in January 2002 (see paragraph 11 above) could she reasonably had entertained any expectation of being able to remain in the country."

Om betydningen af klagers alder ved indrejsen udtalte EMD i præmis 76, at:

"Moreover, when the applicant arrived in Norway at the age of twenty-one, she had lived all her life in the Dominican Republic. During her stay in Norway she co-habited from the spring of 2001 to October 2005 with Mr O. who was also a national of her home country. Her links to Norway could hardly be said to outweigh her attachment to her home country and, as noted above, had in any event been formed through unlawful residence and without any legitimate expectation of being able remain in the country."

Herefter gennemgik EMD i præmis 78-82 hensynet til barnets bedste og de nationale myndigheders lange sagsbehandlingstid og udtalte i præmis 83-85:

" 83. In light of the above, the Court shares the view of the Supreme Court's minority that the applicant's expulsion with a two-year re-entry ban would no doubt constitute a very far-reaching measure vis-à-vis the children.

84. Having regard to all of the above considerations, notably the children's long lasting and close bonds to their mother, the decision in the custody proceedings, the disruption and stress that the children had already experienced and the long period that elapsed before the immigration authorities took their decision to order the applicant's expulsion with a re-entry ban, the Court is not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention. Reference is made in this context also to Article 3 of the UN Convention on the Rights of the Child, according to which the best interests of the child shall be a primary consideration in all actions taken by public authorities concerning children (see Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, § 135, ECHR 2010-...). The Court is therefore not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicant's need to be able to remain in Norway in order to maintain her contact with her children in their best interests, on the other hand.

85. In sum, the Court concludes that the applicant's expulsion from Norway with a two-year re-entry ban would entail a violation of Article 8 of the Convention."

I sagen *Antwi and others v. Norway (2012)* havde klageren ligeledes opnået sin opholdstilladelse på baggrund af svig. Klageren var i opholdslandet blevet gift og havde fået et barn. Syv år efter indrejsen fik opholdslandet kendskab til hans reelle identitet og året efter blev han udvist fra opholdslandet.

EMD udtalte i præmis 90-91:

"90. In applying the above principles [fra Nunez-dommen, red.] to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Nunez, cited above, § 71, and Darren Omoregie and Others v. Norway, no. 265/07, § 67, 31 July 2008; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Nunez and Darren Omoregie and Others, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Nunez, cited above, § 73).

91. Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country"

I præmis 92 lagde EMD vægt på klagerens alder ved indrejsen i forhold til proportionalitetsvurderingen:

"Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country."

Efter at have gennemgået ægtefællens og datterens forhold, udtalte EMD i præmis 103-105:

"103. There being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion.

104. The above considerations are not altered by the duration of the prohibition on re-entry – five years. In this connection, the Court reiterates that in a comparable case, Darren Omoregie (cited above, §§ 63-68), it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case.

105. In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand.

Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban would not entail a violation of Article 8 of the Convention."

4.2.2.4. Ulovligt ophold

I sagen *Darren Omoregie a.o. v. Norway (2008)* var klageren indrejst som 22-årig og havde fået afslag på asyl, men undlod at efterkomme udrejsebeslutningen og arbejdede endvidere ulovligt i opholdslandet. Nogle måneder senere giftede han sig med en statsborger fra opholdslandet og søgte om familiesammenføring, hvilket blev afslået, og klageren blev på ny pålagt at udrejse, hvilket han ikke efterkom. Der blev endvidere truffet afgørelse om at udvise klageren med indrejseforbud i fem år med mulighed for genindrejse efter ansøgning allerede efter to år. Under domstolsbehandlingen af udvisningsafgørelsen blev klagerens ægtefælle gravid med deres fælles barn, som blev født fem år efter klagerens indrejse. Klageren fik på ny afslag på familiesammenføring og efter fem et halvt års ophold blev han udsendt.

Om klagerens alder på indrejsetidspunktet udtalte EMD i præmis 58, at:

"In this regard the Court first observes that when the first applicant arrived and applied for asylum in Norway on 25 August 2001, he was an adult and had no links to the country. His family links to the second and third applicants were formed at different stages during his stay in the country."

I præmis 59-63 gennemgik EMD klagerens opholdsretlige status på tidspunktet for og efter etableringen af familieliv i opholdslandet og hvorvidt denne kunne give klageren og ægtefællen anledning til at have berettigede forventninger med hensyn til mulighederne for klagerens fortsatte ophold i opholdslandet. I præmis 64 udtalte EMD:

"Against this background the Court does not consider that the first and second applicants, by confronting the Norwegian authorities with the first applicant's presence in the country as a fait accompli, were entitled to expect that any right of residence would be conferred upon him (see Roslina Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003; Yash Priya v. Denmark (dec.) 13594/03; 6 July 2006; cf. Rodrigues da Silva and Hoogkamer, cited above, § 43)."

Om tilknytningen til henholdsvis klagerens hjemland og opholdsland samt om indrejseforbuddets varighed udtalte EMD i præmis 66-68, at:

"66. It should further be noted that the first applicant had lived in Nigeria since he was six months old until he left the country at the age of 22, had studied at university for four years and had three brothers with whom he was still in contact. Whereas his links to Nigeria were particularly strong, his links to Norway were comparatively weak, apart from the family bounds he had formed there with the second and third applicants pending the proceedings. The third applicant was still of an adaptable age at the time when the disputed measures were decided and implemented (see Ajayi and Others, cited above; Sarumi, cited above; and Sezai

Demir c. France (dec.), no. 33736/03, 30 May 2006). The second applicant would probably experience some difficulties and inconveniences in settling in Nigeria, despite her experience from a period spent in another African country, South Africa, and the fact that English was also the official language of Nigeria. However, the Court does not find that there were insurmountable obstacles in the way of the applicants' developing family life in the first applicant's country of origin. In any event, nothing should prevent the second and third applicants from coming to visit the first applicant for periods in Nigeria.

67. Finally, the Court notes that the decision prohibiting the first applicant re-entry for five years was imposed as an administrative sanction, the purpose of which was to ensure that resilient immigrants do not undermine the effective implementation of rules on immigration control. Moreover, it was open to the first applicant to apply for re-entry already after two years.

68. Against this background, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed their margin of appreciation when deciding to expel the first applicant and to prohibit his re-entry for five years. The Court is not only satisfied that the impugned interference was supported by relevant and sufficient reasons but also that in reaching the disputed decision the domestic authorities struck a fair balance between the personal interests of the applicants on the one hand and the public interest in ensuring an effective implementation of immigration control on the other hand. In view of the first applicant's immigration status, the present case disclosed no exceptional circumstances requiring the respondent State to grant him a right of residence in Norway so as to enable the applicants to maintain and develop family life in that country. In sum, the Court finds that the national authorities could reasonably consider that the interference was "necessary" within the meaning of Article 8 § 2 of the Convention.
Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

EMD gennemgik præmis 47-49 sin praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem (pleje)forældre og unge voksne udgør privatliv eller tillige familieliv, og udtalte i præmis 50, at:

"50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham

lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage

by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

4.2.2.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Slivenko v. Latvia (2003)* var klagerne, som var af russisk oprindelse, blevet udsendt fra Letland under henvisning til, at de var familiemedlemmer til en russisk militærperson og derfor forpligtede til at forlade Letland i forbindelse med tilbagetrækningen af de russiske tropper fra Letland som følge af landets opnåelse af uafhængighed fra USSR. Sagen vedrørte klagernes privatliv, idet de havde levet hele eller hovedparten af deres liv i Letland.

EMD udtalte vedrørende spørgsmålet om, hvorvidt der forelå et indgreb i klagernes privatliv, i præmis 96:

"As regards the facts of the present case, the first applicant arrived in Latvia in 1959, when she was only one month old. Until 1999, by which time she was 40 years of age, she continued to live in Latvia. She attended school there, found employment and married. Her daughter, the second applicant, was born in Latvia in 1981 and lived there until the age of 18, when she was compelled to leave the country together with her mother, having just completed her secondary education (see paragraphs 16 and 46 above). It is undisputed that the applicants left Latvia against their own will, as a result of the unsuccessful outcome of the proceedings concerning the legality of their stay in Latvia. They were thus removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being. Furthermore, as a result of the removal, the applicants lost the flat in which they had lived in Riga (see paragraphs 32 and 46 above). In these circumstances, the Court cannot but find that the applicants' removal from Latvia constituted an interference with their "private life" and their "home" within the meaning of Article 8 § 1 of the Convention."

EMD gennemgik i præmis 116-118 nogle overordnede betragtninger vedrørende tilbagetrækning af fremmede tropper fra en uafhængig stat i forhold til aktivt tjenestegørende og pensionerede militærpersoner og deres familier. I præmis 119 fastslog EMD, at klagernes ægtefælle/far var pensioneret på tidspunktet for

sagen om lovligheden af klagernes fortsatte ophold i Letland. I præmis 120-121 konstaterede EMD, at der i visse situationer var mulighed for dispensation fra kravet om at forlade Letland, og i præmis 122 udtalte EMD, at spørgsmålet om, hvorvidt en udsendelse i lyset af klagernes personlige situation var proportional med det legitime formål: statens sikkerhed, måtte afgøres på baggrund af sagens konkrete omstændigheder. EMD udtalte herom i præmis 123-125:

"123. The respondent Government argued that the applicants had not been sufficiently integrated into Latvian society (see paragraph 88 above). In this connection the Court observes that the applicants have spent virtually all their lives in Latvia (see paragraph 96 above). It is true that the applicants are not of Latvian origin, and that they arrived and lived in Latvia – then part of the USSR – in connection with the service of members of their family (the first applicant's father and her husband) in the Soviet armed forces. However, the applicants also developed personal, social and economic ties in Latvia unrelated to their status as relatives of Soviet (and later Russian) military officers. This is shown by the fact that the applicants did not live in army barracks or any other restricted area, but in a block of flats in which there were also civilians. Nor did they study or work in a military institution. The first applicant was able to find employment in Latvian companies after Latvia regained its independence in 1991.

124. As regards the respondent Government's argument about the level of the applicants' proficiency in Latvian, the Court observes that, in so far as this is a relevant consideration, it has not been shown that the degree of the applicants' fluency in the language – although the precise level is in dispute – was insufficient for them to lead a normal everyday life in Latvia. In particular, there is no evidence that the level of the applicants' knowledge of Latvian was in any way different from that of other native Russian speakers living in Latvia, including those who were able to obtain the status of "ex-USSR citizens" in order to remain in Latvia on a permanent basis.

125. Although in 1999 the applicants moved to Russia to join Nikolay Slivenko and eventually obtained Russian citizenship, by that time they had apparently not developed personal, social or economic ties in Russia similar to those they had established in Latvia. In short, the Court finds that at the relevant time the applicants were sufficiently integrated into Latvian society."

I præmis 126-127 gennemgik EMD det af regeringen påberåbte argument for forskelsbehandlingen af klagerne, at det havde betydning for den nationale sikkerhed, at den første klager var kommet til Letland som medlem af en familie til en sovjetisk militærofficer (den første klagers far/den anden klagers bedstefar).

EMD udtalte i præmis 128-129:

"128. Having regard to all the circumstances, the Court considers that the Latvian authorities overstepped the margin of appreciation enjoyed by the Contracting Parties in such a matter, and that they failed to strike a fair balance between the legitimate aim of the protection of national security and the interest of the protection of the applicants' rights under Article 8. Therefore, the applicants' removal from the territory of Latvia cannot be regarded as having been 'necessary in a democratic society'.

129. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Osman v. Denmark (2011)* ansås klagerens opholdstilladelse i medlemsstaten som bortfaldet som følge af hendes langvarige ophold i familiens tidligere opholdsland Kenya. Klageren, der var somalisk statsborger, havde boet i Kenya fra hun var tre-fire år, indtil hun som syvårig indrejste i opholdslandet som familiesammenført. Hun havde herefter opholdt sig i opholdslandet, indtil hun som 15-årig af forældrene blev sendt tilbage til Kenya. Kort tid før hun fyldte 18 år, kontaktede klageren den danske ambassade i Kenya med henblik på at kunne vende tilbage til sin familie i opholdslandet, hvilket blev afslået af de danske myndigheder. Hun indrejse herefter som 19-årig i medlemsstaten, hvor hun ikke længere havde lovligt ophold.

Vedrørende klagerens tidligere lovlige ophold i opholdslandet udtalte EMD i præmis 65 og 67-68, at:

"65. It also reiterates that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in a host country, very serious reasons are required to justify expulsion (see, Maslov v. Austria [GC], quoted above, § 75). In the present case the applicant was refused restoration of her lapsed residence permit, as opposed to being expelled due to having committed a crime. Nevertheless, it is undisputed that she spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old, that she spoke Danish, that she had received schooling in Denmark until August 2002, and that all her close family remained in Denmark. In these circumstances, the Court also considers that very serious reasons were required to justify the authorities' refusal to restore the applicant's residence permit, when she applied from Kenya in August 2005.

…

67. The Court does not question that the said legislation was accessible and foreseeable and pursued a legitimate aim. The crucial issue remains though whether, in the circumstances of the present case, the refusal to reinstate the applicant's residence permit was proportionate to the aim pursued.

68. The Court notes in particular that the applicant was granted a residence permit in Denmark in November 1994 and subsequently entered the country in February 1995, when she was seven year old. Moreover, at the relevant time the applicant had already legally spent more than eight formative years of her childhood and youth in Denmark before, at the age of fifteen, she was sent to Kenya, which was not her native country. The case thus differs significantly from Ebrahim and Ebrahim v. the Netherlands (dec.) of 18 March 2003, in which the first applicant entered the Netherlands with his family when he was ten years old and applied for asylum or a residence permit. When the boy was thirteen years old, serious tensions had developed between him and his stepfather who disapproved of the boy's behaviour in the Netherlands. Therefore, the boy was returned to Lebanon to stay with his maternal grandmother in a refugee camp to become acquainted with his native country. Neither the boy nor any members of his family had at that time been granted a residence permit in the Netherlands. After three years in Lebanon, having reached the age of sixteen, the boy applied in vain to return to the Netherlands. The Court stated specifically in that case that " that due consideration should be given to cases where a parent has achieved settled status in a country and wants to be reunited with her child who, for the time being, finds himself in the country of origin, and that it may be unreasonable to force the parent to choose between giving up the position which she has acquired in the country of settlement or to

renounce the mutual enjoyment by parent and child of each other's company, which constitutes a fundamental element of family life (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A no. 94, § 68). The issue must therefore be examined not only from the point of view of immigration and residence, but also with regard to the mutual interests of the applicants"."

I præmis 69-75 udtalte EMD sig om hensynet til børns ret til respekt for privat- og familieliv i forhold til den danske lovgivning om genopdragelsesrejser og forældremyndighedsindehaverens rolle, hvorefter EMD i præmis 76-77 udtalte:

"76. Having regard to all the above circumstances, it cannot be said that the applicant's interests have sufficiently been taken into account in the authorities' refusal to reinstate her residence permit in Denmark or that a fair balance was struck between the applicants' interests on the one hand and the State's interest in controlling immigration on the other.

77. There has accordingly been a violation of Article 8 of the Convention."

4.2.3. Klagerens skolegang og uddannelse i opholdslandet

EMD har i flere sager inddraget klagerens skolegang og uddannelse i opholdslandet som et ud af flere momenter ved vurderingen af klagerens tilknytning til det pågældende land.

Som anført i afsnit 3.3.3.2 afhænger vægtningen af de enkelte elementer i proportionalitetsafvejningen af de konkrete omstændigheder i hver enkelt sag, se f.eks. Maslov v. Austria (2008), hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[8] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

4.2.3.1. Alvorlig kriminalitet

I sagen *A.A. v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som 13-årig sammen med sine to søstre som familiesammenført til deres mor. To år senere blev han som 15-årig idømt fire års tilbageholdelse på en ungdomsinstitution for voldtægt begået mod en mindreårig, men blev løsladt tidligere på grund af god opførsel. Fem år efter den begåede kriminalitet blev klagerens udvisningsafgørelse endelig. Da EMD behandlede sagen, havde klageren opholdt sig i opholdslandet i 11 år. Han boede hos sin mor og besøgte sine to søstre regelmæssigt.

I præmis 46-50 gennemgik EMD sin hidtidige praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem myndige børn og forældre udgør privatliv og/eller familieliv. EMD udtalte i præmis 49:

"49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life". However, it is not necessary to decide the question given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Thus, regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is

[8] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

appropriate to focus on "family life" rather than "private life", it observes that in practice the factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged (Üner, cited above, §§ 57-60).

EMD konstaterede i præmis 51-55, at indgrebet var i overensstemmelse med loven og forfulgte et af de legitime hensyn.

Ved vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund, gennemgik EMD i præmis 56 kriterierne som sammenfattet i Üner-dommen og udtalte på den baggrund i præmis 57-58, at de nationale domstole i hver enkelt sag må vurdere, hvilken vægt der skal tillægges de enkelte elementer i foretagelsen af den konkrete afvejning, indenfor staternes margin of appreciation. Om de relevante elementer i den foreliggende sag udtalte EMD i præmis 59-64:

"59. In the present case, the Court considers the relevant factors to be the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in United Kingdom; the time which has elapsed since the offence was committed and the applicant's conduct during that period; and the solidity of social, cultural and family ties with the host country and with the country of destination.

60. The Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Maslov, cited above, § 85). There can be no doubt that the applicant's offence was a serious one and the Court considers the comments of the sentencing judge as to the applicant's conduct and the effect of the attack on the victim to be relevant factors to be taken into account (see paragraph 8 above). The sentence imposed – four years in a Young Offenders' Institution – demonstrates the gravity of the offence. However, the fact that the applicant was a minor at the time the offence was committed is a relevant consideration in assessing the proportionality of a deportation (see Maslov, cited above, § 72). In this regard, the Court recalls that where offences committed by a minor underlie an exclusion order, regard must be had to the best interests of the child. In particular, the obligation to take the best interests of the child into account includes an obligation to facilitate his reintegration, an aim that the Court has previously held will not be achieved by severing family or social ties through expulsion (see Maslov, cited above, §§ 82-83).

61. The Court observes that the total length of the applicant's stay in the United Kingdom to date is eleven years. He arrived in the country at the age of 13 and has therefore now spent almost half his life in the United Kingdom. The Court notes that the applicant committed the offence which rendered him liable to deportation less than two years after his arrival in the United Kingdom. Further, following his conviction, he spent some two years in detention, during which time he was served with a deportation order. While the applicant was granted Indefinite Leave to Remain during this period, the Court is persuaded by the Government's submissions that leave was granted in ignorance of the applicant's conviction and, as a result, considers that no significance can be attached to the fact that Indefinite Leave to Remain was granted following the conviction (compare and contrast Omojudi, cited above, § 42). It is also true that the applicant has been aware since July 2003 of the fact that he was liable to be deported on account of his conviction. However, the Court nonetheless observes that he has now spent seven years at liberty in the United Kingdom following his release and despite having exhausted appeal rights in January 2008, no steps appear to have been taken in respect of his deportation until September 2010 (see paragraphs 23-25 above).

62. As to the lapse of time and the applicant's conduct since commission of the offence in 2002, the Court observes at the outset that the applicant has committed no further offences. While in detention, the applicant took advantage of the educational opportunities available to him and obtained a number of high school qualifications (see paragraph 11 above). At the time of his release from detention in August 2004, his risk of reoffending was assessed to be low (see paragraph 11 above), an assessment subsequently reiterated by his probation officer in 2005 and accepted by the AIT in 2007 (see paragraphs 15 and 20 above). Since his release, the applicant's conduct appears to have been exemplary. He enrolled in college in September 2004 in order to sit his A-level examinations, which he obtained in summer 2005 (see paragraph 14 above). He was subsequently offered a place at university to study towards an undergraduate degree, which he obtained in 2008, followed by a postgraduate degree, which he completed in 2009 (see paragraphs 18 and 24 above). He commenced stable employment with a local authority in 2010 (see paragraph 24 above).

63. The Government have not pointed to any concern regarding the applicant's conduct in the seven years since his release from prison and rely solely on the seriousness of the offence to justify concerns as to his continued presence in the United Kingdom and his risk to the public (see paragraphs 41-42 and 44 above). The Court reiterates that the factors to be taken into consideration in cases involving deportation following a criminal offence are partially designed to evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities (see paragraph 57 above). In particular, the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has an impact on the assessment of the risk which the applicant poses to society (see Boultif, cited above, § 51; Maslov, cited above, § 90; and A.W. Khan, cited above, § 41). Accordingly, the Court considers the present factor to be of particular importance when assessing whether the seriousness of the offence in itself is sufficient to justify the applicant's deportation for the prevention of disorder or crime.

64. Finally, as regards the applicant's ties with the United Kingdom and with Nigeria, the Court observes that the applicant continues to reside with his mother and has close relationships with his two sisters and an uncle, all of whom reside in England. He has completed the majority of his high school and further education in the United Kingdom and has now commenced a career with a local authority in London. He is also a member of a church community. While he spent a significant period of his childhood in Nigeria, he has now not visited the country for eleven years. He has had no contact with his father since 1991".

I præmis 65-68 gennemgik EMD betydningen af opholdslandets passivitet i forhold til at udsende klageren i overensstemmelse med den trufne udvisningsafgørelse og redegjorde for baggrunden for at inddrage forhold indtruffet og klagerens opførsel i perioden efter denne afgørelse i sin afvejning, herunder vigtigheden af at facilitere reintegration af unge lovovertrædere i samfundet.

Herefter konkluderede EMD i præmis 69-70:

"69. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's deportation from the United Kingdom would be disproportionate to the legitimate aim of the "prevention of disorder and crime" and would therefore not be necessary in a democratic society.

70. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Nigeria."

I sagen *A.H. Khan v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som syvårig og var tidligere blevet dømt for samleje med en mindreårig, to forsøg på røveri samt overfald. Som 30-årig blev han ydermere idømt fem års fængsel for røveri og udvist. Klageren blev udsendt ni år efter sin sidste dom. På tidspunktet for EMD´s afgørelse var han far til seks børn i alderen fra 12 til 17 år. Klageren var på daværende tidspunkt ikke i et forhold med mødrene til sine børn.

EMD udtalte i præmis 37, at:

"[…] the Court finds that, on balance, the applicant lived in the United Kingdom from 1978, when he was aged seven, returning to Pakistan only for visits. It is therefore accepted that he has lived in the United Kingdom since an early age, a factor which means that serious reasons would be required before his deportation could be found to be proportionate (see Maslov v. Austria [GC], no. 1638/03, § 75, 23 June 2008)."

EMD fandt den af klageren begåede kriminalitet alvorlig og fremhævede, at det forhold, at han havde begået kriminalitet igen kort tid efter løsladelsen, viste, at han ikke var rehabiliteret og derfor fortsat udgjorde en fare for offentligheden, hvorfor der var gode grunde til at udsende ham.

I præmis 39 udtalte EMD:

"The Court must now consider the applicant's circumstances in the United Kingdom, with a view to determining whether his family and private life, and his consequent level of integration into British society, were such as to outweigh the seriousness of his criminal history. […]"

Herefter gennemgik EMD klagerens familieforhold, hvorefter EMD udtalte i præmis 41:

"Finally, the Court turns to the question of the respective solidity of the applicant's ties to the United Kingdom and to Pakistan. The Court notes that, unlike his younger brother, the applicant returned to Pakistan for visits following his arrival in the United Kingdom and also married there. In the absence of any evidence to the contrary, the Court assumes that this marriage is still, legally at least, subsisting. The applicant therefore maintained some level of connection to his country of origin and was not deported as a stranger to the country. As regards his ties to the United Kingdom, the Court has addressed the question of his family life, both with his parents and siblings and with his various partners and children, above, and found it to be limited in its extent. Furthermore, the applicant's private life in the United Kingdom, as observed by the Tribunal, has been constrained by his convictions and spells in prison. Whilst he was mainly educated in the United Kingdom and has worked, he does not appear to have established a lengthy or consistent employment history. In short, and despite the length of his stay, the applicant did not achieve a significant level of integration into British society. The Court is aware that, as a settled migrant who spent much of his childhood in the United Kingdom, serious reasons would be required to render the applicant's deportation proportionate (see Maslov, cited above, § 75). However, having regard to his substantial offending history, including offences of violence and recidivism following the commencement of deportation proceedings against him, the Court is of the view that such serious reasons are present in the applicant's case. His private and family life in the United Kingdom were not such as to outweigh the risk he presented of future offending and harm to the public and his deportation was therefore proportionate to the legitimate aim of preventing crime. As such, the applicant's deportation to Pakistan did not amount to a violation of Article 8."

I sagen *El Boujaïdi v. France (1997)* var klageren indrejst i opholdslandet som syvårig. Han blev idømt seks års fængsel og udvist med indrejseforbud for bestandig for narkotikakriminalitet begået da han var 19 år. Efter at være blevet løsladt da han var 24 år, blev klageren på ny anholdt og idømt et års fængsel for forsøg på røveri og for ikke at være udrejst i overensstemmelse med udvisningen. Klageren blev udsendt, da han var 26 år gammel. På dette tidspunkt boede han sammen med en statsborger i opholdslandet, med hvem han havde fået et barn nogle måneder forud for udsendelsen. Mens der på tidspunktet, hvor udvisningsbeslutningen blev endelig, endnu ikke var etableret et forhold mellem klageren og samleversken og derfor ifølge EMD ikke bestod et "familieliv", der kunne tages i betragtning, udtalte EMD i præmis 33:

"However, the Court observes that he arrived in France in 1974 at the age of 7 and lived there until 26 August 1993. He received most of his schooling there and worked there for several years. In addition, his parents, his three sisters and his brother – with whom it was not contested that he had remained in contact – live there (see paragraph 7 above). Consequently, the Court is in no doubt that enforcement of the exclusion order amounted to interference with the applicant's right to respect for his private and family life."

Ved vurderingen af, om indrejseforbuddet var nødvendigt i et demokratisk samfund, udtalte EMD i præmis 40-41:

"40. The Court's task therefore consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

The Court notes that Mr El Boujaïdi arrived in France at the age of 7 and lived there lawfully from 1974 until 19 June 1991 (the date of his release – see paragraph 13 above). He received most of his education there, he worked there and his parents, his three sisters and his brother live there (see paragraph 7 above).

However, while he asserted that he had no close family in Morocco, he did not claim that he knew no Arabic or that he had never returned to Morocco before the exclusion order was enforced. It also seems that he has never shown any desire to acquire French nationality. Accordingly, even though most of his family and social ties are in France, it has not been established that he has lost all links with his country of origin other than his nationality. In addition, the applicant had a previous conviction – a sentence of thirty months' imprisonment having been imposed on him by the Annecy Criminal Court for heroin dealing in 1987 – when the Lyons Court of Appeal sentenced him to six years' imprisonment and ordered his permanent exclusion from French territory for drug use and drug trafficking (see paragraphs 10 and 11 above). Once he was released, and at a time when he was unlawfully present in France, he continued to lead a life of crime and committed an attempted robbery (see paragraph 13 above). The seriousness of the offence on account of which the measure in issue was imposed on the applicant and his subsequent conduct count heavily against him.

41. Having regard to the foregoing, the Court does not find that enforcement of the order for the applicant's permanent exclusion from French territory was disproportionate to the legitimate aims pursued. There has accordingly been no breach of Article 8."

I sagen *Loy v. Germany (2014)* var klageren indrejst i opholdslandet som femårig. Som 26-årig blev han idømt fire måneders betinget fængsel for vold mod sine børns mor og tre år senere blev han idømt et års betinget fængsel for vold på en natklub. To år senere blev han idømt to et halvt års fængsel for narkotikakriminalitet.

Det år, han fyldte 32 år, blev klageren udvist af opholdslandet med indrejseforbehold uden fastsat tidsbegrænsning, og to år senere blev han udsendt til hjemlandet. På udvisningstidspunktet var klageren skilt fra sin tidligere ægtefælle, som var statsborger i opholdslandet, og med hvem klageren havde fået to børn, som ligeledes var statsborgere i opholdslandet og 21 og 17 år gamle på tidspunktet for klagerens udvisning. Han giftede sig igen efter udvisningsdommen.

EMD konstaterede i præmis 28, at indgrebet var i overensstemmelse med lovgivningen og tjente et legitimt formål. Til brug for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund og proportionalt med det forfulgte hensyn, gennemgik EMD i præmis 30 kriterierne som sammenfattet i Üner- og Maslov-dommene og konstaterede derefter i præmis 31, at den af klageren begåede kriminalitet, som også omfattede narkotikakriminalitet, var alvorlig. I præmis 32 konstaterede EMD, at klageren havde boet næsten 30 år i opholdslandet og havde tidsubgrænset opholdstilladelse, da udvisningsafgørelsen blev endelig.

I præmis 34-36 fandt EMD med hensyn til karakteren af klagerens familieliv med henholdsvis børnene af det tidligere ægteskab, "that the applicant's family ties with his children were not very developed" og med den nuværende ægtefælle, at "Their family life, such as it was, was thus always against the background of pending expulsion proceedings. They separated soon after the marriage. In these circumstances, no decisive weight can be attached to the family relationship with his spouse."

Herefter udtalte EMD i præmis 37 om klagerens tilknytning til opholdslandet:

"The Court also looks for significant relations within the society of the host country (see Trabelsi, cited above, § 62; Mutlag, cited above, § 58; Lukic v. Germany (dec.), no. 25021/08, 20 September 2011) and notes that apart from mentioning that he went to school and completed a vocational training in Germany in his submissions the applicant submits nothing by way of evidence of his participation in social life apart from the length of his residence. Apart from referring to his children and his former spouse he made reference to the fact that his father, stepmother and siblings live in Germany. He claims that he has contact with his sister, but gives no further details. No information on other social contacts was provided. Therefore, in the present case only few significant relations can be established."

I præmis 38 gennemgik EMD klagerens tilknytning til hjemlandet og konstaterede, at han havde boet der, til han var fem år gammel, og at han angiveligt talte noget serbisk. I præmis 39 konstaterede EMD, at indrejseforbuddet ikke nødvendigvis behøvede at være permanent, idet klageren kunne søge om at få det tidsbegrænset.

I præmis 40 udtalte EMD, at:

"Against the background of the gravity of the applicant's drug related offence, together with the earlier crimes of violence committed by the applicant, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family and his private life reasonably against the State's interest in preventing disorder and crime. Appreciating the consequences of the expulsion for the applicant, the Court cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to impose this measure."

EMD afviste derefter sagen som *inadmissable*, idet klagen blev vurderet *manifestly ill-founded*.

I sagen *Alam v. Denmark (2017)* var klageren indrejst fra Pakistan som halvandetårig som familiesammenført til sin far. Som 30-årig blev hun idømt 16 års fængsel for manddrab og brandstiftelse og udvist for bestandig. Hun talte udover dansk også engelsk, tysk, pashto, urdu og punjabi. Hendes far var død, men hendes mor og fem søskende boede i Danmark og var danske statsborgere. Klageren havde tidligere været i Pakistan, hvor hun havde to halvsøskende, og hendes mor rejste ofte til Pakistan, hvor hun ejede et hus. Klagerens børn var på tidspunktet for EMD's behandling af sagen 16 og 13 år gamle. De talte dansk og den ældste også lidt pashto.

EMD udtalte i præmis 33, at:

"The Court recognises that the City Court made a thorough assessment of the applicant's personal circumstances, carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law (see paragraph 18 above). It specifically noted the children's age, which had significant importance when compared with the sentence imposed (see paragraphs 25 above and 34 below), and found that considerations for the applicant's children could not lead to another decision. [(…])"

Om de nationale domstoles vurdering af klagerens tilknytning til opholdslandet, bl.a. på baggrund af skolegang og uddannelse, samt til hjemlandet udtalte EMD videre i præmis 33, at:

"[…] It made an overall assessment, taking into account especially that the applicant had had all her upbringing, schooling and education in Denmark, that she had maintained a real attachment to Pakistan and Pakistani culture, that she had two children in Denmark, and that she had been convicted of very serious crimes. That balancing and proportionality test was approved by the High Court in its judgment of 4 September 2014 (see paragraph 20 above)."

Efter at have gennemgået spørgsmålet om klagerens børns mulige fortabelse af opholdstilladelse i præmis 34, udtalte EMD i præmis 35, at:

"Having regard to the above, the Court has no reason to call into question the conclusions reached by the domestic courts on the basis of the balancing exercise which they carried out. Those conclusions were neither arbitrary nor manifestly unreasonable. The Court is thus satisfied that the interference with the applicant's private and family life was supported by relevant and sufficient reasons and that her expulsion would not be disproportionate given all the circumstances of the case. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken

afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

EMD gennemgik præmis 47-49 sin praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem (pleje)forældre og unge voksne udgør privatliv eller tillige familieliv, og udtalte i præmis 50, at:

"50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og

han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had estab-

lished close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Savran v. Denmark (2021)* var klageren indrejst i opholdslandet som seksårig sammen med sin mor og sine søskende som familiesammenført til sin far. Klageren var som 16-årig blevet idømt et år og tre måneders fængsel, heraf ni måneder betinget, for røveri. Som 24-årig blev han fundet skyldig i vold med døden til følge begået tre år forinden, men fundet straffri som følge af psykisk sygdom. Han blev idømt retspsykiatrisk behandling samt udvist for bestandig. Fem år senere blev udvisningen prøvet og opretholdt, og klageren blev udsendt til sit hjemland.

Storkammeret udtalte i præmis 175:

"In the present case, the applicant arrived in Denmark at the age of six; he was educated and spent his formative years there; he was issued with a residence permit and remained lawfully resident in the country for fourteen years and eight months (see paragraphs 27 and 30 above). The Court thus accepts that he was a "settled migrant" and therefore Article 8 under its "private life" aspect is engaged."

I præmis 176-178 gennemgik EMD, om klagerens forhold til sin mor og sine søskende udgjorde familie- eller privatliv, og konkluderede, at der var tale om privatliv.

I præmis 179-180 udtalte Storkammeret, at afvisningen af at ophæve udvisningsbeslutningen udgjorde et indgreb i klagerens privatliv, og at indgrebet var hjemlet i lov og forfulgte et af de legitime hensyn, forebyggelse af uro og forbrydelse.

I præmis 181-189 gennemgik EMD de generelle principper vedrørende nødvendighedsvurderingen.

EMD bemærkede i præmis 190, at der var forløbet en betragtelig tid fra det tidspunkt, hvor udvisningsbeslutningen blev endelig, til tidspunktet for afgørelsen om eventuel ophævelse af udvisningsbeslutningen, og at det var op til de nationale domstole at lade alle relevante ændringer i klagerens forhold i denne periode indgå i vurderingen af, om det på tidspunktet for afgørelsen om eventuel ophævelse af udvisningsbeslutningen var proportionalt at udvise klageren, herunder særligt ændringer vedrørende hans opførsel og helbred.

EMD gennemgik i præmis 191-196 betydningen af klagerens helbredstilstand og i præmis 197 betydningen af de fremskridt, der var sket i klagerens opførsel i perioden mellem gerningstidspunktet og den endelige afgørelse vedrørende evt. ophævelse af udvisningen, jf. det tredje Maslov-kriterium, hvilket imidlertid ikke blev taget i betragtning ved de nationale domstoles vurdering af risikoen for gentagelseskriminalitet.

I præmis 198 udtalte EMD om fastheden af klagerens sociale, kulturelle og familiemæssige bånd til opholdslandet og til hjemlandet:

"A further issue to be considered is the solidity of the applicant's social, cultural and family ties with the host country and the country of destination (the fourth Maslov criterion). Whilst the applicant's ties with Turkey seem to have been limited, it cannot be said that he was completely unfamiliar with that country (see paragraphs 30, 59 and 65 above). However, it appears that the High Court gave little consideration to the length of the applicant's stay in and his ties to his host country Denmark (the second and fourth Maslov criteria respectively; see paragraph 182 above), stressing as it did the fact that he had not founded his own family and had no children in Denmark (see paragraph 66 above). As to the latter aspect, the Court reiterates its finding in paragraph 178 above that, even if he had no "family life", the applicant could still claim protection of his right to respect for his "private life" within the meaning of Article 8 (see Maslov, cited above, § 93). In this regard, the Court attaches particular weight to the fact, also noted by the domestic courts in the criminal proceedings and by the City Court in the revocation proceedings, that the applicant was a settled migrant who had been living in Denmark since the age of six (see paragraph 59 above). Although the applicant's child and young adulthood were clearly difficult, suggesting integration difficulties, he had received most of his education in Denmark and his close family members (mother and siblings) all live there. He had also been attached to the Danish labour market for about five years (see paragraphs 27 and 30 above). "

Afslutningsvis gennemgik EMD I præmis 199-200 betydningen af varigheden af indrejseforbuddet for den samlede proportionalitetsvurdering.

Herefter konkluderede EMD i præmis 201-202:

"201. In the light of the above, it appears that in the revocation proceedings, despite the significant period of time during which the applicant underwent medical treatment for his mental disorder, the High Court, apart from briefly referring to his lack of family ties in Denmark and to the serious nature and gravity of his criminal offence, did not consider the changes in the applicant's personal circumstances with a view to assessing the risk of his reoffending against the background of his mental state at the time of the commission of the offence and the apparent beneficial effects of his treatment. Nor did it have due regard to the strength of the applicant's ties to Denmark as compared to those to Turkey. The Court further notes that under the domestic law, the administrative and judicial authorities had no possibility of making an individual assessment of the duration of the applicant's exclusion from Danish territory, which was both irreducible and permanent. Therefore, and notwithstanding the respondent State's margin of appreciation, the Court considers that, in the particular circumstances of the present case, the domestic authorities failed to duly take into account and to properly balance the interests at stake (see paragraphs 182 and 183 above).

202. Accordingly, there has been a violation of Article 8 of the Convention."

Der kan endvidere henvises til følgende sager:

- *Sharifi v. Denmark (2023)*.
- *Al-Masudi v. Denmark (2023)*.
- *Noorzae v. Denmark (2023)*.
- *Goma v. Denmark (2023)*.

4.2.3.2. Mindre alvorlig kriminalitet

I sagen *Maslov v. Austria (2008)* var klageren indrejst i landet som seksårig og var blevet udvist på grund af kriminalitet i form af mere end 40 kvalificerede indbrud, nogle i forbindelse med banderelationer, brugstyveri af køretøj og et enkelt tilfælde af vold. Klageren var mindreårig, da han begik disse forhold, og da afgørelsen om udvisning blev endelig. Medlemsstaten havde begrundet udvisningen med hensynet til forebyggelse af uro og forbrydelse. Klageren blev efterfølgende udsendt i en alder af 19 år. Klageren havde på dette tidspunkt ikke stiftet egen familie.

Efter i præmis 66 og 67 at have fastslået, at udvisningen var i overensstemmelse med loven og forfulgte et af de legitime hensyn, vurderede EMD, om indgrebet var nødvendigt i et demokratisk samfund. EMD henviste til de fundamentale principper, som er sammenfattet i Üner-dommen, og udtalte i præmis 70-75:

"70. The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Moreover, it has to be borne in mind that where, as in the present case, the interference with the applicant's rights under Article 8 pursues, as a legitimate aim, the "prevention of disorder or crime" (see paragraph 67 above), the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities.

71. In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family of his own, the relevant criteria are
– the nature and seriousness of the offence committed by the applicant;

– *the length of the applicant's stay in the country from which he or she is to be expelled;*
– *the time elapsed since the offence was committed and the applicant's conduct during that period; and*
– *the solidity of social, cultural and family ties with the host country and with the country of destination.*

72. The Court would also clarify that the age of the person concerned can play a role when applying some of the above criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult (see, for instance, Moustaquim v. Belgium, 18 February 1991, § 44, Series A no. 193, and Radovanovic v. Austria, no. 42703/98, § 35, 22 April 2004).

73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec(2000)15 and Rec(2002)4 (see paragraphs 34-35 above).

74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see Üner, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there (see Üner, § 58 in fine).

75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

Herefter gennemgik EMD i præmis 77-80 karakteren og alvorligheden af den af klageren begåede kriminalitet og udtalte i præmis 81 blandt andet:

"81. In the Court's view, the decisive feature of the present case is the young age at which the applicant committed the offences and, with one exception, their non-violent nature. This also clearly distinguishes the present case from Boultif and Üner […]."

I denne sammenhæng gennemgik EMD i præmis 82-83 de situationer, hvor princippet om barnets tarv skal finde anvendelse, og hvilke forpligtelser anvendelsen af dette princip indebærer.

I præmis 84-85 udtalte EMD om forskellen i vurderingen af sager, hvor en mindreårig har begået ikke-voldelig kriminalitet, over for sager, hvor mindreårige har begået meget alvorlige voldelige forbrydelser:

"84. In sum, the Court sees little room for justifying an expulsion of a settled migrant on account of mostly non-violent offences committed when a minor (see Moustaquim, cited above, § 44, concerning an applicant who had been convicted of offences committed as a juvenile, namely numerous counts of aggravated theft, one count each of handling stolen goods and destruction of a vehicle, two counts of assault and one count of

threatening behaviour, and Jakupovic v. Austria, no. 36757/97, § 27, 6 February 2003, in which the exclusion order was based on two convictions for burglary committed when a minor and where, in addition, the applicant was still a minor when he was expelled).

85. Conversely, the Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Bouchelkia, cited above, § 51, where the Court found no violation of Article 8 as regards a deportation order made on the basis of the applicant's conviction of aggravated rape committed at the age of 17; in the decisions Hizir Kilic v. Denmark (dec.), no. 20277/05, and Ferhat Kilic v. Denmark (dec.), no. 20730/05, both of 22 January 2007, the Court declared inadmissible the applicants' complaints about exclusion orders imposed following their convictions for attempted robbery, aggravated assault and manslaughter committed at the age of 16 and 17 respectively)."

Om klagerens alder ved indrejse i opholdslandet og længden af hans ophold dér konstaterede EMD i præmis 86:

"The applicant came to Austria in 1990, at the age of six, and spent the rest of his childhood and youth there. He was lawfully resident in Austria with his parents and siblings and was granted a permanent-settlement permit in March 1999."

I præmis 87-95 gennemgik EMD den forløbne tid efter begåelsen af kriminaliteten og klagernes opførsel i den periode.

Vedrørende fastheden af de sociale, kulturelle og familiære bånd i opholdslandet og i hjemlandet udtalte EMD i præmis 96-97:

"96. The Court observes that the applicant spent the formative years of his childhood and youth in Austria. He speaks German and received his entire schooling in Austria where all his close family members live. He therefore has his principal social, cultural and family ties in Austria.

97. As to the applicant's ties with his country of origin, the Court notes that he has convincingly explained that he did not speak Bulgarian at the time of his expulsion as his family belonged to the Turkish minority in Bulgaria. It was not disputed that he was unable to read or write Cyrillic as he had never gone to school in Bulgaria. It has not been shown, nor even alleged, that he had any other close ties with his country of origin."

Endelig forholdt EMD sig i præmis 98 til varigheden af det meddelte indrejseforbud.

EMD udtalte i præmis 100-101, at:

"100. Having regard to the foregoing considerations, in particular the – with one exception – non-violent nature of the offences committed when a minor and the State's duty to facilitate his reintegration into society, the length of the applicant's lawful residence in Austria, his family, social and linguistic ties with Austria and the lack of proven ties with his country of origin, the Court finds that the imposition of an exclusion order, even of a limited duration, was disproportionate to the legitimate aim pursued, 'the prevention of disorder or crime'. It was therefore not 'necessary in a democratic society'.

101. Consequently, there has been a violation of Article 8 of the Convention."

I sagen *Radovanovic v. Austria (2004)* var klageren kort efter fødslen i opholdslandet flyttet til hjemlandet, hvor han boede hos sine bedsteforældre og gik i skole. Som tiårig vendte han tilbage til sine forældre og sin søster i opholdslandet, hvor han færdiggjorde skolen og blev udlært som slagter. Som mindreårig begik han kriminalitet i form af blandt andet groft røveri og indbrud og blev idømt 30 måneders fængsel, heraf 24 betinget, og udvist for bestandig. Efter at have afsonet fængselsstraffen blev klageren i det år, han fyldte 19 år, udsendt til hjemlandet.

EMD bemærkede i præmis 33:

"The Court notes that the applicant, a single young adult at the time of his expulsion, is not a second generation immigrant as, despite his birth in Austria, he did not permanently live there until the age of ten. Given the young age at which he arrived, the Court will nevertheless assess the necessity of the interference by applying the same criteria it usually applies in cases of second generation immigrants who have not yet founded a family of their own in the host country. These criteria, so far as material, are the nature and gravity of the offence committed by the applicant and the length of his stay in the host country. In addition the applicant's family ties and the social ties he established in the host country by receiving his schooling and by spending the decisive years of his youth there are to be taken into account (see Benhebba v. France, no. 53441/99, §§ 32-33, 15 June 2003)."

EMD sammenholdt i præmis 34 sagen med en række sager, hvor der ikke var sket krænkelse af artikel 8, om udvisning af second generation immigrants, som var ankommet til opholdslandet i en ung alder og var idømt langvarige ubetingede fængselsstraffe for alvorlig kriminalitet i form af narkotikakriminalitet, som EMD ser med alvor på. Trods den kortere varighed af klagerens ophold i opholdslandet tillagde EMD det stor vægt, at selvom der var tale om groft røveri, var klageren kun idømt seks måneders ubetinget fængsel. Uden at underkende kriminalitetens grovhed noterede EMD sig, at klageren havde været mindreårig, at han ikke var tidligere straffet og at hovedparten af den relativt lange straf var gjort betinget. Derfor kunne EMD ikke tilslutte sig de nationale myndigheders vurdering af, at klageren udgjorde en sådan fare for public order, at det nødvendiggjorde indgrebet, jf. præmis 35.

Herefter udtalte EMD i præmis 36-38:

"36. Given the applicant's birth in Austria, where he later also completed his secondary education and vocational training while living with his family, and also taking into account that his family had already lawfully stayed in Austria for a long time and that the applicant himself had an unlimited residence permit when he committed the offence, and considering that, after the death of his grandparents in Serbia and Montenegro, he no longer has any relatives there, the Court finds that his family and social ties with Austria were much stronger than with Serbia and Montenegro.

37. The Court therefore considers that, in the circumstances of the present case, the imposition of a residence prohibition of unlimited duration was an overly rigorous measure. A less intrusive measure, such as a residence prohibition of a limited duration would have sufficed. The Court thus concludes that the Austrian authorities, by imposing a residence prohibtion of unlimited duration against the applicant, have not struck a fair balance between the interests involved and that the means employed were disproportionate to the aim

pursued in the circumstances of the case (see mutatis mutandis, Ezzouhdi, cited above, § 35; and Yilmaz, cited above, §§ 48-49).

38. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Emre v. Schweiz (2008)* var klageren indrejst i opholdslandet som femårig sammen med sine forældre. Klageren blev flere gange dømt for kriminalitet, herunder kriminalitet begået mens han var mindreårig, og blev som 22-årig udvist.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det kortfattede Press Release issued by the Registrar af 22. maj 2008, der er gengivet i sin helhed i afsnit 4.2.1.2. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

EMD gentog i dommens præmis 69 det ovennævnte princip om betydningen af længden af opholdet, som blandt andet kom til udtryk i Üner-dommens præmis 58[9], og uddybede i forlængelse heraf i præmis 70 (uofficiel dansk oversættelse):

"Domstolen har understreget vigtigheden af dette sidste punkt med hensyn til immigranter, der har tilbragt størstedelen af deres liv i værtslandet. I et sådant tilfælde bør det reelt bemærkes, at de modtog deres uddannelse der, fik størstedelen af deres sociale tilknytninger der og derfor udviklede deres identitet der. Da de er født eller ankommet til værtslandet på grund af deres forældres emigration, har de normalt deres vigtigste familiemæssige tilknytning der. Nogle af disse immigranter har endog kun bevaret nationalitetstilknytningen til fødelandet (Benhebba mod Frankrig, nr. 53441/99, præmis 33, 10. juli 2003, Mehemi, nævnt ovenfor, præmis 36, og Boujlifa, nævnt ovenfor, s. 2264, præmis 44, og, a contrario, Bouchelkia mod Frankrig, dom af 29. januar 1997, Samlingen af domme og afgørelser 1997- I, og Baghli mod Frankrig, nr. 34374/97, EMD 1999-VIII, nævnt ovenfor, henholdsvis præmis 50 og præmis 48)."

EMD udtalte sig i præmis 73-76 om kriminalitetens alvor, herunder blandt andet at den samlede længde af frihedsstraffen på 18½ måned ikke var ubetydelig og at kriminaliteten strakte sig over en betydelig periode på 10 år, men at nogle af lovovertrædelserne faldt ind under ungdomskriminalitet, som ifølge FN's retningslinjer hos de fleste forsvinder ved overgangen til voksenlivet. Med hensyn til "arten" af kriminalitet kunne det ikke bestrides, at dommen for legemsbeskadigelse var til skade for ham. Det så derimod med hensyn til overtrædelse af våbenloven ud til, at den udelukkende bestod i besiddelse af en tåregasspray, ligesom det ikke var fastslået, at det var klager, der stak en sikkerhedsvagt ned under et felttog mod en natklub. Overtrædelserne af færdselsloven udgjorde utvivlsomt en potentiel fare, men skulle ikke desto mindre vurderes i

[9] *"Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there."*

lyset af de relativt milde sanktioner, der normalt ifaldes. I lyset af sammenlignelige sager skulle domfældelserne vurderes korrekt både mht deres alvor og de i sidste ende pålagte sanktioner.

EMD udtalte i præmis 78:

"78. Med hensyn til den tid, der er forløbet fra lovovertrædelserne blev begået, til det tidspunkt, hvor den anfægtede foranstaltning blev endelig, såvel som den pågældende persons adfærd i denne periode, bemærker Domstolen, at klagers kriminelle handlinger strakte sig over en betydelig periode. De nationale instanser har ligeledes gentagne gange konstateret, at han ikke udviste bevidsthed om sine kriminelle handlinger, og at han havde nægtet at følge psykoterapien (jf. i denne henseende Keles, citeret ovenfor, præmis 60)."

I præmis 77 udtalte EMD om varigheden af klagerens ophold i opholdslandet (uofficiel dansk oversættelse):

"For så vidt angår varigheden af opholdet i det land, hvorfra klager skal udvises, bemærker Domstolen, at klager, der er født den 18. december 1980, ankom til Schweiz den 21. september 1986, dvs. inden han var seks år gammel. På tidspunktet for forbundsdomstolens dom af 3. maj 2004 var han 23½ år gammel. Han havde dermed tilbragt mere end 17½ år i Schweiz."

I præmis 79-80 udtalte EMD om fastheden af klagerens sociale, kulturelle og familiemæssige tilknytning til værtslandet (uofficiel dansk oversættelse):

"79. For så vidt angår de særlige tilknytninger, som klager har til sit værtsland, bemærkede forbundsdomstolen, at han havde haft hele sin skolegang og boet det meste af sit liv i Schweiz, hvor hans forældre og hans brødre også er bosat. Den ene af hans brødre har schweizisk statsborgerskab. Selv om der på den anden side er en vis uenighed mellem parterne om klagers arbejdsmæssige integration i Schweiz (ovenstående præmis 44 og 58), finder Domstolen sig ikke forpligtet til at tage stilling til dette anliggende.

80. Sammenlignet med disse forhold, der til trods for klagers kriminelle aktivitet viser en vis integration i Schweiz, forekommer de sociale, kulturelle og familiemæssige tilknytninger, som han opretholder til Tyrkiet, at være meget ubetydelige. Det fremgår af sagsakterne, at klager kun har opholdt sig 1½ måned i landet i juni og juli 2002, og at kun hans bedstemor stadig bor der. Domstolen er ikke overbevist om, at det korte ophold i Tyrkiet efter klagers første udsendelse, – en foranstaltning, der anfægtes i nærværende klage, kan tages i betragtning. Det er desuden ikke sikkert, at klager har et tilstrækkeligt kendskab til det tyrkiske sprog. Selv om forholdet mellem forældre og voksne børn ikke er omfattet af beskyttelsen i artikel 8 uden påvisning af "yderligere afhængighedsforhold mellem dem ud over almindelige følelsesmæssige bånd" (jf. mutatis mutandis, Kwakye-Nti og Dufie mod Nederlandene (dec.), nr. 311519/96, 7. november 2000), bemærker Domstolen ligeledes, at forbundsdomstolen selv erkendte, at klagers familiemæssige tilknytning til Tyrkiet var meget mindre betydningsfuld end hans tilknytning til værtslandet. Domstolen har i øvrigt på ingen måde rejst tvivl om, at klager ville "få betydelige vanskeligheder, hvis han vendte tilbage til Tyrkiet"."

I præmis 81-83 gennemgik EMD "Særlige forhold i sagen: sagens medicinske aspekt".

Endelig gennemgik EMD i præmis 84-85 opholdsforbuddet i opholdslandet.

EMD konkluderede i præmis 86-87 (uofficiel dansk oversættelse):

"86. I betragtning af ovenstående og navnlig den relative grovhed [alvorlighed, red.] af domfældelserne mod klager, hans svage tilknytning til hjemlandet og den endelige karakter af udsendelsesforanstaltningen finder Domstolen, at den indklagede stat ikke kan anses for at have foretaget en rimelig afvejning mellem klagers og hans families interesser på den ene side og statens egen interesse i at kontrollere indvandringen på den anden.

87. Der er følgelig sket en krænkelse af artikel 8."

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis 5 og 6 måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden.

EMD udtalte i præmis 56 vedrørende klagerens alder ved ankomsten til opholdslandet:

"The Court notes that the applicant is not a so-called "second generation immigrant" as he first entered Germany at the age of ten. Given the relatively young age at which he arrived, the Court will nevertheless assess the necessity of the interference by applying criteria which are similar to those it usually applies in cases of second generation immigrants (see Radovanovic v. Austria, no. 42703/98, § 33, 22 April 2004; Üner v. the Netherlands, no. 46410/99, § 40, 5 July 2005)."

EMD gennemgik herefter i præmis 57 Boultif-kriterierne og udtalte i præmis 58:

"In addition, the Court will also take into account the particular ties which these immigrants have developed with the host country where they will have spent most of their life (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, § 36; Radovanovic, cited above, § 33; Üner, cited above, § 40)"

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som f.eks. narkotikahandel.

Vedrørende tilknytningen til opholdslandet udtalte EMD i præmis 61, at:

"With regard to the applicant's personal and family situation, the Court notes that the applicant, at the time of the expulsion order of 22 January 1999, had been lawfully residing in Germany for 27 years, having moved to that country at the age of ten in order to live there with his parents and brother and where he received his secondary school education. While the parties do not agree on the extent of the applicant's professional work, he had been employed for a certain period of that time. Since 1988 he had been in possession of a permanent residence permit. While it is true that the applicant and his wife had been separated during the first five years of their marriage as the applicant's wife and their first son did not follow the applicant to Germany until 1989, the family had been living together in Germany for ten years and there is no indication that their marriage and family life was anything less than effective."

I præmis 62 udtalte EMD om klagerens tilknytning til hjemlandet:

"On the other hand, the Court is not persuaded that the applicant has become so estranged from the country where he spent the first ten years of his life that he would no longer be able to settle in Turkey, having regard to the fact that the applicant married his Turkish wife in Turkey, where their first son was born and that his wife and son did not follow him to Germany until 1989. It follows that the applicant must have entertained certain links to his country of origin at least until 1989. It can further be presumed that the applicant is familiar with the Turkish language, as he married a Turkish wife."

EMD gennemgik herefter i præmis 63-64 spørgsmålet om, hvorvidt klagerens ægtefælle og børn med rimelighed kunne forventes at følge med klageren til hjemlandet, og fandt, at børnene ville møde store vanskeligheder ved omplantning til det tyrkiske skolesystem. I præmis 65 gennemgik EMD spørgsmålet om den manglende tidsbegrænsning i klagerens indrejseforbud. Endelig udtalte EMD i præmis 66:

"The Court considers that the applicant's expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant's children could be expected to face if they followed him to Turkey, the Court considers that an unlimited exclusion from the German territory violates the applicant's rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention."

4.2.3.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende klagernes opholdstilladelse, da de var blevet myndige.

EMD udtalte i præmis 76:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had

such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

[citat af præmis 68-70 i Nunez-dommen, red.]"

På den baggrund gennemgik EMD i præmis 79-85 de hensyn af immigrationspolitisk karakter, som kan tale for at identificere børn med deres forældres handlinger i svigssager, medmindre der foreligger ekstraordinære omstændigheder, og vurderingen heraf i den konkrete sag. De nævnte præmisser er indsat i afsnittene 4.2.1.3 og 4.2.1.4.

I præmis 86-87 udtalte EMD:

"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 og 89 gennemgik EMD klagernes tilknytning til hjemlandet og betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

4.2.3.4. Ulovligt ophold

I sagen *Nnyanzi v. the United Kingdom (2008)* var klagerens ansøgning om asyl blevet afvist, hvorefter opholdslandet gjorde tiltag med henblik på, at klageren skulle forlade landet. EMD udtalte i præmis 76-78:

"76. The Court does not consider it necessary to determine whether the applicant's accountancy studies, involvement with her church and friendship of unspecified duration with a man during her stay of almost ten years in the United Kingdom constitute private life within the meaning of Article 8 § 1 of the Convention. Even assuming this to be the case, it finds that her proposed removal to Uganda is "in accordance with the law" and is motivated by a legitimate aim, namely the maintenance and enforcement of immigration control. As to the necessity of the interference, the Court finds that any private life that the applicant has established during her stay in the United Kingdom when balanced against the legitimate public interest in effective immigration control would not render her removal a disproportionate interference. In this regard, the Court notes that, unlike the applicant in the case of Üner (cited above), the present applicant is not a settled migrant and has never been granted a right to remain in the respondent State. Her stay in the United Kingdom, pending the determination of her several asylum and human rights claims, has at all times been precarious and her removal, on rejection of those claims, is not rendered disproportionate by any alleged delay on the part of the authorities in assessing them.

77. Nor does the Court find there to be sufficient evidence that the applicant's removal with her asthma condition, which she asserts is exacerbated by stress, would have such adverse effects on her physical and moral integrity as to breach her rights under Article 8 of the Convention.

78. Accordingly, the applicant's removal to Uganda would not give rise to a violation of Article 8 of the Convention."

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende klagernes opholdstilladelse, da de var blevet myndige.

EMD udtalte i præmis 76:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their

stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

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"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 og 89 gennemgik EMD klagernes tilknytning til hjemlandet og betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

EMD gennemgik præmis 47-49 sin praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem (pleje)forældre og unge voksne udgør privatliv eller tillige familieliv, og udtalte i præmis 50, at:

"50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many

authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive

weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

4.2.3.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Slivenko v. Latvia (2003)* var klagerne, som var af russisk oprindelse, blevet udsendt fra Letland under henvisning til, at de var familiemedlemmer til en russisk militærperson og derfor forpligtede til at forlade Letland i forbindelse med tilbagetrækningen af de russiske tropper fra Letland som følge af landets opnåelse af uafhængighed fra USSR. Sagen vedrørte klagernes privatliv, idet de havde levet hele eller hovedparten af deres liv i Letland.

EMD udtalte vedrørende spørgsmålet om, hvorvidt der forelå et indgreb i klagernes privatliv, i præmis 96:

"As regards the facts of the present case, the first applicant arrived in Latvia in 1959, when she was only one month old. Until 1999, by which time she was 40 years of age, she continued to live in Latvia. She attended school there, found employment and married. Her daughter, the second applicant, was born in Latvia in 1981 and lived there until the age of 18, when she was compelled to leave the country together with her mother, having just completed her secondary education (see paragraphs 16 and 46 above). It is undisputed that the applicants left Latvia against their own will, as a result of the unsuccessful outcome of the proceedings concerning the legality of their stay in Latvia. They were thus removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being. Furthermore, as a result of the removal, the applicants lost the flat in which they had lived in Riga (see paragraphs 32 and 46 above). In these circumstances, the Court cannot but find that the applicants' removal from Latvia constituted an interference with their "private life" and their "home" within the meaning of Article 8 § 1 of the Convention."

EMD gennemgik i præmis 116-118 nogle overordnede betragtninger vedrørende tilbagetrækning af fremmede tropper fra en uafhængig stat i forhold til aktivt tjenestegørende og pensionerede militærpersoner og deres familier. I præmis 119 fastslog EMD, at klagernes ægtefælle/far var pensioneret på tidspunktet for sagen om lovligheden af klagernes fortsatte ophold i Letland. I præmis 120-121 konstaterede EMD, at der i visse situationer var mulighed for dispensation fra kravet om at forlade Letland, og i præmis 122 udtalte EMD, at spørgsmålet om, hvorvidt en udsendelse i lyset af klagernes personlige situation var proportional med det legitime formål: statens sikkerhed, måtte afgøres på baggrund af sagens konkrete omstændigheder. EMD udtalte herom i præmis 123-125:

"123. The respondent Government argued that the applicants had not been sufficiently integrated into Latvian society (see paragraph 88 above). In this connection the Court observes that the applicants have spent virtually all their lives in Latvia (see paragraph 96 above). It is true that the applicants are not of Latvian origin, and that they arrived and lived in Latvia – then part of the USSR – in connection with the service of members of their family (the first applicant's father and her husband) in the Soviet armed forces. However, the applicants also developed personal, social and economic ties in Latvia unrelated to their status as relatives of Soviet (and later Russian) military officers. This is shown by the fact that the applicants did not live in army barracks or any other restricted area, but in a block of flats in which there were also civilians. Nor did they study or

work in a military institution. The first applicant was able to find employment in Latvian companies after Latvia regained its independence in 1991.

124. As regards the respondent Government's argument about the level of the applicants' proficiency in Latvian, the Court observes that, in so far as this is a relevant consideration, it has not been shown that the degree of the applicants' fluency in the language – although the precise level is in dispute – was insufficient for them to lead a normal everyday life in Latvia. In particular, there is no evidence that the level of the applicants' knowledge of Latvian was in any way different from that of other native Russian speakers living in Latvia, including those who were able to obtain the status of "ex-USSR citizens" in order to remain in Latvia on a permanent basis.

125. Although in 1999 the applicants moved to Russia to join Nikolay Slivenko and eventually obtained Russian citizenship, by that time they had apparently not developed personal, social or economic ties in Russia similar to those they had established in Latvia. In short, the Court finds that at the relevant time the applicants were sufficiently integrated into Latvian society."

I præmis 126-127 gennemgik EMD det af regeringen påberåbte argument for forskelsbehandlingen af klagerne, at det havde betydning for den nationale sikkerhed, at den første klager var kommet til Letland som medlem af en familie til en sovjetisk militærofficer (den første klagers far/den anden klagers bedstefar).

EMD udtalte i præmis 128-129:

"128. Having regard to all the circumstances, the Court considers that the Latvian authorities overstepped the margin of appreciation enjoyed by the Contracting Parties in such a matter, and that they failed to strike a fair balance between the legitimate aim of the protection of national security and the interest of the protection of the applicants' rights under Article 8. Therefore, the applicants' removal from the territory of Latvia cannot be regarded as having been 'necessary in a democratic society'.

129. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Osman v. Denmark (2011)* ansås klagerens opholdstilladelse i medlemsstaten som bortfaldet som følge af hendes langvarige ophold i familiens tidligere opholdsland Kenya. Klageren, der var somalisk statsborger, havde boet i Kenya fra hun var tre-fire år, indtil hun som syvårig indrejste i opholdslandet som familiesammenført. Hun havde herefter opholdt sig i opholdslandet, indtil hun som 15-årig af forældrene blev sendt tilbage til Kenya. Kort tid før hun fyldte 18 år, kontaktede klageren den danske ambassade i Kenya med henblik på at kunne vende tilbage til sin familie i opholdslandet, hvilket blev afslået af de danske myndigheder. Hun indrejse herefter som 19-årig i medlemsstaten, hvor hun ikke længere havde lovligt ophold.

Vedrørende klagerens tidligere lovlige ophold i opholdslandet udtalte EMD i præmis 65 og 67-68, at:

"65. It also reiterates that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in a host country, very serious reasons are required to justify expulsion (see, Maslov v. Austria [GC], quoted above, § 75). In the present case the applicant was refused restoration of her lapsed

residence permit, as opposed to being expelled due to having committed a crime. Nevertheless, it is undisputed that she spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old, that she spoke Danish, that she had received schooling in Denmark until August 2002, and that all her close family remained in Denmark. In these circumstances, the Court also considers that very serious reasons were required to justify the authorities' refusal to restore the applicant's residence permit, when she applied from Kenya in August 2005.

…

67. The Court does not question that the said legislation was accessible and foreseeable and pursued a legitimate aim. The crucial issue remains though whether, in the circumstances of the present case, the refusal to reinstate the applicant's residence permit was proportionate to the aim pursued.

68. The Court notes in particular that the applicant was granted a residence permit in Denmark in November 1994 and subsequently entered the country in February 1995, when she was seven year old. Moreover, at the relevant time the applicant had already legally spent more than eight formative years of her childhood and youth in Denmark before, at the age of fifteen, she was sent to Kenya, which was not her native country. The case thus differs significantly from Ebrahim and Ebrahim v. the Netherlands (dec.) of 18 March 2003, in which the first applicant entered the Netherlands with his family when he was ten years old and applied for asylum or a residence permit. When the boy was thirteen years old, serious tensions had developed between him and his stepfather who disapproved of the boy's behaviour in the Netherlands. Therefore, the boy was returned to Lebanon to stay with his maternal grandmother in a refugee camp to become acquainted with his native country. Neither the boy nor any members of his family had at that time been granted a residence permit in the Netherlands. After three years in Lebanon, having reached the age of sixteen, the boy applied in vain to return to the Netherlands. The Court stated specifically in that case that " that due consideration should be given to cases where a parent has achieved settled status in a country and wants to be reunited with her child who, for the time being, finds himself in the country of origin, and that it may be unreasonable to force the parent to choose between giving up the position which she has acquired in the country of settlement or to renounce the mutual enjoyment by parent and child of each other's company, which constitutes a fundamental element of family life (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A no. 94, § 68). The issue must therefore be examined not only from the point of view of immigration and residence, but also with regard to the mutual interests of the applicants"."

I præmis 69-75 udtalte EMD sig om hensynet til børns ret til respekt for privat- og familieliv i forhold til den danske lovgivning om genopdragelsesrejser og forældremyndighedsindehaverens rolle, hvorefter EMD i præmis 76-77 udtalte:

"76. Having regard to all the above circumstances, it cannot be said that the applicant's interests have sufficiently been taken into account in the authorities' refusal to reinstate her residence permit in Denmark or that a fair balance was struck between the applicants' interests on the one hand and the State's interest in controlling immigration on the other.

77. There has accordingly been a violation of Article 8 of the Convention."

4.2.4. Klagerens arbejdsmæssige tilknytning til opholdslandet

EMD har i flere sager inddraget klagerens arbejdsmæssige tilknytning til opholdslandet i proportionalitetsafvejningen.

Som anført i afsnit 3.3.3.2 afhænger vægtningen af de enkelte elementer i proportionalitetsafvejningen af de konkrete omstændigheder i hver enkelt sag, se f.eks. Maslov v. Austria (2008), hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[10] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

4.2.4.1. Alvorlig kriminalitet

I sagen *A.A. v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som 13-årig sammen med sine to søstre som familiesammenført til deres mor. To år senere blev han som 15-årig idømt fire års tilbageholdelse på en ungdomsinstitution for voldtægt begået mod en mindreårig, men blev løsladt tidligere på grund af god opførsel. Fem år efter den begåede kriminalitet blev klagerens udvisningsafgørelse endelig. Da EMD behandlede sagen, havde klageren opholdt sig i opholdslandet i 11 år. Han boede hos sin mor og besøgte sine to søstre regelmæssigt.

I præmis 46-50 gennemgik EMD sin hidtidige praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem myndige børn og forældre udgør privatliv og/eller familieliv. EMD udtalte i præmis 49:

"49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life". However, it is not necessary to decide the question given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Thus, regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is

[10] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

appropriate to focus on "family life" rather than "private life", it observes that in practice the factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged (Üner, cited above, §§ 57-60)."

EMD konstaterede i præmis 51-55, at indgrebet var i overensstemmelse med loven og forfulgte et af de legitime hensyn.

Ved vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund, gennemgik EMD i præmis 56 kriterierne som sammenfattet i Üner-dommen og udtalte på den baggrund i præmis 57-58, at de nationale domstole i hver enkelt sag må vurdere, hvilken vægt der skal tillægges de enkelte elementer i foretagelsen af den konkrete afvejning, indenfor staternes margin of appreciation. Om de relevante elementer i den foreliggende sag udtalte EMD i præmis 59-64:

"59. In the present case, the Court considers the relevant factors to be the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in United Kingdom; the time which has elapsed since the offence was committed and the applicant's conduct during that period; and the solidity of social, cultural and family ties with the host country and with the country of destination.

60. The Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Maslov, cited above, § 85). There can be no doubt that the applicant's offence was a serious one and the Court considers the comments of the sentencing judge as to the applicant's conduct and the effect of the attack on the victim to be relevant factors to be taken into account (see paragraph 8 above). The sentence imposed – four years in a Young Offenders' Institution – demonstrates the gravity of the offence. However, the fact that the applicant was a minor at the time the offence was committed is a relevant consideration in assessing the proportionality of a deportation (see Maslov, cited above, § 72). In this regard, the Court recalls that where offences committed by a minor underlie an exclusion order, regard must be had to the best interests of the child. In particular, the obligation to take the best interests of the child into account includes an obligation to facilitate his reintegration, an aim that the Court has previously held will not be achieved by severing family or social ties through expulsion (see Maslov, cited above, §§ 82-83).

61. The Court observes that the total length of the applicant's stay in the United Kingdom to date is eleven years. He arrived in the country at the age of 13 and has therefore now spent almost half his life in the United Kingdom. The Court notes that the applicant committed the offence which rendered him liable to deportation less than two years after his arrival in the United Kingdom. Further, following his conviction, he spent some two years in detention, during which time he was served with a deportation order. While the applicant was granted Indefinite Leave to Remain during this period, the Court is persuaded by the Government's submissions that leave was granted in ignorance of the applicant's conviction and, as a result, considers that no significance can be attached to the fact that Indefinite Leave to Remain was granted following the conviction (compare and contrast Omojudi, cited above, § 42). It is also true that the applicant has been aware since July 2003 of the fact that he was liable to be deported on account of his conviction. However, the Court nonetheless observes that he has now spent seven years at liberty in the United Kingdom following his release and despite having exhausted appeal rights in January 2008, no steps appear to have been taken in respect of his deportation until September 2010 (see paragraphs 23-25 above).

62. As to the lapse of time and the applicant's conduct since commission of the offence in 2002, the Court observes at the outset that the applicant has committed no further offences. While in detention, the applicant took advantage of the educational opportunities available to him and obtained a number of high school qualifications (see paragraph 11 above). At the time of his release from detention in August 2004, his risk of reoffending was assessed to be low (see paragraph 11 above), an assessment subsequently reiterated by his probation officer in 2005 and accepted by the AIT in 2007 (see paragraphs 15 and 20 above). Since his release, the applicant's conduct appears to have been exemplary. He enrolled in college in September 2004 in order to sit his A-level examinations, which he obtained in summer 2005 (see paragraph 14 above). He was subsequently offered a place at university to study towards an undergraduate degree, which he obtained in 2008, followed by a postgraduate degree, which he completed in 2009 (see paragraphs 18 and 24 above). He commenced stable employment with a local authority in 2010 (see paragraph 24 above).

63. The Government have not pointed to any concern regarding the applicant's conduct in the seven years since his release from prison and rely solely on the seriousness of the offence to justify concerns as to his continued presence in the United Kingdom and his risk to the public (see paragraphs 41-42 and 44 above). The Court reiterates that the factors to be taken into consideration in cases involving deportation following a criminal offence are partially designed to evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities (see paragraph 57 above). In particular, the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has an impact on the assessment of the risk which the applicant poses to society (see Boultif, cited above, § 51; Maslov, cited above, § 90; and A.W. Khan, cited above, § 41). Accordingly, the Court considers the present factor to be of particular importance when assessing whether the seriousness of the offence in itself is sufficient to justify the applicant's deportation for the prevention of disorder or crime.

64. Finally, as regards the applicant's ties with the United Kingdom and with Nigeria, the Court observes that the applicant continues to reside with his mother and has close relationships with his two sisters and an uncle, all of whom reside in England. He has completed the majority of his high school and further education in the United Kingdom and has now commenced a career with a local authority in London. He is also a member of a church community. While he spent a significant period of his childhood in Nigeria, he has now not visited the country for eleven years. He has had no contact with his father since 1991".

I præmis 65-68 gennemgik EMD betydningen af opholdslandets passivitet i forhold til at udsende klageren i overensstemmelse med den trufne udvisningsafgørelse og redegjorde for baggrunden for at inddrage forhold indtruffet og klagerens opførsel i perioden efter denne afgørelse i sin afvejning, herunder vigtigheden af at facilitere reintegration af unge lovovertrædere i samfundet.

Herefter konkluderede EMD i præmis 69-70:

"69. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's deportation from the United Kingdom would be disproportionate to the legitimate aim of the "prevention of disorder and crime" and would therefore not be necessary in a democratic society.

70. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Nigeria."

I sagen *A.H. Khan v. the United Kingdom (2011)* inddrog EMD også klagerens tidligere beskæftigelse i vurderingen af hans tilknytning til opholdslandet. Klageren var indrejst i opholdslandet som syvårig og var tidligere blevet dømt for samleje med en mindreårig, to forsøg på røveri samt overfald. Som 30-årig blev han ydermere idømt fem års fængsel for røveri og udvist. Klageren blev udsendt ni år efter sin sidste dom. På tidspunktet for EMD´s afgørelse af sagen var han far til seks børn i alderen fra 12 til 17 år. Klageren var på daværende tidspunkt ikke i et forhold med mødrene til sine børn.

EMD udtalte, at det forhold, at klageren havde opholdt sig i medlemsstaten fra en ung alder (siden han var syv år gammel), indebar, at der måtte kræves alvorlige grunde for at anse en udsendelse for proportional (præmis 37). EMD fandt den af klageren begåede kriminalitet alvorlig og fremhævede, at det forhold, at han havde begået kriminalitet igen kort tid efter løsladelsen, viste, at han ikke var rehabiliteret og derfor fortsat udgjorde en fare for offentligheden, hvorfor der var gode grunde til at udsende ham (præmis 38).

I præmis 39 udtalte EMD:

"The Court must now consider the applicant's circumstances in the United Kingdom, with a view to determining whether his family and private life, and his consequent level of integration into British society, were such as to outweigh the seriousness of his criminal history. […]"

Herefter gennemgik EMD klagerens familieforhold, hvorefter EMD i præmis 41 udtalte:

"Finally, the Court turns to the question of the respective solidity of the applicant's ties to the United Kingdom and to Pakistan. The Court notes that, unlike his younger brother, the applicant returned to Pakistan for visits following his arrival in the United Kingdom and also married there. In the absence of any evidence to the contrary, the Court assumes that this marriage is still, legally at least, subsisting. The applicant therefore maintained some level of connection to his country of origin and was not deported as a stranger to the country. As regards his ties to the United Kingdom, the Court has addressed the question of his family life, both with his parents and siblings and with his various partners and children, above, and found it to be limited in its extent. Furthermore, the applicant's private life in the United Kingdom, as observed by the Tribunal, has been constrained by his convictions and spells in prison. Whilst he was mainly educated in the United Kingdom and has worked, he does not appear to have established a lengthy or consistent employment history. In short, and despite the length of his stay, the applicant did not achieve a significant level of integration into British society. The Court is aware that, as a settled migrant who spent much of his childhood in the United Kingdom, serious reasons would be required to render the applicant's deportation proportionate (see Maslov, cited above, § 75). However, having regard to his substantial offending history, including offences of violence and recidivism following the commencement of deportation proceedings against him, the Court is of the view that such serious reasons are present in the applicant's case. His private and family life in the United Kingdom were not such as to outweigh the risk he presented of future offending and harm to the public and his deportation was therefore proportionate to the legitimate aim of preventing crime. As such, the applicant's deportation to Pakistan did not amount to a violation of Article 8."

I sagen *El Boujaïdi v. France (1997)* var klageren indrejst i opholdslandet som syvårig. Han blev idømt seks års fængsel og udvist med indrejseforbud for bestandig for narkotikakriminalitet begået da han var 19 år. Efter at være blevet løsladt da han var 24 år, blev klageren på ny anholdt og idømt et års fængsel for forsøg på røveri og for ikke at være udrejst i overensstemmelse med udvisningen. Klageren blev udsendt, da han var

26 år gammel. På dette tidspunkt boede han sammen med en statsborger i opholdslandet, med hvem han havde fået et barn nogle måneder forud for udsendelsen. Mens der på tidspunktet, hvor udvisningsbeslutningen blev endelig, endnu ikke var etableret et forhold mellem klageren og samleversken og derfor ifølge EMD ikke bestod et "familieliv", der kunne tages i betragtning, udtalte EMD i præmis 33:

"However, the Court observes that he arrived in France in 1974 at the age of 7 and lived there until 26 August 1993. He received most of his schooling there and worked there for several years. In addition, his parents, his three sisters and his brother – with whom it was not contested that he had remained in contact – live there (see paragraph 7 above). Consequently, the Court is in no doubt that enforcement of the exclusion order amounted to interference with the applicant's right to respect for his private and family life."

Ved vurderingen af, om indrejseforbuddet var nødvendigt i et demokratisk samfund, udtalte EMD i præmis 40-41:

"40. The Court's task therefore consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

The Court notes that Mr El Boujaïdi arrived in France at the age of 7 and lived there lawfully from 1974 until 19 June 1991 (the date of his release – see paragraph 13 above). He received most of his education there, he worked there and his parents, his three sisters and his brother live there (see paragraph 7 above).

However, while he asserted that he had no close family in Morocco, he did not claim that he knew no Arabic or that he had never returned to Morocco before the exclusion order was enforced. It also seems that he has never shown any desire to acquire French nationality. Accordingly, even though most of his family and social ties are in France, it has not been established that he has lost all links with his country of origin other than his nationality. In addition, the applicant had a previous conviction – a sentence of thirty months' imprisonment having been imposed on him by the Annecy Criminal Court for heroin dealing in 1987 – when the Lyons Court of Appeal sentenced him to six years' imprisonment and ordered his permanent exclusion from French territory for drug use and drug trafficking (see paragraphs 10 and 11 above). Once he was released, and at a time when he was unlawfully present in France, he continued to lead a life of crime and committed an attempted robbery (see paragraph 13 above). The seriousness of the offence on account of which the measure in issue was imposed on the applicant and his subsequent conduct count heavily against him.

41. Having regard to the foregoing, the Court does not find that enforcement of the order for the applicant's permanent exclusion from French territory was disproportionate to the legitimate aims pursued. There has accordingly been no breach of Article 8."

I sagen *Bajsultanov v. Austria (2012)* inddrog EMD ligeledes klagerens manglende beskæftigelse i vurderingen af hans tilknytning til opholdslandet. Klageren var meddelt asyl i opholdslandet. Han blev idømt i alt 20 måneders fængsel for bl.a. flere tilfælde af vold samt udvist. EMD fastsatte længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen. Klagerens ægtefælle var meddelt asyl afledt af klagerens forhold og de havde to børn, der på tidspunktet for EMD's behandling af sagen var otte og fem år.

Efter i præmis 79-82 at have konstateret, at udvisningen af klageren udgjorde et indgreb i hans ret til respekt for familieliv, og at dette indgreb var i overensstemmelse med loven og forfulgte et af de legitime hensyn, gennemgik EMD i præmis 83 de generelle principper, som indgår i afvejningen af, om indgrebet var nødvendigt i et demokratisk samfund, jf. kriterierne som sammenfattet i Boultif- og Üner-dommene.

Om karakteren og alvorligheden af den begåede kriminalitet udtalte EMD i præmis 84:

"Turning to the first set of criteria relating to the criminal offences committed by the applicant, the Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks' imprisonment, suspended with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions."

EMD udtalte i præmis 85-87, at:

"85. As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there.

86. On the other hand, the applicant lived in Chechnya for almost twenty-three years, went to school there and subsequently worked occasionally in different jobs. The applicant's parents and siblings still live in Chechnya, and the applicant has maintained regular contact with his father.

87. The Court therefore considers, in line with the Austrian authorities, that the applicant still has stronger social and cultural ties to his country of origin than to his host country."

I præmis 88-90 gennemgik EMD klagerens familieliv og ægtefællens mulighed for at følge med klageren tilbage til hjemlandet i relation til artikel 3 og i forhold til, om der ville være uoverstigelige hindringer forbundet hermed.

EMD udtalte i præmis 91-92:

"Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian

authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

EMD udtalte i præmis 45, at:

"As regards the length of the applicant's stay in Switzerland, the Court observes that he arrived in Switzerland in 1989 at the age of nine and lived in Switzerland for more than twenty years. His stay in Switzerland was, thus, of a considerable length of time."

I præmis 46-50 gennemgik EMD klagerens opførsel og domstolsbehandlingen af hans sag efter begåelsen af lovovertrædelsen samt klagerens families forhold, herunder muligheden for klagerens ægtefælle og børn for at tage ophold i klagerens hjemland.

I præmis 51 og 52 gennemgik EMD klagerens tilknytning til henholdsvis opholdslandet og hjemlandet:

"51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'."

EMD udtalte herefter i præmis 53-55:

"53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

Der kan endvidere henvises til følgende sager:

- *Sharifi v. Denmark (2023)*.
- *Al-Masudi v. Denmark (2023)*.
- *Noorzae v. Denmark (2023)*.
- *Goma v. Denmark (2023)*.

4.2.4.2. Mindre alvorlig kriminalitet

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis 5 og 6 måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden.

EMD udtalte i præmis 56 vedrørende klagerens alder ved ankomsten til opholdslandet:

"The Court notes that the applicant is not a so-called "second generation immigrant" as he first entered Germany at the age of ten. Given the relatively young age at which he arrived, the Court will nevertheless assess the necessity of the interference by applying criteria which are similar to those it usually applies in cases of second generation immigrants (see Radovanovic v. Austria, no. 42703/98, § 33, 22 April 2004; Üner v. the Netherlands, no. 46410/99, § 40, 5 July 2005)."

EMD gennemgik herefter i præmis 57 Boultif-kriterierne og udtalte i præmis 58:

"In addition, the Court will also take into account the particular ties which these immigrants have developed with the host country where they will have spent most of their life (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, § 36; Radovanovic, cited above, § 33; Üner, cited above, § 40)"

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som f.eks. narkotikahandel.

Ved vurderingen af klagerens tilknytning til opholdslandet, udtalte EMD i præmis 61, at:

"61. With regard to the applicant's personal and family situation, the Court notes that the applicant, at the time of the expulsion order of 22 January 1999, had been lawfully residing in Germany for 27 years, having moved to that country at the age of ten in order to live there with his parents and brother and where he received his secondary school education. While the parties do not agree on the extent of the applicant's professional work, he had been employed for a certain period of that time. Since 1988 he had been in possession of a permanent residence permit. While it is true that the applicant and his wife had been separated during the first five years of their marriage as the applicant's wife and their first son did not follow the applicant to Germany until 1989, the family had been living together in Germany for ten years and there is no indication that their marriage and family life was anything less than effective."

I præmis 62-65 gennemgik EMD klagerens tilknytning til hjemlandet, familiens mulighed for af følge med ham tilbage samt varigheden af det meddelte indrejseforbud.

EMD udtalte i præmis 66, at:

"The Court considers that the applicant's expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant's children could be expected to face if they followed him to Turkey, the Court considers that an unlimited exclusion from the German territory violates the applicant's rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention."

I sagen *Yildiz v. Austria (2002)* var den første klager indrejst i opholdslandet som 14-årig for at bo sammen med sine forældre og sine søskende. Han indledte et forhold til den anden klager, som var statsborger i den første klagers hjemland, men født og opvokset i opholdslandet. Nogle måneder senere traf opholdslandet afgørelse om udvisning af den første klager med indrejseforbud i fem år på baggrund af flere bødestraffe for tyveri og færdselslovsovertrædelser. Da udvisningsafgørelsen blev endelig, havde klagerne sammen fået et

barn, den tredje klager. Klageren udrejste til hjemlandet, da barnet var knap to år gammelt. På tidspunktet for EMD's behandling af sagen boede han fortsat i hjemlandet. Den anden og tredje klager besøgte ham jævnligt, indtil parret blev skilt.

EMD udtalte i præmis 43, at:

"The Court will first examine the applicants' family situation and the length of their stay in Austria. It observes that the first applicant is not a second generation immigrant, i.e. a person who was born or has lived the main part of his life in the country from which he is going to be removed. He only came to Austria in 1989 at the age of fourteen and must therefore have links with his country of origin and in particular be able to speak Turkish. On the other hand, he was still an adolescent when he came to Austria, where his close family was and is still living. In December 1996, when the Administrative Court confirmed the residence ban against him, he had been living in Austria for seven years, he had been working there and had been co-habiting for a little less than three years with the second applicant, who is also a Turkish national but was born in Austria and has lived there all her life. Their daughter, the third applicant, was one year and four months old at the material time. In fact, the Austrian authorities issuing the residence ban acknowledged that the first applicant had reached a high degree of integration in Austria. Nevertheless, the Court considers that, as regards the possible effects of the residence ban on his family life, the authorities failed to establish whether the second applicant could be expected to follow him to Turkey, in particular whether she spoke Turkish and maintained any links, other than her nationality, with that country."

I præmis 44 fastslog EMD, at vurderingen af, om indrejseforbuddet udgjorde en krænkelse af artikel 8, skulle foretages på baggrund af de forhold, der gjorde sig gældende, da indrejseforbuddet blev endeligt, uanset at klagerne efterfølgende var blevet skilt, og deres familiesituation således var anderledes på tidspunktet for EMD's behandling af sagen. I præmis 45- 46 udtalte EMD:

"45. Next, the Court will turn to the offences committed by the first applicant, as their gravity is an essential element for assessing the proportionality of the interference with the applicants' family life. The Court notes that in 1993 the first applicant, who was then still a minor, was convicted twice by the criminal courts, once for shop-lifting with a sentence of three days' imprisonment suspended on probation, and once for theft without a sentence being pronounced. Between 1992 and April 1994 he was convicted seven times of traffic offences, in particular driving without a license and once ignoring a red light and high speeding. The fines imposed on him amounted to a total sum of ATS 28,000 (equivalent to EUR 2,035). In sum, the Court finds that these offences were not negligible. However, as is shown by the modest penalties imposed, the domestic authorities considered them to be of a minor nature. Moreover, the first applicant did not commit any further offences between April 1994 and December 1996, when the residence ban proceedings were terminated. Thus, in the Court's view the authorities' fear that he constituted a danger to public order and security in that would commit further offences is mitigated by the particular circumstances of the case (see Boultif v. Switzerland, cited above, § 51, with further references).

46. Having regard to all these elements, the Court considers that the authorities failed to strike a fair balance between the different interests involved and that the interference with the applicants' right to respect for their family life was not proportionate to the legitimate aim pursued.

Accordingly, there has been a breach of Article 8 of the Convention."

4.2.4.3. Opholdstilladelse opnået på baggrund af svig

Der er i forbindelse med udarbejdelsen af dette notat ikke fundet domme vedrørende svig, hvor spørgsmålet om klagerens tilknytning til opholdslandet i form af (lovligt) arbejde, som udgør en del af klagerens privatliv, har været vurderet af EMD.

4.2.4.4. Ulovligt ophold

Sagen *Gezginci v. Switzerland (2010)* omhandlede såvel ulovligt ophold som nægtelse af forlængelse af opholdstilladelse. EMD har i et *legal summary* karakteriseret klagerens ophold i opholdslandet som *long term illegal immigration*, hvorfor sagen er placeret i dette afsnit. Dommen foreligger ikke på engelsk i en officiel oversættelse, hvorfor hele EMD´s *legal summary* er citeret herunder:

"Judgment 9.12.2010 [Section I]
Article 8
Expulsion
Deportation order against long-term illegal immigrant: deportation would not constitute a violation
Facts – The applicant is a Turkish national who has lived in Switzerland since 1978, on the basis of residence permits from 1980 to 1998 and unlawfully during the remaining periods. In 1997 the national authorities decided not to renew his residence permit. A few months later they set March 1999 as the deadline for his deportation from Switzerland. However, the applicant did not leave the country. In 2003, after a serious work-related accident, he applied for a residence permit on humanitarian grounds. The authorities refused the application. Shortly afterwards his wife disappeared without trace, leaving him to care for their eleven-year-old daughter. The applicant lodged several unsuccessful appeals against the deportation order, which is still in force.
Law – Article 8: In view of the applicant's very long-standing residence in Switzerland, the refusal to grant him a residence permit on humanitarian grounds amounted to interference with his right to respect for his private life. That interference had been in accordance with the law and had pursued the legitimate aims of ensuring the economic well-being of the country, preventing disorder or crime and protecting the rights and freedoms of others. In order to determine whether it had been necessary in a democratic society, a number of factors had to be taken into consideration. First of all, the applicant's convictions between 1982 and 1992 had not been very serious and since 1993 his conduct did not appear to have been open to criticism from a purely criminal-law standpoint. Next, the applicant had lived in Switzerland for approximately thirty years, not counting periods spent abroad, thanks to the considerable tolerance shown by the authorities since 1999. Furthermore, some members of the applicant's family still lived in Turkey and would be able to help him resettle there and find work; he also spoke Turkish fluently. Similar considerations would apply were he to opt for Romania, a country which he knew from visits, where his wife lived and his daughter had spent much of her life, and where he appeared to have been in gainful employment. Furthermore, it was clear from his attitude that he was unable and unwilling to find employment in Switzerland. As to his daughter, given that she had spent most of her life in Romania and Turkey, was a citizen of both countries and probably spoke both languages, she could reasonably be expected to be able to adjust if she returned there. Lastly, the applicant's health was not liable to significantly hinder his integration in Turkey, given that he would have access there to the necessary medicines and treatment and would undoubtedly receive an invalidity pension. Accordingly, regard being had in particular to the fact that the applicant had been residing unlawfully in Switzerland since 1997,

his lack of willingness to integrate there, his failure to abide by the rules of the country and the fact that his ties with his country of origin did not appear to have been completely severed, the respondent State could be said to have struck a fair balance between the interests of the applicant and his daughter on the one hand and its own interest in controlling immigration on the other.
Conclusion: the applicant's deportation would not amount to a violation (five votes to two)." [Understreget her, red.]

4.2.4.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Slivenko v. Latvia (2003)* var klagerne, som var af russisk oprindelse, blevet udsendt fra Letland under henvisning til, at de var familiemedlemmer til en russisk militærperson og derfor forpligtede til at forlade Letland i forbindelse med tilbagetrækningen af de russiske tropper fra Letland som følge af landets opnåelse af uafhængighed fra USSR. Sagerne vedrørte klagernes privatliv, idet de havde levet hele eller hovedparten af deres liv i Letland.

EMD udtalte vedrørende spørgsmålet om, hvorvidt der forelå et indgreb i klagernes privatliv, i præmis 96:

"As regards the facts of the present case, the first applicant arrived in Latvia in 1959, when she was only one month old. Until 1999, by which time she was 40 years of age, she continued to live in Latvia. She attended school there, found employment and married. Her daughter, the second applicant, was born in Latvia in 1981 and lived there until the age of 18, when she was compelled to leave the country together with her mother, having just completed her secondary education (see paragraphs 16 and 46 above). It is undisputed that the applicants left Latvia against their own will, as a result of the unsuccessful outcome of the proceedings concerning the legality of their stay in Latvia. They were thus removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being. Furthermore, as a result of the removal, the applicants lost the flat in which they had lived in Riga (see paragraphs 32 and 46 above). In these circumstances, the Court cannot but find that the applicants' removal from Latvia constituted an interference with their "private life" and their "home" within the meaning of Article 8 § 1 of the Convention."

EMD gennemgik i præmis 116-118 nogle overordnede betragtninger vedrørende tilbagetrækning af fremmede tropper fra en uafhængig stat i forhold til aktivt tjenestegørende og pensionerede militærpersoner og deres familier. I præmis 119 fastslog EMD, at klagernes ægtefælle/far var pensioneret på tidspunktet for sagen om lovligheden af klagernes fortsatte ophold i Letland. I præmis 120-121 konstaterede EMD, at der i visse situationer var mulighed for dispensation fra kravet om at forlade Letland, og i præmis 122 udtalte EMD, at spørgsmålet om, hvorvidt en udsendelse i lyset af klagernes personlige situation var proportional med det legitime formål: statens sikkerhed, måtte afgøres på baggrund af sagens konkrete omstændigheder. EMD udtalte herom i præmis 123-125:

"123. The respondent Government argued that the applicants had not been sufficiently integrated into Latvian society (see paragraph 88 above). In this connection the Court observes that the applicants have spent virtually all their lives in Latvia (see paragraph 96 above). It is true that the applicants are not of Latvian origin, and that they arrived and lived in Latvia – then part of the USSR – in connection with the service of members

of their family (the first applicant's father and her husband) in the Soviet armed forces. However, the applicants also developed personal, social and economic ties in Latvia unrelated to their status as relatives of Soviet (and later Russian) military officers. This is shown by the fact that the applicants did not live in army barracks or any other restricted area, but in a block of flats in which there were also civilians. Nor did they study or work in a military institution. The first applicant was able to find employment in Latvian companies after Latvia regained its independence in 1991.

124. As regards the respondent Government's argument about the level of the applicants' proficiency in Latvian, the Court observes that, in so far as this is a relevant consideration, it has not been shown that the degree of the applicants' fluency in the language – although the precise level is in dispute – was insufficient for them to lead a normal everyday life in Latvia. In particular, there is no evidence that the level of the applicants' knowledge of Latvian was in any way different from that of other native Russian speakers living in Latvia, including those who were able to obtain the status of "ex-USSR citizens" in order to remain in Latvia on a permanent basis.

125. Although in 1999 the applicants moved to Russia to join Nikolay Slivenko and eventually obtained Russian citizenship, by that time they had apparently not developed personal, social or economic ties in Russia similar to those they had established in Latvia. In short, the Court finds that at the relevant time the applicants were sufficiently integrated into Latvian society."

I præmis 126-127 gennemgik EMD det af regeringen påberåbte argument for forskelsbehandlingen af klagerne, at det havde betydning for den nationale sikkerhed, at den første klager var kommet til Letland som medlem af en familie til en sovjetisk militærofficer (den første klagers far/den anden klagers bedstefar).

EMD udtalte i præmis 128-129:

"128. Having regard to all the circumstances, the Court considers that the Latvian authorities overstepped the margin of appreciation enjoyed by the Contracting Parties in such a matter, and that they failed to strike a fair balance between the legitimate aim of the protection of national security and the interest of the protection of the applicants' rights under Article 8. Therefore, the applicants' removal from the territory of Latvia cannot be regarded as having been "necessary in a democratic society.

129. Accordingly, there has been a violation of Article 8 of the Convention."

4.2.5. Klagerens familiemæssige tilknytning til opholdslandet (ej familieliv efter EMRK artikel 8)

EMD lægger i sin praksis vægt på, om klageren har haft familiemedlemmer i opholdslandet, selvom dette ikke har udgjort et familieliv efter EMRK artikel 8. EMD har i stedet tillagt disse forhold vægt under privatlivsvurderingen.

EMD har i flere domme fastslået, at vurderingen af, hvorvidt der i udvisningssager foreligger et "familieliv" i artikel 8's forstand, skal foretages på baggrund af de faktiske forhold på det tidspunkt, hvor udvisningsafgørelsen blev endelig.

Se i den forbindelse sagen *El Boujaïdi v. France (1997)*. I denne sag var klageren indrejst i opholdslandet som syvårig. Han blev idømt seks års fængsel og udvist med indrejseforbud for bestandig for narkotikakriminalitet begået da han var 19 år. Efter at være blevet løsladt da han var 24 år, blev klageren på ny anholdt og idømt et års fængsel for forsøg på røveri og for ikke at være udrejst i overensstemmelse med udvisningen. Klageren blev udsendt, da han var 26 år gammel. På dette tidspunkt boede han sammen med en statsborger i opholdslandet, med hvem han havde fået et barn nogle måneder forud for udsendelsen. Mens der på tidspunktet, hvor udvisningsbeslutningen blev endelig, endnu ikke var etableret et forhold mellem klageren og samleversken og derfor ifølge EMD ikke bestod et "familieliv", der kunne tages i betragtning, udtalte EMD i præmis 33:

"However, the Court observes that he arrived in France in 1974 at the age of 7 and lived there until 26 August 1993. He received most of his schooling there and worked there for several years. In addition, his parents, his three sisters and his brother – with whom it was not contested that he had remained in contact – live there (see paragraph 7 above). Consequently, the Court is in no doubt that enforcement of the exclusion order amounted to interference with the applicant's right to respect for his private and family life."

Se også sagen *Yildiz v. Austria (2002)*. Her var den første klager indrejst i opholdslandet som 14-årig for at bo sammen med sine forældre og sine søskende. Han indledte et forhold til den anden klager, som var statsborger i den første klagers hjemland, men født og opvokset i opholdslandet. Nogle måneder efter traf opholdslandet afgørelse om udvisning af den første klager med indrejseforbud i fem år på baggrund af flere bødestraffe for tyveri og færdselslovsovertrædelser. Da udvisningsafgørelsen blev endelig, havde klagerne sammen fået et barn, den tredje klager. Klageren udrejste til hjemlandet, da barnet var knap to år gammelt. På tidspunktet for EMD's behandling af sagen boede han fortsat i hjemlandet. Den anden og tredje klager besøgte ham jævnligt, indtil parret blev skilt.

Regeringen gjorde gældende, at vurderingen af, om der var "familieliv" i EMRKs forstand, skulle foretages på baggrund af de faktiske forhold på tidspunktet for beslutningen om at udvise klageren med indrejseforbud. Herom udtalte EMD i præmis 34-36:

"34. The Court reiterates that the question whether the applicants had established a private and family life within the meaning of Article 8 must be determined in the light of the position when the residence ban became final (see for instance the Bouchelkia v. France judgment of 29 January 1997, Reports of Judgments and Decisions 1997-I, p. 63, § 41; El Boujaïdi v. France judgment of 26 September 1997, Reports 1997-VI, p. 1990, § 33 and also Ezzouhdi v. France, no. 47160/99, § 25, 13 February 2001).

35. In the present case the relevant date is, thus, 4 December 1996, when the Administrative Court gave its judgment confirming the residence ban. The applicants can, therefore, rely also on the third applicant's birth on 14 August 1995 and not only on the first and second applicants' cohabitation which had commenced in early 1994 before the residence ban proceedings were initiated.

36. Thus, the residence ban, which had the effect of separating the first applicant from his life-companion and their child, constituted an interference with their right to respect for their private and family life."

Videre udtalte EMD i præmis 44:

"It is true that, meanwhile, the applicants' family situation has changed. The first and second applicant divorced in March 2001 and, while the second applicant is residing in Austria, the first applicant lives in Turkey. The third applicant is currently staying with relatives in Turkey although the second applicant, who has sole custody over the child, asserts that she intends to bring her back to Austria. However, the Court has to make its assessment in the light of the position when the residence ban became final (see paragraph 34 above). Its task is to state whether or not the domestic authorities complied with their obligation to respect the applicants' family life at that particular moment and it cannot have regard to circumstances which only came into being after the authorities took their decision. […]"

Som gennemgået ovenfor under afsnit 4.1.1 har EMD i flere sager vurderet, om forholdet mellem myndige børn og deres forældre og søskende udgjorde familieliv og/eller privatliv. Som eksempler herpå kan nævnes dommene *El Boujaïdi v. France (1997)*, *Moustaquim v. Belgium (1991)*, *A.A. v. the United Kingdom (2011)*, *A.W. Khan v. the United Kingdom (2010)*, *Levakovic v. Denmark (2018)*, *Maslov v. Austria (2008)*, *Osman v. Denmark (2011)*, *Butt v. Norway (2012)*, *Nacic and others v. Sweden (2012)*, *I.M. v. Switzerland (2019)*, *Zakharchuk v. Russia (2019)*, *Pormes v. the Netherlands (2020)* og *Savran v. Denmark (2021)*.

Den centrale præmis 33 i sagen *El Boujaïdi v. France (1997)* er citeret lige ovenfor.

I sagen *Moustaquim v. Belgium (1991)*, som er gennemgået nærmere i kapitel 5, blev klageren udvist fra opholdslandet, da han var 20 år gammel, med indrejseforbud gældende for 10 år. Alle klagerens nære familiemedlemmer – hans forældre og søskende – boede i opholdslandet. EMD fandt, at der var en krænkelse af klagerens ret til respekt for familieliv og fandt herefter ikke anledning til at vurdere, om udvisningen også udgjorde en krænkelse af hans ret til respekt for privatliv. EMD udtalte i præmis 44-47:

"44. Mr Moustaquim's alleged offences in Belgium have a number of special features. They all go back to when the applicant was an adolescent (see paragraphs 10-15 above). Furthermore, proceedings were brought in the criminal courts in respect of only 26 of them, which were spread over a fairly short period - about eleven months -, and on appeal the Liège Court of Appeal acquitted Mr Moustaquim on 4 charges and convicted him on the other 22. The latest offence of which he was convicted dated from 21 December 1980. There was thus a relatively long interval between then and the deportation order of 28 February 1984. During that period the applicant was in detention for some sixteen months but at liberty for nearly twenty-three months.

45. Moreover, at the time the deportation order was made, all the applicant's close relatives - his parents and his brothers and sisters - had been living in Liège for a long while; one of the older children had acquired Belgian nationality and the three youngest had been born in Belgium. Mr Moustaquim himself was less than two years old when he arrived in Belgium. From that time on he had lived there for about twenty years with

his family or not far away from them. He had returned to Morocco only twice, for holidays. He had received all his schooling in French.

46. Having regard to these various circumstances, it appears that, as far as respect for the applicant's family life is concerned, a proper balance was not achieved between the interests involved, and that the means employed was therefore disproportionate to the legitimate aim pursued. Accordingly, there was a violation of Article 8 (art. 8).

47. This conclusion makes it unnecessary for the Court to consider whether the deportation was also a breach of the applicant's right to respect for his private life."

I sagen *A.A. v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som 13-årig sammen med sine to søstre som familiesammenført til deres mor. To år senere blev han som 15-årig idømt fire års tilbageholdelse på en ungdomsinstitution for voldtægt begået mod en mindreårig, men blev løsladt tidligere på grund af god opførsel. Fem år efter den begåede kriminalitet blev klagerens udvisningsafgørelse endelig. Da EMD behandlede sagen, havde klageren opholdt sig i opholdslandet i 11 år. Han boede hos sin mor og besøgte sine to søstre regelmæssigt. EMD udtalte i præmis 46-49:

"46. The Court recalls that in Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I, when considering whether there was an interference with Article 8 rights in a deportation case, it found that "family life" existed in respect of an applicant who was 20 years old and living with his mother, step-father and siblings. In Boujlifa v. France, 21 October 1997, § 36, Reports 1997-VI, the Court considered that there was "family life" where an applicant aged 28 when deportation proceedings were commenced against him had arrived in France at the age of five and received his schooling there, had lived there continuously with the exception of a period of imprisonment in Switzerland and where his parents and siblings lived in France. In Maslov, cited above, § 62, the Court recalled, in the case of an applicant who had reached the age of majority by the time the exclusion order became final but was living with his parents, that it had accepted in a number of cases that the relationship between young adults who had not founded a family of their own and their parents or other close family members also constituted "family life".

47. However, in two recent cases against the United Kingdom the Court has declined to find "family life" between an adult child and his parents. Thus in Onur v. the United Kingdom, no. 27319/07, §§ 43-45, 17 February 2009, the Court noted that the applicant, aged around 29 years old at the time of his deportation, had not demonstrated the additional element of dependence normally required to establish "family life" between adult parents and adult children. In A.W. Khan v. the United Kingdom, no. 47486/06, § 32, 12 January 2010, the Court reiterated the need for additional elements of dependence in order to establish family life between parents and adult children and found that the 34-year old applicant in that case did not have "family life" with his mother and siblings, notwithstanding the fact that he was living with them and that they suffered a variety of different health problems. It is noteworthy, however, that both applicants had a child or children of their own following relationships of some duration.

48. Most recently, in Bousarra, cited above, §§ 38-39, the Court found "family life" to be established in a case concerning a 24-year old applicant, noting that the applicant was single and had no children and recalling

that in the case of young adults who had not yet founded their own families, their ties with their parents and other close family members could constitute "family life".

49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life". However, it is not necessary to decide the question given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Thus, regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on "family life" rather than "private life", it observes that in practice the factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged (Üner, cited above, §§ 57-60)."

I sagen *Maslov v. Austria (2008)* var klageren indrejst i opholdslandet som seksårig og var blevet udvist på grund af kriminalitet i form af mere end 40 kvalificerede indbrud, nogle i forbindelse med banderelationer, brugstyveri af køretøj og et enkelt tilfælde af vold. Klageren var mindreårig, da han begik disse forhold, og da afgørelsen om udvisning blev endelig. Medlemsstaten havde begrundet udvisningen med hensynet til forebyggelse af uro og forbrydelse. EMD udtalte i præmis 62-64:

"62. The applicant was a minor when the exclusion order was imposed. He had reached the age of majority, namely 18 years, when the exclusion order became final in November 2002 following the Constitutional Court's decision, but he was still living with his parents. In any case, the Court has accepted in a number of cases concerning young adults who had not yet founded a family of their own that their relationship with their parents and other close family members also constituted "family life" (see Bouchelkia v. France, 29 January 1997, § 41, Reports 1997-I; El Boujaïdi, cited above, § 33; and Ezzouhdi, cited above, § 26).

63. Furthermore, the Court observes that not all settled migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy "family life" there within the meaning of Article 8. However, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant therefore constitutes an interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect (see Üner, cited above, § 59).

64. Accordingly, the measures complained of interfered with both the applicant's "private life" and his "family life"."

Se tilsvarende EMD i sagen *Osman v. Denmark (2011)*, præmis 55-56.

I sagen *Nacic and others v. Sweden (2012)* var familien indrejste sammen i Sverige og havde søgt om asyl. Familien bestod af to forældre og deres to sønner. Den ældste søn blev meddelt opholdstilladelse på baggrund af hans helbred, mens de tre andre personer fik afslag på asyl. Sønnen, som fik opholdstilladelse, var på dette tidspunkt fyldt 18 år. EMD udtalte i præmis 75-76:

"75. The question in the present case is whether, in view of the circumstances, the applicants still had a family life in Sweden within the meaning of Article 8 of the Convention after the third applicant had reached the age of majority and, if so, whether the Migration Court of Appeal's decision to deport the first, second and fourth applicants amounted to an unjustified interference with this right.

76. The Court notes that the applicants have lived together as a family ever since arriving in Sweden in 2006 and that they presumably lived together in Kosovo before that. The fact that the third applicant reached the age of majority during the domestic proceedings did not change the fact that he was still a dependent member of the applicant family, in particular considering his state of health. In these circumstances the Court considers that the applicants' situation amounted to family life within the meaning of Article 8 § 1 of the Convention even after the third applicant had reached the age of majority. It further finds that the impugned decision to remove the first, second and fourth applicants from Sweden interfered with the applicants' right to family life."

I sagen *I.M. v. Switzerland (2019)* blev klageren udvist af opholdslandet efter at være blevet dømt for voldtægt ti år forinden. Klagerens tidligere ægtefælle og deres fællesbørn, hvoraf tre var myndige, havde alle ophold i opholdslandet, og klageren, der var vurderet 80% invalid, var afhængig af hjælp fra de myndige børn i form af pleje og økonomiske bistand. EMD udtalte i præmis 62 (uofficiel dansk oversættelse):

"Klagers myndige børn er i øvrigt henholdsvis 23, 26 og 28 år gamle. Domstolen henviser til, at eksistensen af et familieliv, i henhold til Konventionens artikel 8, ikke kan lægges til grund mellem forældre og deres voksne børn eller mellem søskende, uden at eksistensen af supplerende afhængighed er påvist (Slivenko mod Letland [Storkammeret], nr. 48321/99, præmis 97, EMD 2003-X, og Danelyan mod Schweiz (dec.), nr. 76424/14 og 76435/14, præmis 29, 29. maj 2018). Domstolen vurderer imidlertid i den foreliggende sag, at klager kan påberåbe sig supplerende afhængighed af sine børn, idet han er afhængig af ekstern hjælp for at klare dagligdagen. Klager gør endvidere gældende, at hans tre myndige børn siden ophævelsen af invalidepensionen i februar 2016 har forsøget ham økonomisk. Han skulle endvidere have boet sammen med to af sine myndige børn, der tog sig af husholdningen, handlede, plejede ham, vaskede ham, klædte ham på og dermed var hans primære referencepersoner. Domstolen har ingen gyldig grund til at betvivle, at disse påstande skulle være usande, og de bestrides heller ikke af Regeringen. De schweiziske domstole har endvidere i deres evaluering af det hensigtsmæssige i udsendelse af klager taget højde for, at familiemedlemmerne ville kunne bidrage til medicinudgifterne (ovenstående præmis 25). Det faktum, at disse bidrag ville kunne udtales til klager i Kosovo og stamme fra familien, der bor i Schweiz og i Tyskland, skaber ikke tvivl om selve eksistensen af et relevant afhængighedsforhold, der ville kunne lade området "familieliv" i artikel 8 finde anvendelse. Domstolen vurderer herefter, at klagers relationer med børnene ligeledes henhører under retten til respekt for familielivet."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel

og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Da klageren var 17 år gammel, fandt man ud af, at han ikke havde opholdstilladelse. Han blev efterfølgende nægtet opholdstilladelse under henvisning til gentagen kriminalitet. EMD udtalte i præmis 47-50:

"47. The Court has further laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, for instance, Konstatinov v. the Netherlands, no. 16351/03, § 52, 26 April 2007, and Z. and T. v. the United Kingdom (dec.), no. 27034/05, ECHR 2006-III). However, it has not insisted on such further elements of dependency in a number of cases concerning young adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; Osman v. Denmark, no. 38058/09, §§ 55-56, 14 June 2011; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019).

48. Even if a person of 26 years of age could still be considered a "young adult", the Court notes that at least in 2011 the applicant was not living full-time with his foster parents anymore (see paragraph 21 above). Moreover, it has not been argued and there is no indication that there are any further elements of dependency between the applicant and his foster parents.

49. The above notwithstanding, the Court deems it not necessary to decide on the question whether or not the ties between the applicant and his foster parents constituted family life within the meaning of Article 8. It reiterates that, in practice, the factors to be examined in order to assess the compatibility with Article 8 of a denial of a right of residence – in so far as those factors are relevant in a particular case – are the same regardless of whether family or private life is engaged (see, mutatis mutandis, A.A. v. the United Kingdom, no. 8000/08, §§ 49 and 57, 20 September 2011).

50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

I sagen *Savran v. Denmark (2021)* var klageren indrejst i opholdslandet som seksårig sammen med sin mor og sine søskende som familiesammenført til sin far. Han var fundet skyldig i vold med døden til følge, men fundet straffri som følge af psykisk sygdom. Han blev idømt retspsykiatrisk behandling samt udvist for bestandig. Storkammeret udtalte i præmis 174-178:

"174. Whilst in some cases the Court has held that there will be no family life between parents and adult children or between adult siblings unless they can demonstrate additional elements of dependence (see, for instance, A.W. Khan v. the United Kingdom, no. 47486/06, § 32, 12 January 2010, and Narjis v. Italy, no. 57433/15, § 37, 14 February 2019), in a number of other cases it has not insisted on such further elements of dependence with respect to young adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019). As already stated above, whether it is appropriate for the Court to

focus on the "family life" rather than the "private life" aspect will depend on the circumstances of the particular case.

175. In the present case, the applicant arrived in Denmark at the age of six; he was educated and spent his formative years there; he was issued with a residence permit and remained lawfully resident in the country for fourteen years and eight months (see paragraphs 27 and 30 above). The Court thus accepts that he was a "settled migrant" and therefore Article 8 under its "private life" aspect is engaged.

176. The applicant also alleged that, prior to his expulsion, he had had a close relationship with his mother, his four siblings and their children, who all lived in Denmark. In particular, while he had remained in forensic psychiatric care, they had visited him and he had visited them. The applicant also stressed his particular vulnerability on account of his mental condition, which, in his view, was an additional element of his dependence on them, and argued that he had had a "family life" with them, which had been interrupted by his expulsion (see paragraph 152 above).

177. The Court observes that, at the time when the applicant's expulsion order became final, he was 24 years old (see paragraph 30 above). Even if the Court may be prepared to accept that a person of this age can still be considered a "young adult" (see paragraph 174 above), the facts of the case reveal that from his childhood the applicant was removed from home and placed in foster care, and that, at various times over the years, he lived in socio-educational institutions (see paragraph 18 above). It is thus clear that from his early years the applicant was not living full time with his family (compare Pormes v. the Netherlands, no. 25402/14, § 48, 28 July 2020, and compare and contrast Nasri, cited above, § 44).

178. The Court is further not convinced that the applicant's mental illness, albeit serious, can in itself be regarded as a sufficient evidence of his dependence on his family members to bring the relationship between them within the sphere of "family life" under Article 8 of the Convention. In particular, it has not been demonstrated that the applicant's health condition incapacitated him to the extent that he was compelled to rely on their care and support in his daily life (compare and contrast Emonet and Others v. Switzerland, no. 39051/03, § 35, 13 December 2007; Belli and ArquierMartinez v. Switzerland, no. 65550/13, § 65, 11 December 2018; and I.M. v. Switzerland, cited above, § 62). Moreover, it has not been argued that the applicant was dependent on any of his relatives financially (compare and contrast I.M. v. Switzerland, cited above, § 62); it is noteworthy in this connection that the applicant has been and remains in receipt of a disability pension from the Danish authorities (see paragraphs 27, 30 and 72 above). Moreover, there is no indication that there were any further elements of dependence between the applicant and his family members. In these circumstances, whilst the Court sees no reason to doubt that the applicant's relationship with his mother and siblings involved normal ties of affection, it considers that it would be appropriate to focus its review on the "private life" rather than the "family life" aspect under Article 8."

I sagen *Bierski v. Poland (2022)* forholdt EMD sig til forholdet mellem en far og hans voksne søn, der havde et mentalt handicap, i forbindelse med en tvist vedrørende retten til samvær. EMD udtalte i præmis 47:

"*In this respect, the Court notes that the applicant is D.B.'s biological father with whom he lived for the first two years of his life. Following that, they had regular contact throughout D.B.'s childhood and youth and enjoyed a father-son relationship. Moreover, before D.B. turned 18 years of age, the applicant took the necessary steps to have contact with him secured by way of interim measure (see paragraph 7 above). On the basis of this measure, he continued to have contact with his son until A.R. was appointed as D.B.'s guardian*

and the measure was lifted (see paragraphs 9 and 12 above). Already against this background, the Court finds that even after he had reached the age of 18, D.B. was part of the applicant's core family. In addition, D.B. suffers from Down syndrome and is fully incapacitated. Indeed, according to the findings of the Wrocław Regional Court in its decision of 18 January 2019 (see paragraph 14 above) D.B. did not react to questions posed to him and communication between him and people not known to him was impossible. In view of this, it is clear to the Court that there existed "additional factors of dependence" between the applicant and his son, as the applicant was one of the close persons who could communicate with D.B. Taking into account the above considerations, the Court finds that, even though D.B. was no longer a minor at the relevant time, there existed "family life" between the applicant and his son within the meaning of Article 8 of the Convention and that, therefore, Article 8 is applicable to the present case."

Se endvidere sagen *Zakharchuk v. Russia (2019)*, hvor klageren, der efter at være blevet løsladt som 30-årig gjorde gældende, at forholdet til moren udgjorde familieliv, da han altid havde boet sammen med hende. EMD udtalte i præmis 53:

"As for the applicant's allegation concerning the adverse effect of his exclusion on his family life with his mother, the Court notes that the applicant furnished no documents, financial, medical or otherwise, substantiating the alleged dependency on him of his mother, who was resident in Russia. On the basis of the case file, and given that the applicant was thirty years old at the time of the issuance of the exclusion order, the Court does not find that there are any elements of dependency apart from the normal emotional ties between the applicant and his mother capable of bringing their relationship into the protective sphere of family life under Article 8 of the Convention (see, for comparison, Sapondzhyan, cited above)."

I sagen *Katsikeros v. Greece (2022)* forholdt EMD sig til forholdet mellem en far og hans mindreårige datter i en tvist vedrørende retten til samvær. Vedrørende spørgsmålet om, om der forelå "familieliv" i artikel 8's forstand, udtalte EMD i præmis 46-47:

"46. In the present case, the Court must first determine whether the decision of the Court of Appeal, upheld by the Court of Cassation, to put certain restrictions on the applicant's contact with M. disregarded the applicant's existing "family life" with his child within the meaning of Article 8. It notes at the outset that, despite K.P.'s initial refusal to acknowledge that the applicant was the biological father of M., it was then established that that was indeed the case; the applicant's paternity is now uncontested between the parties. In examining whether there is, in addition, a close personal relationship between him and the child which must be regarded as an established "family life" for the purposes of Article 8, the Court observes on the one hand, that the applicant cohabited with M.'s mother for a short period of time and they intended to get married; on the other hand, the applicant has never cohabited with M. and, despite the contact rights granted by the domestic decisions, he had only met M. once on 7 March 2015 until the end of the domestic proceedings in question, when M. was around three and a half years old. There are no signs of any commitment on the part of the applicant towards M. before she was born. In these circumstances, their relationship does not have sufficient constancy to be characterised as an existing "family life".

47. However, the Court has found that intended family life may, exceptionally, fall within the ambit of Article 8 in cases in which the fact that family life has not been established is not attributable to the applicant (see the references in paragraph 44 above). This applies, in particular, to the relationship between a child born out of wedlock and the child's biological father, who are inalterably linked by a natural bond while their actual relationship may be determined, for practical and legal reasons, by the child's mother and, if married, by her husband (see Anayo v. Germany, no. 20578/07, § 60, 21 December 2010). In the present case, the Court notes that the applicant expressed his wish to be recognised as M.'s father, to share parental responsibility with K.P. and to have regular contact with M. through his applications to the domestic courts. However, after his

paternity was established and his contact rights were granted by the domestic courts, the applicant refused to exercise his rights under the conditions that had been set out in the decisions and, as a result, he only saw M. once during the period covered by the domestic decisions in question. In the Court's view, that conduct was not sufficient to demonstrate the applicant's interest in his child. Thus, the present case should be distinguished from Anayo (cited above), in which the applicant had not had any contact with his biological children because their mother and their legal father had refused his requests to allow contact with them. It follows that in the circumstances of the present case, the fact that there was not any established family relationship between the applicant and M. can be attributed to the applicant."

Herefter udtalte EMD i præmis 48:

"*48. Having regard to the foregoing, the Court considers that the applicant's intended relationship with his biological child does not attract the protection of "family life" under Article 8. It notes, however, that in any event, the issue of whether the applicant's contact schedule with M. was excessively restrictive, even if it fell short of falling within "family life", concerned an important part of the applicant's identity and thus his "private life" within the meaning of Article 8 § 1 (see paragraph 45 above).*"

Som anført i afsnit 3.3.3.2 afhænger vægtningen af de enkelte elementer i proportionalitetsafvejningen af de konkrete omstændigheder i hver enkelt sag, se f.eks. *Maslov v. Austria (2008)*, hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[11] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

4.2.5.1. Alvorlig kriminalitet

I sagen *A.A. v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som 13-årig sammen med sine to søstre som familiesammenført til deres mor. To år senere blev han som 15-årig idømt fire års tilbageholdelse på en ungdomsinstitution for voldtægt begået mod en mindreårig, men blev løsladt tidligere på grund af god opførsel. Fem år efter den begåede kriminalitet blev klagerens udvisningsafgørelse endelig. Da EMD behandlede sagen, havde klageren opholdt sig i opholdslandet i 11 år. Han boede hos sin mor og besøgte sine to søstre regelmæssigt.

Vedrørende spørgsmålet om, hvorvidt udvisningen af klageren udgjorde et indgreb i hans ret til respekt for privatliv og familieliv, udtalte EMD i præmis 46-50:

[11] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

"46. The Court recalls that in Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I, when considering whether there was an interference with Article 8 rights in a deportation case, it found that "family life" existed in respect of an applicant who was 20 years old and living with his mother, step-father and siblings. In Boujlifa v. France, 21 October 1997, § 36, Reports 1997-VI, the Court considered that there was "family life" where an applicant aged 28 when deportation proceedings were commenced against him had arrived in France at the age of five and received his schooling there, had lived there continuously with the exception of a period of imprisonment in Switzerland and where his parents and siblings lived in France. In Maslov, cited above, § 62, the Court recalled, in the case of an applicant who had reached the age of majority by the time the exclusion order became final but was living with his parents, that it had accepted in a number of cases that the relationship between young adults who had not founded a family of their own and their parents or other close family members also constituted "family life".

47. However, in two recent cases against the United Kingdom the Court has declined to find "family life" between an adult child and his parents. Thus in Onur v. the United Kingdom, no. 27319/07, §§ 43-45, 17 February 2009, the Court noted that the applicant, aged around 29 years old at the time of his deportation, had not demonstrated the additional element of dependence normally required to establish "family life" between adult parents and adult children. In A.W. Khan v. the United Kingdom, no. 47486/06, § 32, 12 January 2010, the Court reiterated the need for additional elements of dependence in order to establish family life between parents and adult children and found that the 34-year old applicant in that case did not have "family life" with his mother and siblings, notwithstanding the fact that he was living with them and that they suffered a variety of different health problems. It is noteworthy, however, that both applicants had a child or children of their own following relationships of some duration.

48. Most recently, in Bousarra, cited above, §§ 38-39, the Court found "family life" to be established in a case concerning a 24-year old applicant, noting that the applicant was single and had no children and recalling that in the case of young adults who had not yet founded their own families, their ties with their parents and other close family members could constitute "family life".

49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life". However, it is not necessary to decide the question given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Thus, regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on "family life" rather than "private life", it observes that in practice the factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged (Üner, cited above, §§ 57-60).

50. An interference with right to respect for private life will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", as pursuing one or

more of the legitimate aims listed and as being "necessary in a democratic society" in order to achieve the aim or aims concerned."

EMD konstaterede i præmis 51-55, at indgrebet var i overensstemmelse med loven og forfulgte et af de legitime hensyn.

Ved vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund, gennemgik EMD i præmis 56 kriterierne som sammenfattet i Üner-dommen og udtalte på den baggrund i præmis 57-58, at de nationale domstole i hver enkelt sag må vurdere, hvilken vægt der skal tillægges de enkelte elementer i foretagelsen af den konkrete afvejning, indenfor staternes margin of appreciation. Om de relevante elementer i den foreliggende sag udtalte EMD i præmis 59-64:

"59. In the present case, the Court considers the relevant factors to be the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in United Kingdom; the time which has elapsed since the offence was committed and the applicant's conduct during that period; and the solidity of social, cultural and family ties with the host country and with the country of destination.

60. The Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Maslov, cited above, § 85). There can be no doubt that the applicant's offence was a serious one and the Court considers the comments of the sentencing judge as to the applicant's conduct and the effect of the attack on the victim to be relevant factors to be taken into account (see paragraph 8 above). The sentence imposed – four years in a Young Offenders' Institution – demonstrates the gravity of the offence. However, the fact that the applicant was a minor at the time the offence was committed is a relevant consideration in assessing the proportionality of a deportation (see Maslov, cited above, § 72). In this regard, the Court recalls that where offences committed by a minor underlie an exclusion order, regard must be had to the best interests of the child. In particular, the obligation to take the best interests of the child into account includes an obligation to facilitate his reintegration, an aim that the Court has previously held will not be achieved by severing family or social ties through expulsion (see Maslov, cited above, §§ 82-83).

61. The Court observes that the total length of the applicant's stay in the United Kingdom to date is eleven years. He arrived in the country at the age of 13 and has therefore now spent almost half his life in the United Kingdom. The Court notes that the applicant committed the offence which rendered him liable to deportation less than two years after his arrival in the United Kingdom. Further, following his conviction, he spent some two years in detention, during which time he was served with a deportation order. While the applicant was granted Indefinite Leave to Remain during this period, the Court is persuaded by the Government's submissions that leave was granted in ignorance of the applicant's conviction and, as a result, considers that no significance can be attached to the fact that Indefinite Leave to Remain was granted following the conviction (compare and contrast Omojudi, cited above, § 42). It is also true that the applicant has been aware since July 2003 of the fact that he was liable to be deported on account of his conviction. However, the Court nonetheless observes that he has now spent seven years at liberty in the United Kingdom following his release and despite having exhausted appeal rights in January 2008, no steps appear to have been taken in respect of his deportation until September 2010 (see paragraphs 23-25 above).

62. As to the lapse of time and the applicant's conduct since commission of the offence in 2002, the Court observes at the outset that the applicant has committed no further offences. While in detention, the applicant

took advantage of the educational opportunities available to him and obtained a number of high school qualifications (see paragraph 11 above). At the time of his release from detention in August 2004, his risk of reoffending was assessed to be low (see paragraph 11 above), an assessment subsequently reiterated by his probation officer in 2005 and accepted by the AIT in 2007 (see paragraphs 15 and 20 above). Since his release, the applicant's conduct appears to have been exemplary. He enrolled in college in September 2004 in order to sit his A-level examinations, which he obtained in summer 2005 (see paragraph 14 above). He was subsequently offered a place at university to study towards an undergraduate degree, which he obtained in 2008, followed by a postgraduate degree, which he completed in 2009 (see paragraphs 18 and 24 above). He commenced stable employment with a local authority in 2010 (see paragraph 24 above).

63. The Government have not pointed to any concern regarding the applicant's conduct in the seven years since his release from prison and rely solely on the seriousness of the offence to justify concerns as to his continued presence in the United Kingdom and his risk to the public (see paragraphs 41-42 and 44 above). The Court reiterates that the factors to be taken into consideration in cases involving deportation following a criminal offence are partially designed to evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities (see paragraph 57 above). In particular, the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has an impact on the assessment of the risk which the applicant poses to society (see Boultif, cited above, § 51; Maslov, cited above, § 90; and A.W. Khan, cited above, § 41). Accordingly, the Court considers the present factor to be of particular importance when assessing whether the seriousness of the offence in itself is sufficient to justify the applicant's deportation for the prevention of disorder or crime.

64. Finally, as regards the applicant's ties with the United Kingdom and with Nigeria, the Court observes that the applicant continues to reside with his mother and has close relationships with his two sisters and an uncle, all of whom reside in England. He has completed the majority of his high school and further education in the United Kingdom and has now commenced a career with a local authority in London. He is also a member of a church community. While he spent a significant period of his childhood in Nigeria, he has now not visited the country for eleven years. He has had no contact with his father since 1991".

I præmis 65-68 gennemgik EMD betydningen af opholdslandets passivitet i forhold til at udsende klageren i overensstemmelse med den trufne udvisningsafgørelse og redegjorde for baggrunden for at inddrage forhold indtruffet og klagerens opførsel i perioden efter denne afgørelse i sin afvejning, herunder vigtigheden af at facilitere reintegration af unge lovovertrædere i samfundet.

Herefter konkluderede EMD i præmis 69-70:

"69. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's deportation from the United Kingdom would be disproportionate to the legitimate aim of the "prevention of disorder and crime" and would therefore not be necessary in a democratic society.

70. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Nigeria."

I sagen *A.W. Khan v. the United Kingdom (2010)* var klageren indrejst i opholdslandet som treårig og var meddelt tidsubegrænset opholdstilladelse. Han blev som 28-årig idømt syv års fængsel for narkotikakriminalitet, men blev løsladt efter tre år på grund af god opførsel. Myndighederne traf efterfølgende afgørelse om udvisning på baggrund af den begåede kriminalitet. Klageren havde dels sin mor og sine søskende i opholdslandet, dels en kæreste, som han havde fået et barn med. På tidspunktet for sagens behandling for EMD var klageren 34 år gammel.

Vedrørende spørgsmålet om, om klagerens forhold til sin mor og sine søskende udgjorde familieliv, udtalte EMD i præmis 31-32:

"31. The Government have accepted that the applicant's deportation would interfere with his private life as reflected in his relationship with his mother and brothers, and the Court endorses this view. The Court also recalls that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants such as the applicants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", and having regard to the considerable period of time he has lived in the United Kingdom, the expulsion of the applicant would therefore constitute an interference with his right to respect for his private life. The Court recalls that it will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect (see Maslov v. Austria [GC], no. 1638/03, ECHR 2008 § 63).

32. In immigration cases the Court has held that there will be no family life between parents and adult children unless they can demonstrate additional elements of dependence (Slivenko v. Latvia [GC], no. 48321/99, § 97, ECHR 2003 X; Kwakye-Nti and Dufie v. the Netherlands (dec.), no. 31519/96, 7 November 2000). The Court does not accept that the fact that the applicant was living with his mother and brothers, or the fact that the entire family suffered from different health complaints, constitutes a sufficient degree of dependence to result in the existence of family life. In particular, the Court notes that in addition to his two brothers, the applicant also has three married sisters who live in the United Kingdom. It does not, therefore, accept that the applicant is necessarily the sole carer for his mother and brothers. Moreover, while his mother and brothers undoubtedly suffer from health complaints, there is no evidence before the Court which would suggest that these conditions are so severe as to entirely incapacitate them."

I præmis 33-35 gennemgik EMD klagerens forhold til sin kæreste og deres fælles barn, som fandtes at udgøre familieliv, hvorefter EMD i præmis 36 konkluderede, at der var tale om et ingreb både i klagerens privatliv og hans familieliv.

Herefter gennemgik EMD i præmis 37-42 om indgrebet var i overensstemmelse med loven, om det skete til varetagelse af et af de legitime hensyn og om det var nødvendigt i et demokratisk samfund. EMD henviste i denne forbindelse til de relevante kriterier som sammenfattet i Üner-dommen og udtalte i præmis 40-43:

"40. The Court reiterates that in view of the devastating effects of drugs on people's lives, it understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge (Dalia v France, cited above, § 54; Bhagli v France, cited above, § 48). The applicant's offence was particularly serious as it involved the importation of a significant quantity of heroin. The severity of the offence is reflected

in the fact that the applicant was sentenced to seven years' imprisonment, taking account of his decision to plead guilty at a very early stage. The severity of this offence must therefore weigh heavily in the balance.

41. Nevertheless, the Court must also take into account the fact that the applicant had not previously committed any serious criminal offences in the United Kingdom, and has committed no further offences following his release in June 2006. Under the approach taken in the Boultif judgment (cited above, §51), the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has a certain impact on the assessment of the risk which the applicant poses to society.

42. As regards the applicant's private life, the Court accepts that the applicant has lived most of his life in the United Kingdom, having arrived there at the age of three, and no longer has any real social, cultural or family ties to Pakistan. The applicant has not returned to Pakistan, even for a short visit, and he has no immediate family in Pakistan.

43. In the United Kingdom the applicant has established close ties with his mother and two brothers, with whom he has lived for most of his life. The relationship clearly entails an additional degree of dependence which results from the relative ill-health of all of the parties. Although there is no evidence to suggest that the family would not be able to cope without the applicant, his removal would likely cause greater difficulties than would otherwise be the case."

I præmis 44-47 gennemgik EMD, hvorvidt klagerens familieliv med sin kæreste og deres fælles barn kunne tillægges vægt i proportionalitetsafvejningen, hvilket ikke fandtes at være tilfældet henset til omstændighederne på tidspunktet for etableringen af familielivet. I præmis 48 udtalte EMD, at der også måtte tages hensyn til varigheden af indrejseforbuddet, som var højst ti år.

Herefter udtalte EMD i præmis 50-51, at:

"50. In light of the above, having particular regard to the length of time that the applicant has been in the United Kingdom and his very young age at the time of his entry, the lack of any continuing ties to Pakistan, the strength of his ties with the United Kingdom, and the fact that the applicant has not reoffended following his release from prison in 2006, the Court finds that the applicant's deportation from the United Kingdom would not be proportionate to the legitimate aim pursued and would therefore not be necessary in a democratic society.

51. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Pakistan."

I sagen vedrørende A.W. Khans bror, *A.H. Khan v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som syvårig og var tidligere blevet dømt for samleje med en mindreårig, to forsøg på røveri samt overfald. Som 30-årig blev han ydermere idømt fem års fængsel for røveri og udvist. Klageren blev udsendt ni år efter sin sidste dom. På tidspunktet for EMD´s afgørelse af sagen var han far til seks børn i alderen fra 12 til 17 år. Klageren var på daværende tidspunkt ikke i et forhold med mødrene til sine børn.

EMD udtalte i præmis 37, at:

"[…] the Court finds that, on balance, the applicant lived in the United Kingdom from 1978, when he was aged seven, returning to Pakistan only for visits. It is therefore accepted that he has lived in the United Kingdom since an early age, a factor which means that serious reasons would be required before his deportation could be found to be proportionate (see Maslov v. Austria [GC], no. 1638/03, § 75, 23 June 2008)."

EMD fandt den af klageren begåede kriminalitet alvorlig og fremhævede, at det forhold, at han havde begået kriminalitet igen kort tid efter løsladelsen, viste, at han ikke var rehabiliteret og derfor fortsat udgjorde en fare for offentligheden, hvorfor der var gode grunde til at udsende ham.

Hvad angik klagerens forhold til sin mor og sine søskende udtalte EMD i præmis 39:

"The Court must now consider the applicant's circumstances in the United Kingdom, with a view to determining whether his family and private life, and his consequent level of integration into British society, were such as to outweigh the seriousness of his criminal history. Looking first at the nationalities of the persons involved, the Court notes that, unlike the applicant, his mother and siblings are all now naturalised British citizens. […]"

Herefter gennemgik EMD klagerens forhold til sine børn og deres mødre samt til sin aktuelle kæreste, hvorefter EMD udtalte i præmis 41:

"Finally, the Court turns to the question of the respective solidity of the applicant's ties to the United Kingdom and to Pakistan. The Court notes that, unlike his younger brother, the applicant returned to Pakistan for visits following his arrival in the United Kingdom and also married there. In the absence of any evidence to the contrary, the Court assumes that this marriage is still, legally at least, subsisting. The applicant therefore maintained some level of connection to his country of origin and was not deported as a stranger to the country. As regards his ties to the United Kingdom, the Court has addressed the question of his family life, both with his parents and siblings and with his various partners and children, above, and found it to be limited in its extent. Furthermore, the applicant's private life in the United Kingdom, as observed by the Tribunal, has been constrained by his convictions and spells in prison. Whilst he was mainly educated in the United Kingdom and has worked, he does not appear to have established a lengthy or consistent employment history. In short, and despite the length of his stay, the applicant did not achieve a significant level of integration into British society. The Court is aware that, as a settled migrant who spent much of his childhood in the United Kingdom, serious reasons would be required to render the applicant's deportation proportionate (see Maslov, cited above, § 75). However, having regard to his substantial offending history, including offences of violence and recidivism following the commencement of deportation proceedings against him, the Court is of the view that such serious reasons are present in the applicant's case. His private and family life in the United Kingdom were not such as to outweigh the risk he presented of future offending and harm to the public and his deportation was therefore proportionate to the legitimate aim of preventing crime. As such, the applicant's deportation to Pakistan did not amount to a violation of Article 8."

I sagen *Üner v. the Netherlands (2006)* blev klageren idømt syv års fængsel for drab og udvist for bestandig. Klageren var indrejst som 12-årig sammen med sin mor og sine søskende som familiesammenført til faren. På tidspunktet, hvor afgørelsen om udvisning blev endelig, havde han opholdt sig 17 år i opholdslandet og havde to mindreårige børn med sin nederlandske partner. Han var flyttet fra partneren efter halvandet års samliv, da det ældste barn var omkring ni måneder gammel, men forblev i tæt kontakt med partneren og

barnet i de følgende omkring otte måneder indtil fængslingen. Partneren og det ældste barn besøgte klageren i fængslet mindst en gang om ugen og ofte hyppigere. Mens klageren var fængslet, fik parret endnu et barn, som klageren ligeledes så hver uge. Klageren havde på tidspunktet for EMD´s afgørelse opholdt sig 25 år i opholdslandet.

EMD fastslog i præmis 61, at der forelå et indgreb både i klagerens ret til respekt for familieliv og hans ret til respekt for privatliv. EMD udtalte imidlertid:

"[...] Even so, having regard to the particular issues at stake in the present case and the positions taken by the parties, the Court will pay special attention to the applicant's right to respect for his family life."

EMD udtalte i præmis 62, at:

"The Court considers at the outset that the applicant lived for a considerable length of time in the Netherlands, the country that he moved to at the age of 12 together with his mother and brothers in order to join his father, and where he held a permanent residence status. Moreover, he subsequently went on to found a family there. In these circumstances, the Court does not doubt that the applicant had strong ties with the Netherlands. That said, it cannot overlook the fact that the applicant 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. As the Chamber put it in paragraph 46 of its judgment, '... the disruption of their family life would not have the same impact as it would [have had] if they had been living together as a family for a much longer time'. Moreover, while it is true that the applicant came to the Netherlands at a relatively young age, the Court is not prepared to accept that he had spent so little time in Turkey that, at the time he was returned to that country, he no longer had any social or cultural (including linguistic) ties with Turkish society."

I præmis 63-65 forholdt EMD sig til den begåede kriminalitet, tidspunktet for prøveløsladelse, klagerens børns alder og deres og partnerens statsborgerskab i opholdslandet i forhold til muligheden for at følge med klageren til dennes hjemland samt det pålagte indrejseforbuds varighed. Herefter konkluderede EMD i præmis 67:

"In the light of the above, the Court finds that a fair balance was struck in this case in that the applicant's expulsion and exclusion from the Netherlands were proportionate to the aims pursued and therefore necessary in a democratic society.

Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Loy v. Germany (2014)* var klageren indrejst i opholdslandet som femårig. Som 26-årig blev han idømt fire måneders betinget fængsel for vold mod sine børns mor og tre år senere blev han idømt et års betinget fængsel for vold på en natklub. To år senere blev han idømt to et halvt års fængsel for narkotikakriminalitet. Det år, han fyldte 32 år, blev klageren udvist af opholdslandet med indrejseforbehold uden fastsat tidsbegrænsning, og to år senere blev han udsendt til hjemlandet. På udvisningstidspunktet var klageren skilt fra sin tidligere ægtefælle, som var statsborger i opholdslandet, og med hvem klageren havde fået to børn, som ligeledes var statsborgere i opholdslandet og 21 og 17 år gamle på tidspunktet for klagerens udvisning. Han giftede sig igen, efter hans udvisningsdom var blevet afsagt.

EMD konstaterede i præmis 28, at indgrebet var i overensstemmelse med lovgivningen og tjente et legitimt formål. Til brug for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund og proportionalt med det forfulgte hensyn, gennemgik EMD i præmis 30 kriterierne som sammenfattet i Üner- og Maslov-dommene og konstaterede derefter i præmis 31, at den af klageren begåede kriminalitet, som også omfattede narkotikakriminalitet, var alvorlig. I præmis 32 konstaterede EMD, at klageren havde boet næsten 30 år i opholdslandet og havde tidsubgrænset opholdstilladelse, da udvisningsafgørelsen blev endelig.

I præmis 34-36 fandt EMD med hensyn til karakteren af klagerens familieliv med henholdsvis børnene af det tidligere ægteskab, "that the applicant's family ties with his children were not very developed" og med den nuværende ægtefælle, at "Their family life, such as it was, was thus always against the background of pending expulsion proceedings. They separated soon after the marriage. In these circumstances, no decisive weight can be attached to the family relationship with his spouse."

Herefter udtalte EMD i præmis 37 om klagerens tilknytning til opholdslandet:

"The Court also looks for significant relations within the society of the host country (see Trabelsi, cited above, § 62; Mutlag, cited above, § 58; Lukic v. Germany (dec.), no. 25021/08, 20 September 2011) and notes that apart from mentioning that he went to school and completed a vocational training in Germany in his submissions the applicant submits nothing by way of evidence of his participation in social life apart from the length of his residence. Apart from referring to his children and his former spouse he made reference to the fact that his father, stepmother and siblings live in Germany. He claims that he has contact with his sister, but gives no further details. No information on other social contacts was provided. Therefore, in the present case only few significant relations can be established."

I præmis 38 gennemgik EMD klagerens tilknytning til hjemlandet og konstaterede, at han havde boet der, til han var fem år gammel, og at han angiveligt talte noget serbisk. I præmis 39 konstaterede EMD, at indrejseforbuddet ikke nødvendigvis behøvede at være permanent, idet klageren kunne søge om at få det tidsbegrænset.

I præmis 40 udtalte EMD, at:

"Against the background of the gravity of the applicant's drug related offence, together with the earlier crimes of violence committed by the applicant, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family and his private life reasonably against the State's interest in preventing disorder and crime. Appreciating the consequences of the expulsion for the applicant, the Court cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to impose this measure."

EMD afviste derefter sagen som *inadmissable*, idet klagen blev vurderet *manifestly ill-founded*.

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før

klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

EMD udtalte i præmis 45, at:

"As regards the length of the applicant's stay in Switzerland, the Court observes that he arrived in Switzerland in 1989 at the age of nine and lived in Switzerland for more than twenty years. His stay in Switzerland was, thus, of a considerable length of time."

I præmis 46-50 gennemgik EMD klagerens opførsel og domstolsbehandlingen af hans sag efter begåelsen af lovovertrædelsen samt klagerens families forhold, herunder muligheden for klagerens ægtefælle og børn for at tage ophold i klagerens hjemland.

I præmis 51 og 52 gennemgik EMD klagerens tilknytning til henholdsvis opholdslandet og hjemlandet:

"51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'."

EMD udtalte herefter i præmis 53-55:

"53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in

total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Levakovic v. Denmark (2018)* havde klageren haft opholdstilladelse i opholdslandet, siden han var otte måneder gammel. Da han var 25 år gammel, blev han idømt fem års fængsel og udvist på grund af mange tilfælde af grov kriminalitet, herunder flere væbnede røverier, narkotikakriminalitet, tyverier og besiddelse af både våben og stjålne effekter.

Ved de nationale myndigheders behandling af straffesagen oplyste klageren om sin familiemæssige tilknytning til Danmark, som det fremgår af præmis 16, at:

"The case was heard by the City Court of Copenhagen (Københavns Byret). Two co-accused from the applicant's family were also on trial. The applicant was heard and pleaded not guilty to the robberies. He explained that he was 25 years old. Except for eight months spent, as a baby, in the Netherlands, he had lived all his life in Denmark, where all his family lived, including his parents, three brothers and 80 other family members. He had never been to Croatia or the former Yugoslavia. He had no family there and did not speak the language. He had been diagnosed with ADHD and took medication for that. He had had a girlfriend for 2 years and 3 months. They wanted to marry and have children."

Efter at have gennemgået de generelle betragtninger bl.a. om begrebet "privatliv" og om forholdet mellem forældre og voksne børn og mellem voksne søskende samt redegjort for kriterierne som sammenfattet i Üner-dommen og om staternes margin of appreciation, udtalte EMD i præmis 39:

"The Court considers it established that there was an interference with the applicant's right to respect for his private life within the meaning of Article 8, that the expulsion order was "in accordance with the law", and that it pursued the legitimate aim of preventing disorder and crime (see also, for example, Salem v. Denmark, no. 77036/11, § 61, 1 December 2016)."

Herefter gennemgik EMD i præmis 40-45, hvorvidt udvisningen af klageren var nødvendig i et demokratisk samfund, og udtalte i præmis 41-46:

"41. As flows from the Court's case-law (see paragraph 33), the point of departure for the Court's analysis under Article 8 of the Convention in the present case is the fact that an alien does not have a Convention right to reside in a particular country, a rule which applies to settled migrants like the applicant. However, if a Member State's decision to expel a settled migrant, lawfully residing in the State in question, interferes with his or her family or privacy rights, protected by paragraph 1 of Article 8, the national authorities are under a duty, provided by paragraph 2 of the same provision, to evaluate the individual situation of the migrant in accordance with the criteria set out in the Court's case-law (see paragraph 36 above). In the application of these criteria, the Court has not qualified the relative weight to be accorded to each criteria in the individual assessment, as this analysis is, in the first place, for the national authorities subject to European supervision. However, in Maslov (cited above, § 75), the Court made clear that when a case concerns a settled migrant, who has lawfully spent all or major part of his or her childhood and youth in the host country, "very serious reasons are required to justify expulsion". It is clear that in the light of the facts in the present case, the Court is called upon to examine whether such "very serious reasons" were adequately adduced by the national authorities when assessing the applicant's case and, if so, whether the Court considers itself in a position to substitute its view for that of the domestic courts."

42. The Court recognises that the City Court made a thorough assessment of the applicant's personal circumstances, carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law (see paragraph 19 above). It was fully aware that very strong reasons are required to justify the deportation of settled migrants (see Maslov, cited above, § 75). It found, making an overall assessment, that although the applicant had no ties to Croatia, due to his criminal past, which included two convictions for three robberies committed when he was an adult, the nature and seriousness of the crimes committed, namely a robbery in a private home and an armed bank robbery, both committed during the probation period for the most recent suspended expulsion order, and the fact that the applicant had twice violated the conditions for suspended expulsion orders, there were such very serious reasons justifying expulsion.

43. That balancing and proportionality test was approved by the High Court in its judgment of 26 August 2013.

44. Thus assessing whether the national authorities adduced relevant and sufficient reasons for expelling the applicant, the Court observes that after entering adulthood, the applicant has been convicted twice for robbery which by the very nature of the crime in question is a serious act including elements of violence or the threat of violence. He has also been convicted of other offences against property. In the Court's view, when assessing the 'nature and seriousness' of the offences committed by the applicant, the national authorities were thus entitled to take the view that they attained a level of gravity warranting expulsion unless other counterbalancing criteria militated against imposing that measure in the light of the Court's case-law. In this regard, the Court attaches particular weight to the fact that the expulsion of the applicant did not interfere with his family rights as he is an adult and has not made any arguments to the effect that there are additional elements of dependence between himself and his parents or siblings (see paragraph 35 above). Therefore, the interference with the applicant's Article 8 rights was limited to his right to privacy. Furthermore, the applicant has no children, thus obviating the need to take into account weighty reasons directed at protecting a child's best interests. Moreover, and importantly, the Court recalls that under its case-law, the evaluation of the applicant's 'social' and 'cultural ties' with the host country, here Denmark, is a criteria to be included in the analysis (see paragraph 36 above). On this basis, the Court considers it of importance that the City Court

examined the particular situation of the applicant and found that although he has lived most of his life in Denmark he 'must be considered very poorly integrated into Danish society'. In fact, it can be readily deduced from the file that the applicant has primarily lived a life of crime and consistently demonstrated a lack of will to comply with Danish law. The Court makes clear that unlike in Maslov (cited above), the national authorities based their decision to expel the applicant not on crimes perpetrated when the applicant was a juvenile.

45. In the light of the above, the Court reiterates that in the interpretation and application of Article 8 of the Convention in cases of the kind in question, emphasis must be placed on securing a fair balance between the public interest and the Article 8 rights of aliens residing in the Member States. Ascertaining whether 'very weighty reasons' justify the expulsion of a settled migrant, like the applicant, who has lived almost all his life in the host country, must inevitably require a delicate and holistic assessment of all the criteria flowing from the Court's case-law, an assessment that must be carried out by the national authorities under the final supervision of the Court. Taking account of all of the elements described above, the Court concludes that the interference with the applicant's private life was supported by relevant and sufficient reasons. There are no indications whatsoever that the domestic authorities may have based their decisions on stereotypes about Roma, as it appears to be alleged by the third party intervener, and the applicant never made such a complaint. The Court is also satisfied that the applicant's expulsion was not disproportionate given all the circumstances of the case. It notes that the City Court and the High Court explicitly assessed whether the expulsion order could be deemed to be contrary to Denmark's international obligations. The Court points out in this respect that, although opinions may differ on the outcome of a judgment, 'where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts' (see, Ndidi v. the United Kingdom (no. 41215/14, § 76, 14 September 2017; and, mutatis mutandis, Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012 and Axel Springer AG v. Germany [GC], no. 39954/08, § 88, 7 February 2012).

46. Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *I.M. v. Switzerland (2019)* blev klageren udvist af opholdslandet efter at være blevet dømt for voldtægt ti år forinden. Han led af forskellige sygdomme og var vurderet 80 % invalid. Klagerens tidligere ægtefælle og deres fællesbørn, hvoraf tre var myndige, havde alle ophold i opholdslandet, og klageren var afhængig af hjælp fra de myndige børn i form af pleje og økonomisk bistand.

I præmis 69 gennemgik EMD de generelle kriterier, som Storkammeret havde sammenfattet i Üner-sommen, som skal vejlede de nationale domstole i sager om udvisning af kriminelle udlændinge ved vurderingen af, om indgrebet er nødvendigt i et demokratisk samfund. EMD udtalte herefter i præmis 70 (uofficiel dansk oversættelse):

"Der skal ligeledes i givet fald tages højde for de særlige omstændigheder i forbindelse med den foreliggende sag, som f.eks. forhold af lægelig art eller indrejseforbuddets midlertidige eller definitive karakter (Shala mod Schweiz, nr. 52873/09, præmis 46, 15. november 2012, og de citerede referencer)."

I præmis 71-73 udtalte EMD om de nationale myndigheders skønsbeføjelser og begrundelsespligt (uofficiel dansk oversættelse):

"71. Domstolen henviser til, at de nationale myndigheder har visse skønsbeføjelser til at udtale sig om nødvendigheden af et indgreb i udøvelsen af en rettighed, der er beskyttet i medfør af artikel 8, og om den pågældende foranstaltnings proportionalitet med det legitime mål, der forfølges. Domstolens opgave består i at bestemme, om der i forbindelse med anfægtede foranstaltninger er respekteret en rimelig afvejning mellem de tilstedeværende interesser, dvs. på den ene side den pågældende persons interesser, der er beskyttet i medfør af Konventionen, og på den anden side samfundets interesser (Slivenko, nævnt ovenfor, præmis 113, og Boultif, nævnt ovenfor, præmis 47).

72. Domstolen henviser ligeledes til, at de nationale domstole skal begrunde deres afgørelser tilstrækkeligt udførligt, for navnlig at gøre det muligt for Domstolen at sikre det europæiske tilsyn, som Domstolen er betroet (jf., mutatis mutandis, X mod Letland [Storkammeret], nr. 27853/09, præmis 107, EMD 2013, og El Ghatet mod Schweiz, nr. 56971/10, præmis 47, 8. november 2016). Et utilstrækkeligt ræsonnement fra de nationale myndigheders side uden en reel afvejning af de tilstedeværende interesser strider mod kravene i Konventionens artikel 8. Det er tilfældet, når de nationale myndigheder ikke på en overbevisende måde formår at overbevise om, at indgrebet i en ret, der er beskyttet i medfør af Konventionen, står i forhold til de forfulgte mål, og at det herefter svarer til et "bydende nødvendigt socialt behov" i overensstemmelse med den ovennævnte retspraksis (El Ghatet, nævnt ovenfor, præmis 47, og mutatis mutandis, Schweizerische Radio- und Fernsehgesellschaft SRG mod Schweiz, nr. 34124/06, præmis 65, 21. juni 2012, Saber og Boughassal mod Spanien, nr. 76550/13 og 45938/14, præmis 51, 18. december 2018).

73. Hvis det til gengæld viser sig, at de nationale myndigheder har foretaget en tilstrækkelig og overbevisende undersøgelse af de faktiske forhold og relevante betragtninger, herunder en passende afvejning af klagers interesser og samfundets mere generelle interesser, tilkommer det ikke Domstolen at lade sin vurdering træde i stedet for den vurdering, der er foretaget af de nationale myndigheder, herunder i forhold til behandlingen af proportionaliteten i den omtvistede sag, medmindre der findes væsentlige årsager til at gøre dette (jf. i denne henseende Ndidi mod Det Forenede Kongerige, nr. 41215/14, præmis 76, 14. september 2017, Hamesevic mod Danmark (dec.), nr. 25748/15, præmis 43, 16. maj 2017 og Alam mod Danmark (dec.), nr. 33809/15, præmis 35, 6. juni 2017)."

EMD konstaterede om de nationale domstoles konkrete vurdering af indgrebets nødendighed i et demokratisk samfund i præmis 76-79 (uofficiel dansk oversættelse):

"76. Domstolen bemærker, at den administrative forbundsdomstol har udtalt sig om alvoren af den begåede lovovertrædelse, kortfattet behandlet spørgsmålet om risikoen for gentagelse af den strafbare handling og bemærket de problemer, som klager måtte blive konfronteret med ved sin tilbagevenden til Kosovo. Domstolen henviser imidlertid til, at forbundsdomstolen har begrænset sin analyse i forhold til Konventionens artikel 8 til alene disse dele. Da forbundsdomstolen traf afgørelse mere end tolv år efter lovovertrædelsen, tog den på ingen måde højde for udviklingen i klagers adfærd, siden lovovertrædelsen blev begået (K.M. mod Schweiz, nr. 6009/10, præmis 54, 2. juni 2015, og de nævnte referencer). Den vurderede heller ikke indvirkningen af den betydelige forværring af den pågældende persons helbredstilstand (invaliditetsgrad på 80 % siden 1. oktober 2012) i forhold til risikoen for gentagelse af de strafbare forhold og har ikke behandlet flere kriterier, der er fastlagt i Domstolens retspraksis ved vurdering af nødvendigheden af udvisningsforanstaltningen. Den

administrative forbundsdomstol har navnlig ikke taget højde for fastheden af klagers sociale, kulturelle og familiemæssige tilknytning til værtslandet Schweiz og destinationslandet Kosovo samt de særlige omstændigheder i den foreliggende sag, som for eksempel de lægelige oplysninger (Üner, nævnt ovenfor, præmis 58, og Shala, nævnt ovenfor, præmis 46). For så vidt angår navnlig respekten for familielivet, selv om domstolene har anerkendt klagers afhængighed, i det mindste hans økonomiske afhængighed af de myndige børn, er der ikke foretaget en mere dybtgående analyse af indvirkningerne af denne afhængighed på klagers udøvelse af rettighederne i medfør af Konventionens artikel 8.

77. Domstolen vurderer henset til ovenstående, at der ved anvendelse af de kriterier, der er fastlagt i dens retspraksis (ovenstående præmis 68 og 69), ikke kan udledes nogen tydelig konklusion med hensyn til, hvorvidt klagers private og familiemæssige interesse i fortsat at kunne bo på den indklagede stats territorium går forud for sidstnævntes offentlige interesse i at udvise klager med henblik på at varetage missionen med opretholdelse af den offentlige orden (jf., mutatis mutandis, El Ghatet, nævnt ovenfor, præmis 52). Hvis de nationale myndigheder havde foretaget en grundig afvejning af de pågældende interesser og taget højde for de forskellige kriterier, der er fastlagt i Domstolens retspraksis, og hvis de havde anført relevante og tilstrækkelige grunde, der kunne berettige deres afgørelse, ville Domstolen i givet fald, i tråd med nærhedsprincippet, kunne have været foranlediget til at vurdere, at de nationale myndigheder hverken havde undladt at foretage en retfærdig afvejning af klagers og den indklagede stats interesser eller overskredet de skønsbeføjelser, som de har inden for immigrationsområdet (jf., El Ghatet, nævnte ovenfor, præmis 52).

78. Domstolen vurderer imidlertid, at den administrative forbundsdomstol i den foreliggende sag har foretaget en overfladisk behandling af udsendelsesforanstaltningens proportionalitet. Henset til fraværet af en reel afvejning af de interesser, der står på spil, vurderer Domstolen, at de nationale myndigheder ikke på en overbevisende måde har formået at bevise, at udsendelsesforanstaltningen skulle være proportionel med de forfulgte legitime mål og dermed nødvendig i et demokratisk samfund.

79. Der ville herefter foreligge en krænkelse af Konventionens artikel 8, hvis klager udvises."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

Vedrørende spørgsmålet om, hvorvidt klageren havde privatliv og familieliv i Nederlandene, udtalte EMD i præmis 47-50:

"47. The Court has further laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, for instance, Konstatinov v. the Netherlands, no. 16351/03, § 52, 26 April 2007, and Z. and T. v. the United Kingdom (dec.), no. 27034/05, ECHR 2006-III). However, it has not insisted on such further elements of dependency in a number of cases concerning young adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; Osman v. Denmark, no. 38058/09, §§ 55-56, 14 June 2011; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019).

48. Even if a person of 26 years of age could still be considered a "young adult", the Court notes that at least in 2011 the applicant was not living full-time with his foster parents anymore (see paragraph 21 above). Moreover, it has not been argued and there is no indication that there are any further elements of dependency between the applicant and his foster parents.

49. The above notwithstanding, the Court deems it not necessary to decide on the question whether or not the ties between the applicant and his foster parents constituted family life within the meaning of Article 8. It reiterates that, in practice, the factors to be examined in order to assess the compatibility with Article 8 of a denial of a right of residence – in so far as those factors are relevant in a particular case – are the same regardless of whether family or private life is engaged (see, mutatis mutandis, A.A. v. the United Kingdom, no. 8000/08, §§ 49 and 57, 20 September 2011).

50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with

Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought

to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Savran v. Denmark (2021)* var klageren indrejst i opholdslandet som seksårig sammen med sin mor og sine søskende som familiesammenført til sin far. Klageren var som 16-årig blevet idømt et år og tre måneders fængsel, heraf ni måneder betinget, for røveri. Som 24-årig blev han fundet skyldig i vold med døden til følge begået tre år forinden, men fundet straffri som følge af psykisk sygdom. Han blev idømt retspsykiatrisk behandling samt udvist for bestandig. Fem år senere blev udvisningen prøvet og opretholdt, og klageren blev udsendt til sit hjemland.

Vedrørende spørgsmålet om, hvorvidt klageren havde privatliv og familieliv i opholdslandet, udtalte Storkammeret i præmis 174-178:

"174. Whilst in some cases the Court has held that there will be no family life between parents and adult children or between adult siblings unless they can demonstrate additional elements of dependence (see, for instance, A.W. Khan v. the United Kingdom, no. 47486/06, § 32, 12 January 2010, and Narjis v. Italy, no. 57433/15, § 37, 14 February 2019), in a number of other cases it has not insisted on such further elements of dependence with respect to young adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019). As already stated above, whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect will depend on the circumstances of the particular case.

175. In the present case, the applicant arrived in Denmark at the age of six; he was educated and spent his formative years there; he was issued with a residence permit and remained lawfully resident in the country for fourteen years and eight months (see paragraphs 27 and 30 above). The Court thus accepts that he was a "settled migrant" and therefore Article 8 under its "private life" aspect is engaged.

176. The applicant also alleged that, prior to his expulsion, he had had a close relationship with his mother, his four siblings and their children, who all lived in Denmark. In particular, while he had remained in forensic psychiatric care, they had visited him and he had visited them. The applicant also stressed his particular vulnerability on account of his mental condition, which, in his view, was an additional element of his dependence on them, and argued that he had had a "family life" with them, which had been interrupted by his expulsion (see paragraph 152 above).

177. The Court observes that, at the time when the applicant's expulsion order became final, he was 24 years old (see paragraph 30 above). Even if the Court may be prepared to accept that a person of this age can still be considered a "young adult" (see paragraph 174 above), the facts of the case reveal that from his childhood the applicant was removed from home and placed in foster care, and that, at various times over the years, he lived in socio-educational institutions (see paragraph 18 above). It is thus clear that from his early years the applicant was not living full time with his family (compare Pormes v. the Netherlands, no. 25402/14, § 48, 28 July 2020, and compare and contrast Nasri, cited above, § 44).

178. The Court is further not convinced that the applicant's mental illness, albeit serious, can in itself be regarded as a sufficient evidence of his dependence on his family members to bring the relationship between them within the sphere of "family life" under Article 8 of the Convention. In particular, it has not been demonstrated that the applicant's health condition incapacitated him to the extent that he was compelled to rely on

their care and support in his daily life (compare and contrast Emonet and Others v. Switzerland, no. 39051/03, § 35, 13 December 2007; Belli and ArquierMartinez v. Switzerland, no. 65550/13, § 65, 11 December 2018; and I.M. v. Switzerland, cited above, § 62). Moreover, it has not been argued that the applicant was dependent on any of his relatives financially (compare and contrast I.M. v. Switzerland, cited above, § 62); it is noteworthy in this connection that the applicant has been and remains in receipt of a disability pension from the Danish authorities (see paragraphs 27, 30 and 72 above). Moreover, there is no indication that there were any further elements of dependence between the applicant and his family members. In these circumstances, whilst the Court sees no reason to doubt that the applicant's relationship with his mother and siblings involved normal ties of affection, it considers that it would be appropriate to focus its review on the "private life" rather than the "family life" aspect under Article 8."

I præmis 179-180 udtalte Storkammeret, at afvisningen af at ophæve udvisningsbeslutningen udgjorde et indgreb i klagerens privatliv, og at indgrebet var hjemlet i lov og forfulgte et af de legitime hensyn, forebyggelse af uro og forbrydelse.

I præmis 181-189 gennemgik EMD de generelle principper vedrørende nødvendighedsvurderingen.

EMD bemærkede i præmis 190, at der var forløbet en betragtelig tid fra det tidspunkt, hvor udvisningsbeslutningen blev endelig, til tidspunktet for afgørelsen om eventuel ophævelse af udvisningsbeslutningen, og at det var op til de nationale domstole at lade alle relevante ændringer i klagerens forhold i denne periode indgå i vurderingen af, om det på tidspunktet for afgørelsen om eventuel ophævelse af udvisningsbeslutningen var proportionalt at udvise klageren, herunder særligt ændringer vedrørende hans opførsel og helbred.

EMD gennemgik i præmis 191-196 betydningen af klagerens helbredstilstand og i præmis 197 betydningen af de fremskridt, der var sket i klagerens opførsel i perioden mellem gerningstidspunktet og den endelige afgørelse vedrørende evt. ophævelse af udvisningen, jf. det tredje Maslov-kriterium, hvilket imidlertid ikke blev taget i betragtning ved de nationale domstoles vurdering af risikoen for gentagelseskriminalitet.

I præmis 198 udtalte EMD om fastheden af klagerens sociale, kulturelle og familiemæssige bånd til opholdslandet og til hjemlandet:

"A further issue to be considered is the solidity of the applicant's social, cultural and family ties with the host country and the country of destination (the fourth Maslov criterion). Whilst the applicant's ties with Turkey seem to have been limited, it cannot be said that he was completely unfamiliar with that country (see paragraphs 30, 59 and 65 above). However, it appears that the High Court gave little consideration to the length of the applicant's stay in and his ties to his host country Denmark (the second and fourth Maslov criteria respectively; see paragraph 182 above), stressing as it did the fact that he had not founded his own family and had no children in Denmark (see paragraph 66 above). As to the latter aspect, the Court reiterates its finding in paragraph 178 above that, even if he had no "family life", the applicant could still claim protection of his right to respect for his "private life" within the meaning of Article 8 (see Maslov, cited above, § 93). In this regard, the Court attaches particular weight to the fact, also noted by the domestic courts in the criminal proceedings and by the City Court in the revocation proceedings, that the applicant was a settled migrant who had been living in Denmark since the age of six (see paragraph 59 above). Although the applicant's child

and young adulthood were clearly difficult, suggesting integration difficulties, he had received most of his education in Denmark and his close family members (mother and siblings) all live there. He had also been attached to the Danish labour market for about five years (see paragraphs 27 and 30 above). "

Endelig gennemgik EMD I præmis 199-200 betydningen af varigheden af indrejseforbuddet for den samlede proportionalitetsvurdering.

Herefter konkluderede EMD i præmis 201-202:

"201. In the light of the above, it appears that in the revocation proceedings, despite the significant period of time during which the applicant underwent medical treatment for his mental disorder, the High Court, apart from briefly referring to his lack of family ties in Denmark and to the serious nature and gravity of his criminal offence, did not consider the changes in the applicant's personal circumstances with a view to assessing the risk of his reoffending against the background of his mental state at the time of the commission of the offence and the apparent beneficial effects of his treatment. Nor did it have due regard to the strength of the applicant's ties to Denmark as compared to those to Turkey. The Court further notes that under the domestic law, the administrative and judicial authorities had no possibility of making an individual assessment of the duration of the applicant's exclusion from Danish territory, which was both irreducible and permanent. Therefore, and notwithstanding the respondent State's margin of appreciation, the Court considers that, in the particular circumstances of the present case, the domestic authorities failed to duly take into account and to properly balance the interests at stake (see paragraphs 182 and 183 above).

202. Accordingly, there has been a violation of Article 8 of the Convention."

Der kan endvidere henvises til følgende sager:

- *Loukili v. the Netherlands (2023).*
- *Sharifi v. Denmark (2023).*
- *Al-Masudi v. Denmark (2023).*
- *Noorzae v. Denmark (2023).*
- *Goma v. Denmark (2023).*
- *Nguyen v. Denmark (2024).*

4.2.5.2. Mindre alvorlig kriminalitet

I sagen *Miah v. the United Kingdom (2010)* indrejste klageren i opholdslandet som 11-årig og tog ophold hos sin far, dennes nye ægtefælle samt sine to brødre. Da klageren var 14 år gammel, døde faren. Som 19-årig blev han idømt to års fængsel på en institution for ungdomskriminelle for indbrud og tyveri. Klageren blev efterfølgende flere gange idømt bøder for bl.a. tyveri. Da klageren var 26 år gammel, blev han idømt 12 måneders fængsel for tyveri, og samme år blev han udvist. Klageren havde indtil fængslingen boet hjemme hos stedmoren og havde til hensigt at flytte hjem igen efter løsladelsen. Klageren blev året efter udsendt til Bangladesh.

Vedrørende spørgsmålet om, hvorvidt udvisningen udgjorde et indgreb i klagerens ret til respekt for familie- og privatliv, udtalte EMD i præmis 16-18:

"16. The Court notes that the Asylum and Immigration Tribunal found that the applicant's deportation would not interfere with either his private or family life in the United Kingdom. It also recalls that in immigration cases it has held that there will be no family life between parents and adult children unless they can demonstrate additional elements of dependence (Iyisan v. the United Kingdom (dec.), no. 7673/08, 9 February 2010; Kwakye-Ntl and Dufie v. the Netherlands (dec.), no. 31519/96, 7 November 2000). The same considerations must also apply to adult siblings (see, for example, Onur v. the United Kingdom, no. 27319/07, § 45, 17 February 2009). Consequently, the Court accepts the Tribunal's conclusion in respect of a lack of interference with the applicant's right to respect for his family life. However, in respect of the applicant's private life, the Court recalls the Grand Chamber's finding in Maslov v. Austria [GC], no. 1638/03, § 63, 23 June 2008, that: "[A]s Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of 'private life' within the meaning of Article 8. Regardless of the existence or otherwise of a 'family life', the expulsion of a settled migrant therefore constitutes an interference with his or her right to respect for private life."

17. On the basis of that finding, the Court is unable to accept the Tribunal's finding that, because the applicant had spent eleven years either in prison or abusing drugs, his deportation would not engage Article 8. There is nothing in the case file to indicate that all the applicant's ties with his family and others were severed when he was in prison or abusing drugs. Moreover, the Court considers that, in the sixteen years that he was in the United Kingdom as a settled migrant, the applicant must have accumulated social ties to the community in which he lived. It is clear, therefore, that he enjoyed private life in the United Kingdom. It is equally clear that the applicant's deportation has an impact on his ability to develop the family relationships, friendships and other social ties he had in the United Kingdom; indeed it will be a rare case where a settled migrant will be unable to demonstrate that his or her deportation has interfered with his or her private life as guaranteed by Article 8. Not all settled migrants will have equally strong family or social ties in the Contracting State where they reside but the comparative strength or weakness of those ties is, in the majority of cases, more appropriately considered in assessing the proportionality of the applicant's deportation under Article 8 § 2.

18. In the present case, therefore, the Court finds that the applicant's deportation was an interference with his right to respect for his private life in the United Kingdom. Such an interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", as pursuing one or more of the legitimate aims listed therein, and as being "necessary in a democratic society" in order to achieve the aim or aims concerned."

Efter at have gengivet Storkammerets vurderinger i *Maslov*-dommen, udtalte EMD i præmis 25:

"Turning to the present case, the Court accepts that the applicant has spent a significant period of time in the United Kingdom and that the majority of his social, cultural and family ties are there rather than in Bangladesh. However, despite the relatively young age at which he arrived in the United Kingdom, the Court is not persuaded that he has severed all links to Bangladesh. His mother still lives Bangladesh and, as the Tribunal found, he would be able to rely on her and any extended family for support. In contrast to Mr Maslov, the present applicant speaks the language of his country of origin. Although both Mr Maslov and the applicant were convicted of mostly non-violent offences, the applicant's offences are of a quite different character. With the exception of the first burglary offence, they were all committed when the applicant was an adult and

there cannot be the same duty to facilitate the reintegration of an adult offender rather than deport him as there would be for a juvenile offender who is convicted of the same offences. The applicant's offences appear to have been committed in order to fund a drug addiction, a factor which must go some way to mitigating if not the seriousness of the offences then at least the sentences imposed. Indeed, the domestic courts have made efforts to rehabilitate the applicant by imposing a series of non-custodial sentences. Nonetheless, by the time of the final offence, they were entitled to take the view that further such efforts would be inappropriate. Therefore, while the applicant is correct to observe that his final sentence of twelve months' imprisonment was at the lower end of the scale to which a presumption in favour of deportation would apply, the domestic authorities were entitled to take into account that this was the last in a series of offences and that the applicant had failed to respond to other, less severe sentences. Finally, while the duration of the deportation imposed on the applicant is of the same duration as that imposed in Maslov, it does not exclude him from the United Kingdom for as much time as he spent there and does not do so for a decisive period in his life. The Court therefore finds that the domestic authorities have not exceeded the margin of appreciation afforded to them in such cases. A fair balance has been struck in this case and the Court therefore agrees with the Tribunal that the applicant's deportation was proportionate to the legitimate aim pursued. Accordingly, this part of the application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention."

EMD afviste derefter sagen som inadmissible.

EMD har i en række sager fundet, at forholdet mellem en voksen klager og hans forældre udgjorde familieliv i artikel 8's forstand. EMD's praksis om indgreb i familielivet er nærmere gennemgået i kapitel 5.

Der kan således henvises til sagen *Maslov v. Austria (2008)*. I denne sag var klageren indrejst i opholdslandet som seksårig og var blevet udvist på grund af kriminalitet i form af mere end 40 kvalificerede indbrud, nogle i forbindelse med banderelationer, brugstyveri af køretøj og et enkelt tilfælde af vold. Klageren var mindreårig, da han begik disse forhold, og da afgørelsen om udvisning blev endelig. Medlemsstaten havde begrundet udvisningen med hensynet til forebyggelse af uro og forbrydelse. Klageren blev efterfølgende udsendt i en alder af 19 år. Klageren havde på dette tidspunkt ikke stiftet egen familie.

EMD udtalte i præmis 61-64:

"61. The Court considers that the imposition and enforcement of the exclusion order against the applicant constituted an interference with his right to respect for his "private and family life". It reiterates that the question whether the applicant had a family life within the meaning of Article 8 must be determined in the light of the position when the exclusion order became final (see El Boujaïdi v. France, 26 September 1997, § 33, Reports of Judgments and Decisions 1997-VI; Ezzouhdi v. France, no. 47160/99, § 25, 13 February 2001; Yildiz v. Austria, no. 37295/97, § 34, 31 October 2002; Mokrani v. France, no. 52206/99, § 34, 15 July 2003; and Kaya, cited above, § 57).

62. The applicant was a minor when the exclusion order was imposed. He had reached the age of majority, namely 18 years, when the exclusion order became final in November 2002 following the Constitutional Court's decision, but he was still living with his parents. In any case, the Court has accepted in a number of cases concerning young adults who had not yet founded a family of their own that their relationship with

their parents and other close family members also constituted 'family life' (see Bouchelkia v. France, 29 January 1997*, § 41, Reports 1997-I;* El Boujaïdi*, cited above, § 33; and Ezzouhdi, cited above, § 26).*

63. Furthermore, the Court observes that not all settled migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy "family life" there within the meaning of Article 8. However, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant therefore constitutes an interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect (see Üner, cited above, § 59).

64. Accordingly, the measures complained of interfered with both the applicant's 'private life' and his 'family life'."

Vedrørende fastheden af de sociale, kulturelle og familiære bånd i opholdslandet og i hjemlandet udtalte EMD i præmis 96:

"96. The Court observes that the applicant spent the formative years of his childhood and youth in Austria. He speaks German and received his entire schooling in Austria where all his close family members live. He therefore has his principal social, cultural and family ties in Austria.

EMD konkluderede derefter i præmis 100-101:

"100. Having regard to the foregoing considerations, in particular the – with one exception – non-violent nature of the offences committed when a minor and the State's duty to facilitate his reintegration into society, the length of the applicant's lawful residence in Austria, his family, social and linguistic ties with Austria and the lack of proven ties with his country of origin, the Court finds that the imposition of an exclusion order, even of a limited duration, was disproportionate to the legitimate aim pursued, 'the prevention of disorder or crime'. It was therefore not 'necessary in a democratic society'.

101. Consequently, there has been a violation of Article 8 of the Convention."

Som et yderligere eksempel på sager, hvor EMD fandt, at forholdet mellem en voksen klager og hans forældre udgjorde familieliv i artikel 8's forstand, kan der henvises til gennemgangen af sagen *Radovanovic v. Austria (2004)* i kapitel 5. I denne sag var klageren kort efter fødslen i opholdslandet flyttet til hjemlandet, hvor han boede hos sine bedsteforældre og gik i skole. Som tiårig vendte han tilbage til sine forældre og sin søster i opholdslandet, hvor han færdiggjorde skolen og blev udlært som slagter. Som mindreårig begik han kriminalitet i form af blandt andet groft røveri og indbrud og blev idømt 30 måneders fængsel, heraf 24 betinget, og udvist for bestandig. Efter at have afsonet fængselsstraffen blev klageren i det år, han fyldte 19 år, udsendt til hjemlandet.

EMD bemærkede i præmis 33:

"The Court notes that the applicant, a single young adult at the time of his expulsion, is not a second generation immigrant as, despite his birth in Austria, he did not permanently live there until the age of ten. Given the young age at which he arrived, the Court will nevertheless assess the necessity of the interference by applying the same criteria it usually applies in cases of second generation immigrants who have not yet founded a family of their own in the host country. These criteria, so far as material, are the nature and gravity of the offence committed by the applicant and the length of his stay in the host country. In addition the applicant's family ties and the social ties he established in the host country by receiving his schooling and by spending the decisive years of his youth there are to be taken into account (see Benhebba v. France, no. 53441/99, §§ 32-33, 15 June 2003)."

EMD sammenholdt i præmis 34 sagen med en række sager, hvor der ikke var sket krænkelse af artikel 8, om udvisning af second generation immigrants, som var ankommet til opholdslandet i en ung alder og var idømt langvarige ubetingede fængselsstraffe for alvorlig kriminalitet i form af narkotikakriminalitet, som EMD ser med alvor på. Trods den kortere varighed af klagerens ophold i opholdslandet tillagde EMD det stor vægt, at selvom der var tale om groft røveri, var klageren kun idømt seks måneders ubetinget fængsel. Uden at underkende kriminalitetens grovhed noterede EMD sig, at klageren havde været mindreårig, at han ikke var tidligere straffet og at hovedparten af den relativt lange straf var gjort betinget. Derfor kunne EMD ikke tilslutte sig de nationale myndigheders vurdering af, at klageren udgjorde en sådan fare for public order, at det nødvendiggjorde indgrebet, jf. præmis 35.

Herefter udtalte EMD i præmis 36-38:

"36. Given the applicant's birth in Austria, where he later also completed his secondary education and vocational training while living with his family, and also taking into account that his family had already lawfully stayed in Austria for a long time and that the applicant himself had an unlimited residence permit when he committed the offence, and considering that, after the death of his grandparents in Serbia and Montenegro, he no longer has any relatives there, the Court finds that his family and social ties with Austria were much stronger than with Serbia and Montenegro.

37. The Court therefore considers that, in the circumstances of the present case, the imposition of a residence prohibition of unlimited duration was an overly rigorous measure. A less intrusive measure, such as a residence prohibition of a limited duration would have sufficed. The Court thus concludes that the Austrian authorities, by imposing a residence prohibtion of unlimited duration against the applicant, have not struck a fair balance between the interests involved and that the means employed were disproportionate to the aim pursued in the circumstances of the case (see mutatis mutandis, Ezzouhdi, cited above, § 35; and Yilmaz, cited above, §§ 48-49).

38. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Emre v. Schweiz (2008)* var klageren indrejst i opholdslandet som femårig sammen med sine forældre. Klageren blev flere gange dømt for kriminalitet, herunder kriminalitet begået mens han var mindreårig, og blev som 22-årig udvist.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det kortfattede Press Release issued by the Registrar af 22. maj 2008, der er gengivet i sin helhed i afsnit 4.2.1.2. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

EMD gentog i dommens præmis 69 det ovennævnte princip om betydningen af længden af opholdet, som blandt andet kom til udtryk i Üner-dommens præmis 58[12], og uddybede i forlængelse heraf i præmis 70 (uofficiel dansk oversættelse):

"Domstolen har understreget vigtigheden af dette sidste punkt med hensyn til immigranter, der har tilbragt størstedelen af deres liv i værtslandet. I et sådant tilfælde bør det reelt bemærkes, at de modtog deres uddannelse der, fik størstedelen af deres sociale tilknytninger der og derfor udviklede deres identitet der. Da de er født eller ankommet til værtslandet på grund af deres forældres emigration, har de normalt deres vigtigste familiemæssige tilknytning der. Nogle af disse immigranter har endog kun bevaret nationalitetstilknytningen til fødelandet (Benhebba mod Frankrig, nr. 53441/99, præmis 33, 10. juli 2003, Mehemi, nævnt ovenfor, præmis 36, og Boujlifa, nævnt ovenfor, s. 2264, præmis 44, og, a contrario, Bouchelkia mod Frankrig, dom af 29. januar 1997, Samlingen af domme og afgørelser 1997- I, og Baghli mod Frankrig, nr. 34374/97, EMD 1999-VIII, nævnt ovenfor, henholdsvis præmis 50 og præmis 48)."

EMD udtalte sig i præmis 73-76 om kriminalitetens alvor, herunder blandt andet at den samlede længde af frihedsstraffen på 18½ måned ikke var ubetydelig og at kriminaliteten strakte sig over en betydelig periode på 10 år, men at nogle af lovovertrædelserne faldt ind under ungdomskriminalitet, som ifølge FN's retningslinjer hos de fleste forsvinder ved overgangen til voksenlivet. Med hensyn til "arten" af kriminalitet kunne det ikke bestrides, at dommen for legemsbeskadigelse var til skade for ham. Det så derimod med hensyn til overtrædelse af våbenloven ud til, at den udelukkende bestod i besiddelse af en tåregasspray, ligesom det ikke var fastslået, at det var klager, der stak en sikkerhedsvagt ned under et felttog mod en natklub. Overtrædelserne af færdselsloven udgjorde utvivlsomt en potentiel fare, men skulle ikke desto mindre vurderes i lyset af de relativt milde sanktioner, der normalt ifaldes. I lyset af sammenlignelige sager skulle domfældelserne vurderes korrekt både mht deres alvor og de i sidste ende pålagte sanktioner.

EMD udtalte i præmis 78:

"78. Med hensyn til den tid, der er forløbet fra lovovertrædelserne blev begået, til det tidspunkt, hvor den anfægtede foranstaltning blev endelig, såvel som den pågældende persons adfærd i denne periode, bemærker Domstolen, at klagers kriminelle handlinger strakte sig over en betydelig periode. De nationale instanser har ligeledes gentagne gange konstateret, at han ikke udviste bevidsthed om sine kriminelle handlinger, og at han havde nægtet at følge psykoterapien (jf. i denne henseende Keles, citeret ovenfor, præmis 60)."

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[12] *"Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there."*

I præmis 77 udtalte EMD om varigheden af klagerens ophold i opholdslandet (uofficiel dansk oversættelse):

"For så vidt angår varigheden af opholdet i det land, hvorfra klager skal udvises, bemærker Domstolen, at klager, der er født den 18. december 1980, ankom til Schweiz den 21. september 1986, dvs. inden han var seks år gammel. På tidspunktet for forbundsdomstolens dom af 3. maj 2004 var han 23½ år gammel. Han havde dermed tilbragt mere end 17½ år i Schweiz."

I præmis 79-80 udtalte EMD om fastheden af klagerens sociale, kulturelle og familiemæssige tilknytning til værtslandet (uofficiel dansk oversættelse):

"79. For så vidt angår de særlige tilknytninger, som klager har til sit værtsland, bemærkede forbundsdomstolen, at han havde haft hele sin skolegang og boet det meste af sit liv i Schweiz, hvor hans forældre og hans brødre også er bosat. Den ene af hans brødre har schweizisk statsborgerskab. Selv om der på den anden side er en vis uenighed mellem parterne om klagers arbejdsmæssige integration i Schweiz (ovenstående præmis 44 og 58), finder Domstolen sig ikke forpligtet til at tage stilling til dette anliggende.

80. Sammenlignet med disse forhold, der til trods for klagers kriminelle aktivitet viser en vis integration i Schweiz, forekommer de sociale, kulturelle og familiemæssige tilknytninger, som han opretholder til Tyrkiet, at være meget ubetydelige. Det fremgår af sagsakterne, at klager kun har opholdt sig 1½ måned i landet i juni og juli 2002, og at kun hans bedstemor stadig bor der. Domstolen er ikke overbevist om, at det korte ophold i Tyrkiet efter klagers første udsendelse, – en foranstaltning, der anfægtes i nærværende klage, kan tages i betragtning. Det er desuden ikke sikkert, at klager har et tilstrækkeligt kendskab til det tyrkiske sprog. Selv om forholdet mellem forældre og voksne børn ikke er omfattet af beskyttelsen i artikel 8 uden påvisning af "yderligere afhængighedsforhold mellem dem ud over almindelige følelsesmæssige bånd" (jf. mutatis mutandis, Kwakye-Nti og Dufie mod Nederlandene (dec.), nr. 311519/96, 7. november 2000), bemærker Domstolen ligeledes, at forbundsdomstolen selv erkendte, at klagers familiemæssige tilknytning til Tyrkiet var meget mindre betydningsfuld end hans tilknytning til værtslandet. Domstolen har i øvrigt på ingen måde rejst tvivl om, at klager ville "få betydelige vanskeligheder, hvis han vendte tilbage til Tyrkiet"."

I præmis 81-83 gennemgik EMD "Særlige forhold i sagen: sagens medicinske aspekt".

Endelig gennemgik EMD i præmis 84-85 opholdsforbuddet i opholdslandet.

EMD konkluderede i præmis 86-87 (uofficiel dansk oversættelse):

"86. I betragtning af ovenstående og navnlig den relative grovhed [alvorlighed, red.] af domfældelserne mod klager, hans svage tilknytning til hjemlandet og den endelige karakter af udsendelsesforanstaltningen finder Domstolen, at den indklagede stat ikke kan anses for at have foretaget en rimelig afvejning mellem klagers og hans families interesser på den ene side og statens egen interesse i at kontrollere indvandringen på den anden.

87. Der er følgelig sket en krænkelse af artikel 8."

4.2.5.3. Opholdstilladelse opnået på baggrund af svig

Der er i forbindelse med udarbejdelsen af dette notat ikke fundet domme vedrørende svig, hvor spørgsmålet om klagerens tilknytning til opholdslandet i form af familiemedlemmer, som udgør en del af klagerens privatliv, har været vurderet af EMD.

Se som eksempel på sager, hvor EMD fandt, at forholdet mellem en onkel og en tante og deres nevøer udgjorde familieliv i artikel 8's forstand, sagen *Butt v. Norway (2012)*. I sagen havde klagerne (nevøerne) opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende klagernes opholdstilladelse, da de var blevet myndige.

EMD udtalte i præmis 76:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

EMD gennemgik i præmis 79-86 de hensyn af immigrationspolitisk karakter, som kan tale for at identificere børn med deres forældres handlinger i svigssager, medmindre der foreligger ekstraordinære omstændigheder, og vurderingen heraf i den konkrete sag. Herefter udtalte EMD i præmis 87:

"In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

EMD konkluderede i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

4.2.5.4. Ulovligt ophold

Der er i forbindelse med udarbejdelsen af dette notat ikke fundet domme vedrørende ulovligt ophold, hvor spørgsmålet om klagerens tilknytning til opholdslandet i form af familiemedlemmer, som udgør en del af klagerens privatliv, har været vurderet af EMD.

Se som eksempel på sager, hvor EMD fandt, at forholdet mellem forældre og voksne børn udgjorde familieliv i artikel 8's forstand, sagen *Nacic and others v. Sweden (2012).* Sagen omhandler en familie, som indrejste sammen og søgte om asyl. Familien bestod af to forældre og deres to sønner. Den ældste søn blev meddelt opholdstilladelse på baggrund af hans helbred, mens de tre andre personer fik afslag på asyl. Sønnen, som fik opholdstilladelse, var på dette tidspunkt fyldt 18 år. EMD udtalte i præmis 75-76:

"75. The question in the present case is whether, in view of the circumstances, the applicants still had a family life in Sweden within the meaning of Article 8 of the Convention after the third applicant had reached the age of majority and, if so, whether the Migration Court of Appeal's decision to deport the first, second and fourth applicants amounted to an unjustified interference with this right.

76. The Court notes that the applicants have lived together as a family ever since arriving in Sweden in 2006 and that they presumably lived together in Kosovo before that. The fact that the third applicant reached the age of majority during the domestic proceedings did not change the fact that he was still a dependent member of the applicant family, in particular considering his state of health. In these circumstances the Court considers that the applicants' situation amounted to family life within the meaning of Article 8 § 1 of the Convention even after the third applicant had reached the age of majority. It further finds that the impugned decision to remove the first, second and fourth applicants from Sweden interfered with the applicants' right to family life."

Se også som eksempel på sager, hvor EMD fandt, at forholdet mellem en onkel og en tante og deres nevøer udgjorde familieliv i artikel 8's forstand, sagen *Butt v. Norway (2012)*. I sagen havde klagerne (nevøerne) opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende klagernes opholdstilladelse, da de var blevet myndige.

EMD udtalte i præmis 76:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 No-

vember 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

EMD gennemgik i præmis 79-86 de hensyn af immigrationspolitisk karakter, som kan tale for at identificere børn med deres forældres handlinger i svigssager, medmindre der foreligger ekstraordinære omstændigheder, og vurderingen heraf i den konkrete sag. Herefter udtalte EMD i præmis 87:

"In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

EMD konkluderede i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

Vedrørende spørgsmålet om, hvorvidt klageren havde privatliv og familieliv i Nederlandene, udtalte EMD i præmis 47-50:

"47. The Court has further laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, for instance, Konstatinov v. the Netherlands, no. 16351/03, § 52, 26 April 2007, and Z. and T. v. the United Kingdom (dec.), no. 27034/05, ECHR 2006-III). However, it has not insisted on such further elements of dependency in a number of cases concerning young adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; Osman v. Denmark, no. 38058/09, §§ 55-56, 14 June 2011; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019).

48. Even if a person of 26 years of age could still be considered a "young adult", the Court notes that at least in 2011 the applicant was not living full-time with his foster parents anymore (see paragraph 21 above). Moreover, it has not been argued and there is no indication that there are any further elements of dependency between the applicant and his foster parents.

49. The above notwithstanding, the Court deems it not necessary to decide on the question whether or not the ties between the applicant and his foster parents constituted family life within the meaning of Article 8. It reiterates that, in practice, the factors to be examined in order to assess the compatibility with Article 8 of a denial of a right of residence – in so far as those factors are relevant in a particular case – are the same regardless of whether family or private life is engaged (see, mutatis mutandis, A.A. v. the United Kingdom, no. 8000/08, §§ 49 and 57, 20 September 2011).

50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with

Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought

to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

4.2.5.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Slivenko v. Latvia (2003)* var klagerne, som var af russisk oprindelse, blevet udsendt fra Letland under henvisning til, at de var familiemedlemmer til en russisk militærperson og derfor forpligtede til at forlade Letland i forbindelse med tilbagetrækningen af de russiske tropper fra Letland som følge af landets opnåelse af uafhængighed fra USSR. Sagen vedrørte klagernes privatliv, idet de havde levet hele eller hovedparten af deres liv i Letland.

EMD udtalte vedrørende spørgsmålet om, hvorvidt der forelå et indgreb i klagernes privatliv og familieliv, i præmis 96-98:

"96. As regards the facts of the present case, the first applicant arrived in Latvia in 1959, when she was only one month old. Until 1999, by which time she was 40 years of age, she continued to live in Latvia. She attended school there, found employment and married. Her daughter, the second applicant, was born in Latvia in 1981 and lived there until the age of 18, when she was compelled to leave the country together with her mother, having just completed her secondary education (see paragraphs 16 and 46 above). It is undisputed that the applicants left Latvia against their own will, as a result of the unsuccessful outcome of the proceedings concerning the legality of their stay in Latvia. They were thus removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being. Furthermore, as a result of the removal, the applicants lost the flat in which they had lived in Riga (see paragraphs 32 and 46 above). In these circumstances, the Court cannot but find that the applicants' removal from Latvia constituted an interference with their "private life" and their "home" within the meaning of Article 8 § 1 of the Convention.

97. In contrast, even though the applicants evidently had an established "family life" in Latvia, the impugned measures of removal from the country were not aimed at breaking up the family, nor did they have such an effect, given that the Latvian authorities deported the family, namely Nikolay, Tatjana and Karina Slivenko, in implementation of the Latvian-Russian treaty on the withdrawal of Russian troops. In the light of the Court's above-mentioned case-law, it is clear that under the Convention the applicants were not entitled to choose in which of the two countries – Latvia or Russia – to continue or re-establish an effective family life. Furthermore, the existence of "family life" could not be relied on by the applicants in relation to the first applicant's elderly parents, adults who did not belong to the core family and who have not been shown to have been dependent members of the applicants' family, the applicants' arguments in this respect not having been sufficiently substantiated. Nonetheless, the impact of the impugned measures on the applicants' family life – notably their ultimate enforced migration as a family unit to the Russian Federation – is a relevant factor for the Court's assessment of the case under Article 8 of the Convention. The Court will also take into account the applicants' link with the first applicant's parents (the second applicant's grandparents) under the head of the applicants' "private life" within the meaning of Article 8 § 1 of the Convention.

98. The Court will accordingly concentrate its further examination on the question whether the interference with the applicants' right to respect for their "private life" and their "home" was justified or not."

EMD gennemgik i præmis 116-118 nogle overordnede betragtninger vedrørende tilbagetrækning af fremmede tropper fra en uafhængig stat i forhold til aktivt tjenestegørende og pensionerede militærpersoner og deres familier. I præmis 119 fastslog EMD, at klagernes ægtefælle/far var pensioneret på tidspunktet for sagen om lovligheden af klagernes fortsatte ophold i Letland. I præmis 120-121 konstaterede EMD, at der i

visse situationer var mulighed for dispensation fra kravet om at forlade Letland, og i præmis 122 udtalte EMD, at spørgsmålet om, hvorvidt en udsendelse i lyset af klagernes personlige situation var proportional med det legitime formål: statens sikkerhed, måtte afgøres på baggrund af sagens konkrete omstændigheder. EMD udtalte herom i præmis 123-125:

"123. The respondent Government argued that the applicants had not been sufficiently integrated into Latvian society (see paragraph 88 above). In this connection the Court observes that the applicants have spent virtually all their lives in Latvia (see paragraph 96 above). It is true that the applicants are not of Latvian origin, and that they arrived and lived in Latvia – then part of the USSR – in connection with the service of members of their family (the first applicant's father and her husband) in the Soviet armed forces. However, the applicants also developed personal, social and economic ties in Latvia unrelated to their status as relatives of Soviet (and later Russian) military officers. This is shown by the fact that the applicants did not live in army barracks or any other restricted area, but in a block of flats in which there were also civilians. Nor did they study or work in a military institution. The first applicant was able to find employment in Latvian companies after Latvia regained its independence in 1991.

124. As regards the respondent Government's argument about the level of the applicants' proficiency in Latvian, the Court observes that, in so far as this is a relevant consideration, it has not been shown that the degree of the applicants' fluency in the language – although the precise level is in dispute – was insufficient for them to lead a normal everyday life in Latvia. In particular, there is no evidence that the level of the applicants' knowledge of Latvian was in any way different from that of other native Russian speakers living in Latvia, including those who were able to obtain the status of "ex-USSR citizens" in order to remain in Latvia on a permanent basis.

125. Although in 1999 the applicants moved to Russia to join Nikolay Slivenko and eventually obtained Russian citizenship, by that time they had apparently not developed personal, social or economic ties in Russia similar to those they had established in Latvia. In short, the Court finds that at the relevant time the applicants were sufficiently integrated into Latvian society."

I præmis 126-127 gennemgik EMD det af regeringen påberåbte argument for forskelsbehandlingen af klagerne, at det havde betydning for den nationale sikkerhed, at den første klager var kommet til Letland som medlem af en familie til en sovjetisk militærofficer (den første klagers far/den anden klagers bedstefar).

EMD udtalte i præmis 128-129:

"128. Having regard to all the circumstances, the Court considers that the Latvian authorities overstepped the margin of appreciation enjoyed by the Contracting Parties in such a matter, and that they failed to strike a fair balance between the legitimate aim of the protection of national security and the interest of the protection of the applicants' rights under Article 8. Therefore, the applicants' removal from the territory of Latvia cannot be regarded as having been 'necessary in a democratic society'.

129. Accordingly, there has been a violation of Article 8 of the Convention."

Se som eksempel på sager, hvor EMD foretog en vurderingn af, om forholdet mellem forældre og voksne børn udgjorde familieliv i artikel 8's forstand, *Osman v. Denmark (2011)*. I denne sag ansås klagerens opholdstilladelse i medlemsstaten som bortfaldet som følge af hendes langvarige ophold i familiens tidligere opholdsland Kenya. Klageren, der var somalisk statsborger, havde boet i Kenya fra hun var tre-fire år, indtil hun som syvårig indrejste i opholdslandet som familiesammenført. Hun havde herefter opholdt sig i opholdslandet, indtil hun som 15-årig af forældrene blev sendt tilbage til Kenya. Kort tid før hun fyldte 18 år, kontaktede klageren den danske ambassade i Kenya med henblik på at kunne vende tilbage til sin familie i opholdslandet, hvilket blev afslået af de danske myndigheder. Hun indrejse herefter som 19-årig i medlemsstaten, hvor hun ikke længere havde lovligt ophold.

EMD udtalte i præmis 55-56 om klagerens privatliv/familieliv i opholdslandet:

"55. The applicant was still a minor when, on 9 August 2005, she applied to be reunited with her family in Denmark. She had reached the age of majority when the refusal to reinstate her residence permit became final on 19 January 2008, when leave to appeal to the Supreme Court was refused. The Court has accepted in a number of cases concerning young adults who had not yet founded a family of their own that their relationship with their parents and other close family members also constituted "family life". Furthermore, Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant therefore constitutes an interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect (Maslov v. Austria [GC], no. 1638/03, §§ 62-63, 23 June 2008.

56. Accordingly, the measures complained of interfered with both the applicant's "private life" and her "family life"."

EMD konstaterede i præmis 60:

"The Court observes that the applicant spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old. She speaks Danish and received schooling in Denmark until August 2002. Her divorced parents and older siblings live in Denmark. The applicant therefore had social, cultural and family ties in Denmark."

Om betydningen af forældremyndighed og af klagerens tidligere lovlige ophold i opholdslandet, herunder hendes familiemæssige tilknytning til opholdslandet, udtalte EMD i præmis 64-65:

"64. The Court reiterates in this connection that the exercise of parental rights constitutes a fundamental element of family life, and that the care and upbringing of children normally and necessarily require that the parents decide where the child must reside and also impose, or authorise others to impose, various restrictions on the child's liberty (see, for example Nielsen v. Denmark, 28 November 1988, § 61, Series A no. 144).

65. It also reiterates that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in a host country, very serious reasons are required to justify expulsion (see, Maslov v.

Austria [GC], quoted above, § 75). In the present case the applicant was refused restoration of her lapsed residence permit, as opposed to being expelled due to having committed a crime. Nevertheless, it is undisputed that she spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old, that she spoke Danish, that she had received schooling in Denmark until August 2002, and that all her close family remained in Denmark. In these circumstances, the Court also considers that very serious reasons were required to justify the authorities' refusal to restore the applicant's residence permit, when she applied from Kenya in August 2005."

I præmis 69-75 udtalte EMD sig om hensynet til børns ret til respekt for privat- og familieliv i forhold til den danske lovgivning om genopdragelsesrejser og forældremyndighedsindehaverens rolle. Særligt om klagerens forhold til sin mor udtalte EMD i præmis 74:

"[…] In the Court's view, however, the fact that the applicant's mother did not visit the applicant in Kenya, or that mother and child apparently had very limited contact for four years, can be explained by various factors, including practical and economical restraints, and can hardly lead to the conclusion that the applicant and her mother did not wish to maintain or intensify their family life together."

Herefter udtalte EMD i præmis 76-77:

"76. Having regard to all the above circumstances, it cannot be said that the applicant's interests have sufficiently been taken into account in the authorities' refusal to reinstate her residence permit in Denmark or that a fair balance was struck between the applicants' interests on the one hand and the State's interest in controlling immigration on the other.

77. There has accordingly been a violation of Article 8 of the Convention."

Sagen *Hasanbasic v. Switzerland (2013)* omhandlede en klager, hvis opholdstilladelse blev annulleret af de nationale myndigheder i opholdslandet, idet klageren over for disse myndigheder havde tilkendegivet, at han ville rejse tilbage til sit hjemland med henblik på permanent at bosætte sig der. Klageren genindrejste dog fire måneder senere i opholdslandet, hvorefter hans ægtefælle, som stadig opholdt sig i opholdslandet, indgav en ansøgning om ny opholdstilladelse på baggrund af familiesammenføring. EMD har kategoriseret sagen *som refusal to renew residence visa*, hvorfor den er medtaget under dette punkt.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det komplette *legal summary* under afsnit 4.2.1.5. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

Vedrørende vurderingen af, om der med opholdslandets afvisning af at forny klagerens opholdstilladelse var sket indgreb i en af artikel 8 beskyttet rettighed, udtalte EMD i præmis 49 (uofficiel dansk oversættelse):

"Med hensyn til sagens omstændigheder vurderer Domstolen på grund af klagernes langvarige ophold i Schweiz, at afvisningen af at forny klagerens opholdstilladelse udgør et indgreb i retten til respekt for klagers

"privatliv" (jf., mutatis mutandis, Gezginci mod Schweiz, nr. 16327/05, præmis 57, 9. december 2010). Såfremt denne afvisning kan medføre adskillelse fra klagers hustru samt fra deres fællesbørn, der bor i Schweiz og alle har opholdstilladelse i landet, vurderer Domstolen, at klagerne ligeledes har været udsat for et indgreb i deres ret til "familieliv"."

Efter i præmis 51 og 52 at have fastslået, at indgrebet var i overensstemmelse med loven og forfulgte et eller flere af de legitime hensyn, gennemgik EMD i præmis 53-56 de generelle principper, som var relevante i den konkrete sag for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund.

I præmis 57- udtalte EMD om anvendelsen af disse principper i den konkrete sag (uofficiel dansk oversættelse):

"57. Domstolen bemærker indledningsvist, at de to klagere længe har boet lovligt i Schweiz. Den mandlige klager ankom til Schweiz i 1986, den kvindelige klager ankom allerede i 1969. Varigheden af deres ophold udgør således på det tidspunkt, hvor Forbundsdomstolen afsagde sin dom i 2009, henholdsvis 23 og 40 år. Den kvindelige klager har endvidere haft en etableringstilladelse i Schweiz siden 1979, og dermed en tilladelse af en mere stabil karakter end en almindelig opholdstilladelse. Det er i øvrigt ikke bestridt, at Schweiz i en lang periode har været centrum for klagernes privat- og familieliv.

Domstolen konstaterer ligeledes, at klagerne har opholdt sig uafbrudt i Schweiz, bortset fra i en periode på fire måneder fra mellem august og december 2004, efter at de nationale myndigheder havde afvist den kvindelige klagers anmodning om familiesammenføring (ovenstående præmis 14). Den foreliggende sag adskiller sig på dette punkt væsentligt fra sagen Gezginci (nævnt ovenfor, præmis 69 og 70), hvori klager gentagne gange tog til udlandet i længerevarende perioder.

Domstolen vurderer under disse omstændigheder, at det tilkommer de nationale myndigheder på en overbevisende måde og ved hjælp af relevante og tilstrækkelige årsager at bevise, at der eksisterer et samfundsmæssigt bydende nødvendigt behov for at udvise den pågældende person, og navnlig, at denne foranstaltning står i forhold til det forfulgte legitime mål.

58. Med hensyn til først den mandlige klagers lovstridige adfærd henviser Domstolen til, at klager flere gange mellem 1995 og 2002 er dømt, herunder idømt bøder, der ikke overstiger beløb på 400 CHF, og en fængselsdom på 17 dage (i alt) for overtrædelse af færdselsloven og for krænkelse af husfreden. Domstolen bemærker, lige som klagerne, at disse forseelser ikke vejer tungt, og den konkluderer heraf, at det vil være passende at vurdere forseelserne ud fra en retfærdig afvejning. Domstolen finder det i øvrigt vigtigt, at klager ikke har begået nye forseelser siden 2002. Henset til ovenstående kan klager ikke anses for at udgøre en fare eller trussel for sikkerheden eller den schweiziske offentlige orden.

59. Det, der forekommer at have spillet en væsentlig rolle i de nationale instansers afvejning af interesserne, er opbygningen af den store gæld samt de betydelige beløb, som klagerne har modtaget i offentlig bistand fra 1994 til 2001 samt fra 2003 til 2008 (jf., mutatis mutandis, Gezginci, nævnt ovenfor, præmis 73). Det samlede beløb udgør 333.000 CHF (ca. 277.500 EUR). Idet der henvises til, at ophavsmændene til Konventionen udtrykkeligt har taget højde for landets økonomiske velvære som et legitimt mål for berettigelse af et indgreb i udøvelsen af retten til respekt for privat- og familielivet (jf. f.eks. Miailhe mod Frankrig (nr. 1), 25.

februar 1993, præmis 33, serie A nr. 256-C; Hatton m.fl. mod Det Forenede Kongerige [Storkammeret], nr. 36022/97, præmis 121, EMD 2003-VIII; Mubilanzila Mayeka og Kaniki Mitunga mod Belgien, nr. 13178/03, præmis 79, EMD 2006-XI; Mengesha Kimfe mod Schweiz, nr. 24404/05, præmis 66, 29. juli 2010; Agraw mod Schweiz, nr. 3295/06, præmis 49, 29. juli 2010, og Orlić mod Kroatien, nr. 48833/07, præmis 62, 21. juni 2011), i modsætning til de rettigheder, der er beskyttet i medfør af Konventionens artikel 9-11, vurderer Domstolen, at de schweiziske myndigheder kunne tage højde for klagernes gæld og afhængighed af offentlig bistand, såfremt denne afhængighed måtte have indflydelse på landets økonomiske velvære. Domstolen vurderer ikke desto mindre, at disse forhold kun udgør et aspekt blandt flere, som Domstolen skal tage højde for.

60. Med hensyn til de forskellige berørte personers nationalitet er de to klagere statsborgere fra Bosnien-Hercegovina. Domstolen henviser ligeledes til, at parret har to fællesbørn, der er født i 1982 og 1984, og som bor i Schweiz og har opholdstilladelse i dette land. Desuden bor ét af børnene, der er født i 1979 og stammer fra den mandlige klagers første ægteskab, ligeledes i Schweiz. Idet klagerne ikke over for Domstolen har påvist, at der mellem dem og børnene er supplerende afhængighedsforhold, ud over normale følelsesmæssige bånd, (Ezzouhdi mod Frankrig, nr. 47160/99, præmis 34, 13. februar 2001; og Kwakie-Nti og Dufie mod Nederlandene (dec.), nr. 31519/96, 7. november 2000), kan de naturligvis ikke påberåbe sig disse familieforhold med hensyn til artikel 8, idet børnene er voksne. Domstolen vurderer ikke desto mindre, at forholdene ikke er helt uden relevans for vurderingen af klagernes familiesituation.

61. Domstolen tager endvidere Regeringens argument til efterretning, ifølge hvilket klager, der ikke har indrejseforbud i Schweiz, regelmæssigt kan besøge sine børn og i givet fald sin hustru, hvis hun ikke følger med ham og bosætter sig i Bosnien-Hercegovina. Domstolen er i øvrigt underrettet om, at klager sporadisk kan rejse til Schweiz og opholde sig der i en periode på maksimalt tre måneder (ovenstående præmis 23). Domstolen vurderer i denne henseende, selv om de kompetente myndigheder måtte tage positivt imod sådanne anmodninger i fremtiden, at disse midlertidige foranstaltninger, der i givet fald måtte blive meddelt alene efter anmodning, under ingen omstændigheder ville kunne anses for at erstatte klagernes ret til at udøve rettigheden til at leve sammen, hvilket udgør ét af de grundlæggende aspekter ved retten til respekt for familielivet (jf., mutatis mutandis, dommene Agraw mod Schweiz, nr. 3295/06, præmis 51, og Mengesha Kimfe mod Schweiz, nr. 24404/05, præmis 69-72, begge af 29. juli 2010).

62. Et andet kriterium, der skal tages højde for i afvejningen af interesserne, er fastheden af de sociale, kulturelle og familiemæssige bånd med Schweiz og med Bosnien-Hercegovina. Forbundsdomstolen har selv i den foreliggende sag erkendt, at klagerne har et betydeligt socialt netværk i Schweiz, og at deres tilbagevenden til oprindelseslandet på grund af den betydelige varighed af deres ophold i Schweiz uden tvivl ville stille dem over for visse vanskeligheder (ovenstående præmis 20).

63. De schweiziske myndigheder har ganske vist ligeledes henvist til, at klagerne havde ladet et hus opføre i deres oprindelsesland, og at ét af børnene fra den mandlige klagers første ægteskab samt hans søster bor i oprindelseslandet. Domstolen tager ligeledes til efterretning, at den mandlige klager den 24. august 2003 havde meddelt de schweiziske myndigheder, at han definitivt ville vende tilbage til Bosnien-Hercegovina, hvilket er ét af de nationale myndigheders hovedargumenter for afvisning af en fornyelse af opholdstilladelsen. Domstolen vurderer, at dette argument skal bedømmes i lyset af de efterfølgende indtrufne forhold, dvs. efter Forbundsdomstolens dom af 6. marts 2009."

Herefter gennemgik EMD i præmis 64-65 betydningen af klagerens helbredsmæssige forhold og den risiko for en forværring heraf, en flytning til hjemlandet ville indebære.

EMD udtalte i præmis 66-67 (uofficiel dansk oversættelse):

"66. Domstolen vedgår henset til ovenstående, at landets økonomiske velfærd ganske vist kan tjene som et legitimt mål i forbindelse med en afvisning af at forny en opholdstilladelse. Denne årsag skal ikke desto mindre vurderes ud fra en retfærdig afvejning og i lyset af samtlige omstændigheder i sagen. Domstolen vurderer imidlertid ud fra den betydelige varighed af klagernes ophold i Schweiz og deres ubestridte sociale integration i landet, at den anfægtede foranstaltning ikke var berettiget ud fra et bydende nødvendigt samfundsmæssigt behov og ikke stod i forhold til de påberåbte legitime formål. Den indklagede stat har følgelig overskredet sin skønsmargen i den foreliggende sag.

67. Der er følgelig sket en krænkelse af Konventionens artikel 8."

4.2.6. Klagerens sprogkundskaber fra opholdslandet

EMD har i flere sager lagt vægt på, om klageren havde tilegnet sig det sprog, som blev talt i opholdslandet.

Som anført i afsnit 3.3.3.2 afhænger vægtningen af de enkelte elementer i proportionalitetsafvejningen af de konkrete omstændigheder i hver enkelt sag, se f.eks. Maslov v. Austria (2008), hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[13] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

4.2.6.1. Alvorlig kriminalitet

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

EMD udtalte i præmis 45, at:

"As regards the length of the applicant's stay in Switzerland, the Court observes that he arrived in Switzerland in 1989 at the age of nine and lived in Switzerland for more than twenty years. His stay in Switzerland was, thus, of a considerable length of time."

[13] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

I præmis 46-50 gennemgik EMD klagerens opførsel og domstolsbehandlingen af hans sag efter begåelsen af lovovertrædelsen samt klagerens families forhold, herunder muligheden for klagerens ægtefælle og børn for at tage ophold i klagerens hjemland.

I præmis 51 og 52 gennemgik EMD klagerens tilknytning til henholdsvis opholdslandet og hjemlandet:

"51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'"

EMD udtalte herefter i præmis 53-55:

"53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Bajsultanov v. Austria (2012)* inddrog EMD ligeledes klagerens sprogkundskaber i vurderingen af hans tilknytning til opholdslandet. I sagen var klageren meddelt asyl i opholdslandet. Han blev idømt i alt 20 måneders fængsel for bl.a. flere tilfælde af vold samt udvist. EMD fastsatte længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen. Klagerens ægtefælle var meddelt asyl afledt af klagerens forhold og de havde to børn, der på tidspunktet for EMD's behandling af sagen var otte og fem år.

Efter i præmis 79-82 at have konstateret, at udvisningen af klageren udgjorde et indgreb i hans ret til respekt for familieliv, og at dette indgreb var i overensstemmelse med loven og forfulgte et af de legitime hensyn, gennemgik EMD i præmis 83 de generelle principper, som indgår i afvejningen af, om indgrebet var nødvendigt i et demokratisk samfund, jf. kriterierne som sammenfattet i Boultif- og Üner-dommene.

Om karakteren og alvorligheden af den begåede kriminalitet udtalte EMD i præmis 84:

"Turning to the first set of criteria relating to the criminal offences committed by the applicant, the Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks' imprisonment, suspended with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions."

EMD udtalte i præmis 85 til 87:

"85. As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there.

86. On the other hand, the applicant lived in Chechnya for almost twenty-three years, went to school there and subsequently worked occasionally in different jobs. The applicant's parents and siblings still live in Chechnya, and the applicant has maintained regular contact with his father.

87. The Court therefore considers, in line with the Austrian authorities, that the applicant still has stronger social and cultural ties to his country of origin than to his host country."

I præmis 88-90 gennemgik EMD klagerens familieliv og ægtefællens mulighed for at følge med klageren tilbage til hjemlandet i relation til artikel 3 og i forhold til, om der ville være uoverstigelige hindringer forbundet hermed.

EMD udtalte i præmis 91-92:

"91. Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention." I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

EMD gennemgik præmis 47-49 sin praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem (pleje)forældre og unge voksne udgør privatliv eller tillige familieliv, og udtalte i præmis 50, at:

"50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found

out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

Der kan endvidere henvises til følgende sager:

- *Sharifi v. Denmark (2023)*.
- *Noorzae v. Denmark (2023)*.
- *Goma v. Denmark (2023)*.

4.2.6.2. Mindre alvorlig kriminalitet

I sagen *Maslov v. Austria (2008)* var klageren indrejst i opholdslandet som seks-årig og var blevet udvist på grund af kriminalitet i form af mere end 40 kvalificerede indbrud, nogle i forbindelse med banderelationer, brugstyveri af køretøj og et enkelt tilfælde af vold. Klageren var mindreårig, da han begik disse forhold, og da afgørelsen om udvisning blev endelig. Medlemsstaten havde begrundet udvisningen med hensynet til forebyggelse af uro og forbrydelse. Klageren blev efterfølgende udsendt i en alder af 19 år. Klageren havde på dette tidspunkt ikke stiftet egen familie.

Efter i præmis 66 og 67 at have fastslået, at udvisningen var i overensstemmelse med loven og forfulgte et af de legitime hensyn, vurderede EMD, om indgrebet var nødvendigt i et demokratisk samfund. EMD henviste til de fundamentale principper, som er sammenfattet i Üner-dommen, og udtalte i præmis 70-75:

"70. The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Moreover, it has to be borne in mind that where, as in the present case, the interference with the applicant's rights under Article 8 pursues, as a legitimate aim, the "prevention of disorder or crime" (see paragraph 67 above), the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities.

71. In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family of his own, the relevant criteria are
– the nature and seriousness of the offence committed by the applicant;
– the length of the applicant's stay in the country from which he or she is to be expelled;
– the time elapsed since the offence was committed and the applicant's conduct during that period; and
– the solidity of social, cultural and family ties with the host country and with the country of destination.

72. The Court would also clarify that the age of the person concerned can play a role when applying some of the above criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult (see, for instance, Moustaquim v. Belgium, 18 February 1991, § 44, Series A no. 193, and Radovanovic v. Austria, no. 42703/98, § 35, 22 April 2004).

73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or

youth, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec(2000)15 and Rec(2002)4 (see paragraphs 34-35 above).

74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see Üner, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there (see Üner, § 58 in fine).

75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

Herefter gennemgik EMD i præmis 77-80 karakteren og alvorligheden af den af klageren begåede kriminalitet og udtalte i præmis 81 blandt andet:

"81. In the Court's view, the decisive feature of the present case is the young age at which the applicant committed the offences and, with one exception, their non-violent nature. This also clearly distinguishes the present case from Boultif and Üner […]."

I denne sammenhæng gennemgik EMD i præmis 82-83 de situationer, hvor princippet om barnets tarv skal finde anvendelse, og hvilke forpligtelser anvendelsen af dette princip indebærer.

I præmis 84-85 udtalte EMD om forskellen i vurderingen af sager, hvor en mindreårig har begået ikke-voldelig kriminalitet, over for sager, hvor mindreårige har begået meget alvorlige voldelige forbrydelser:

"84. In sum, the Court sees little room for justifying an expulsion of a settled migrant on account of mostly non-violent offences committed when a minor (see Moustaquim, cited above, § 44, concerning an applicant who had been convicted of offences committed as a juvenile, namely numerous counts of aggravated theft, one count each of handling stolen goods and destruction of a vehicle, two counts of assault and one count of threatening behaviour, and Jakupovic v. Austria, no. 36757/97, § 27, 6 February 2003, in which the exclusion order was based on two convictions for burglary committed when a minor and where, in addition, the applicant was still a minor when he was expelled).

85. Conversely, the Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Bouchelkia, cited above, § 51, where the Court found no violation of Article 8 as regards a deportation order made on the basis of the applicant's conviction of aggravated rape committed at the age of 17; in the decisions Hizir Kilic v. Denmark (dec.), no. 20277/05, and Ferhat Kilic v. Denmark (dec.), no. 20730/05, both of 22 January 2007, the Court declared inadmissible the applicants' complaints about exclusion orders imposed following their convictions for attempted robbery, aggravated assault and manslaughter committed at the age of 16 and 17 respectively)."

I præmis 86-95 gennemgik EMD klagerens alder ved indrejsen i opholdslandet og længden af hans ophold dér samt den forløbne tid efter begåelsen af kriminaliteten og klagernes opførsel i den periode.

Vedrørende fastheden af de sociale, kulturelle og familiære bånd i opholdslandet og i hjemlandet udtalte EMD i præmis 96-97:

"96. The Court observes that the applicant spent the formative years of his childhood and youth in Austria. He speaks German and received his entire schooling in Austria where all his close family members live. He therefore has his principal social, cultural and family ties in Austria.

97. As to the applicant's ties with his country of origin, the Court notes that he has convincingly explained that he did not speak Bulgarian at the time of his expulsion as his family belonged to the Turkish minority in Bulgaria. It was not disputed that he was unable to read or write Cyrillic as he had never gone to school in Bulgaria. It has not been shown, nor even alleged, that he had any other close ties with his country of origin."

Endelig forholdt EMD sig i præmis 98 til varigheden af det meddelte indrejseforbud.

EMD konkluderede i præmis 100-101, at:

"100. Having regard to the foregoing considerations, in particular the – with one exception – non-violent nature of the offences committed when a minor and the State's duty to facilitate his reintegration into society, the length of the applicant's lawful residence in Austria, his family, social and linguistic ties with Austria and the lack of proven ties with his country of origin, the Court finds that the imposition of an exclusion order, even of a limited duration, was disproportionate to the legitimate aim pursued, 'the prevention of disorder or crime'. It was therefore not 'necessary in a democratic society'.

101. Consequently, there has been a violation of Article 8 of the Convention."

4.2.6.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende deres opholdstilladelse, da klagerne var blevet myndige.

EMD udtalte i præmis 76, at:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the

applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

[citat af præmis 68-70 i Nunez-dommen, red.]"

På den baggrund gennemgik EMD i præmis 79-85 de hensyn af immigrationspolitisk karakter, som kan tale for at identificere børn med deres forældres handlinger i svigssager, medmindre der foreligger ekstraordinære omstændigheder, og vurderingen heraf i den konkrete sag. De nævnte præmisser er indsat i afsnittene 4.2.1.3 og 4.2.1.4.

I præmis 86-87 udtalte EMD:

"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 og 89 gennemgik EMD klagernes tilknytning til hjemlandet og betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

4.2.6.4. Ulovligt ophold

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende deres opholdstilladelse, da klagerne var blevet myndige.

EMD udtalte i præmis 76, at:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court

therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

[citat af præmis 68-70 i Nunez-dommen, red.]"

På den baggrund gennemgik EMD i præmis 79-85 de hensyn af immigrationspolitisk karakter, som kan tale for at identificere børn med deres forældres handlinger i svigssager, medmindre der foreligger ekstraordinære omstændigheder, og vurderingen heraf i den konkrete sag. De nævnte præmisser er indsat i afsnittene 4.2.1.3 og 4.2.1.4.

I præmis 86-87 udtalte EMD:

"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 og 89 gennemgik EMD klagernes tilknytning til hjemlandet og betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid

havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

EMD gennemgik præmis 47-49 sin praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem (pleje)forældre og unge voksne udgør privatliv eller tillige familieliv, og udtalte i præmis 50, at:

"50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og

han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had estab-

lished close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

4.2.6.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Slivenko v. Latvia (2003)* var klagerne, som var af russisk oprindelse, blevet udsendt fra Letland under henvisning til, at de var familiemedlemmer til en russisk militærperson og derfor forpligtede til at forlade Letland i forbindelse med tilbagetrækningen af de russiske tropper fra Letland som følge af landets opnåelse af uafhængighed fra USSR. Sagen vedrørte klagernes privatliv, idet de havde levet hele eller hovedparten af deres liv i Letland.

EMD udtalte vedrørende spørgsmålet om, hvorvidt der forelå et indgreb i klagernes privatliv, i præmis 96:

"As regards the facts of the present case, the first applicant arrived in Latvia in 1959, when she was only one month old. Until 1999, by which time she was 40 years of age, she continued to live in Latvia. She attended school there, found employment and married. Her daughter, the second applicant, was born in Latvia in 1981 and lived there until the age of 18, when she was compelled to leave the country together with her mother, having just completed her secondary education (see paragraphs 16 and 46 above). It is undisputed that the

applicants left Latvia against their own will, as a result of the unsuccessful outcome of the proceedings concerning the legality of their stay in Latvia. They were thus removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being. Furthermore, as a result of the removal, the applicants lost the flat in which they had lived in Riga (see paragraphs 32 and 46 above). In these circumstances, the Court cannot but find that the applicants' removal from Latvia constituted an interference with their "private life" and their "home" within the meaning of Article 8 § 1 of the Convention."

EMD gennemgik i præmis 116-118 nogle overordnede betragtninger vedrørende tilbagetrækning af fremmede tropper fra en uafhængig stat i forhold til aktivt tjenestegørende og pensionerede militærpersoner og deres familier. I præmis 119 fastslog EMD, at klagernes ægtefælle/far var pensioneret på tidspunktet for sagen om lovligheden af klagernes fortsatte ophold i Letland. I præmis 120-121 konstaterede EMD, at der i visse situationer var mulighed for dispensation fra kravet om at forlade Letland, og i præmis 122 udtalte EMD, at spørgsmålet om, hvorvidt en udsendelse i lyset af klagernes personlige situation var proportional med det legitime formål: statens sikkerhed, måtte afgøres på baggrund af sagens konkrete omstændigheder. EMD udtalte herom i præmis 123-125:

"123. The respondent Government argued that the applicants had not been sufficiently integrated into Latvian society (see paragraph 88 above). In this connection the Court observes that the applicants have spent virtually all their lives in Latvia (see paragraph 96 above). It is true that the applicants are not of Latvian origin, and that they arrived and lived in Latvia – then part of the USSR – in connection with the service of members of their family (the first applicant's father and her husband) in the Soviet armed forces. However, the applicants also developed personal, social and economic ties in Latvia unrelated to their status as relatives of Soviet (and later Russian) military officers. This is shown by the fact that the applicants did not live in army barracks or any other restricted area, but in a block of flats in which there were also civilians. Nor did they study or work in a military institution. The first applicant was able to find employment in Latvian companies after Latvia regained its independence in 1991.

124. As regards the respondent Government's argument about the level of the applicants' proficiency in Latvian, the Court observes that, in so far as this is a relevant consideration, it has not been shown that the degree of the applicants' fluency in the language – although the precise level is in dispute – was insufficient for them to lead a normal everyday life in Latvia. In particular, there is no evidence that the level of the applicants' knowledge of Latvian was in any way different from that of other native Russian speakers living in Latvia, including those who were able to obtain the status of 'ex-USSR citizens' in order to remain in Latvia on a permanent basis.

125. Although in 1999 the applicants moved to Russia to join Nikolay Slivenko and eventually obtained Russian citizenship, by that time they had apparently not developed personal, social or economic ties in Russia similar to those they had established in Latvia. In short, the Court finds that at the relevant time the applicants were sufficiently integrated into Latvian society."

I præmis 126-127 gennemgik EMD det af regeringen påberåbte argument for forskelsbehandlingen af klagerne, at det havde betydning for den nationale sikkerhed, at den første klager var kommet til Letland som medlem af en familie til en sovjetisk militærofficer (den første klagers far/den anden klagers bedstefar).

EMD udtalte i præmis 128-129:

"128. Having regard to all the circumstances, the Court considers that the Latvian authorities overstepped the margin of appreciation enjoyed by the Contracting Parties in such a matter, and that they failed to strike a fair balance between the legitimate aim of the protection of national security and the interest of the protection of the applicants' rights under Article 8. Therefore, the applicants' removal from the territory of Latvia cannot be regarded as having been 'necessary in a democratic society'.

129. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Osman v. Denmark (2011)* ansås klagerens opholdstilladelse i medlemsstaten som bortfaldet som følge af hendes langvarige ophold i familiens tidligere opholdsland Kenya. Klageren, der var somalisk statsborger, havde boet i Kenya fra hun var tre-fire år, indtil hun som syvårig indrejste i opholdslandet som familiesammenført. Hun havde herefter opholdt sig i opholdslandet, indtil hun som 15-årig af forældrene blev sendt tilbage til Kenya. Kort tid før hun fyldte 18 år, kontaktede klageren den danske ambassade i Kenya med henblik på at kunne vende tilbage til sin familie i opholdslandet, hvilket blev afslået af de danske myndigheder. Hun indrejse herefter som 19-årig i medlemsstaten, hvor hun ikke længere havde lovligt ophold.

EMD konstaterede i præmis 60, at:

"The Court observes that the applicant spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old. She speaks Danish and received schooling in Denmark until August 2002. Her divorced parents and older siblings live in Denmark. The applicant therefore had social, cultural and family ties in Denmark."

Om betydningen af klagerens tidligere lovlige ophold i opholdslandet, herunder hendes sprogkundskaber i opholdslandet, udtalte EMD i præmis 65:

"65. It also reiterates that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in a host country, very serious reasons are required to justify expulsion (see, Maslov v. Austria [GC], quoted above, § 75). In the present case the applicant was refused restoration of her lapsed residence permit, as opposed to being expelled due to having committed a crime. Nevertheless, it is undisputed that she spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old, that she spoke Danish, that she had received schooling in Denmark until August 2002, and that all her close family remained in Denmark. In these circumstances, the Court also considers that very serious reasons were required to justify the authorities' refusal to restore the applicant's residence permit, when she applied from Kenya in August 2005."

I præmis 69-75 udtalte EMD sig om hensynet til børns ret til respekt for privat- og familieliv i forhold til den danske lovgivning om genopdragelsesrejser og forældremyndighedsindehaverens rolle, hvorefter EMD i præmis 76-77 udtalte:

"76. Having regard to all the above circumstances, it cannot be said that the applicant's interests have sufficiently been taken into account in the authorities' refusal to reinstate her residence permit in Denmark or that

a fair balance was struck between the applicants' interests on the one hand and the State's interest in controlling immigration on the other.

77. There has accordingly been a violation of Article 8 of the Convention."

4.2.7. Klagerens personlige, sociale og/eller kulturelle tilknytning til opholdslandet

EMD har i flere afgørelser vurderet, om klageren havde opnået en personlig, social og/eller kulturel tilknytning til opholdslandet, ofte omtalt som elementer, der indgår i EMD's vurdering af graden af klagerens "integration i opholdslandets samfund". Det er ikke altid i dommene uddybet, hvori den personlige, sociale og/eller kulturelle tilknytning består. Der henvises også til afsnit 4.1.

Som anført i afsnit 3.3.3.2 afhænger vægtningen af de enkelte elementer i proportionalitetsafvejningen af de konkrete omstændigheder i hver enkelt sag, se f.eks. Maslov v. Austria (2008), hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[14] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

4.2.7.1. Alvorlig kriminalitet

I sagen *Levakovic v. Denmark (2018)* havde klageren haft opholdstilladelse i opholdslandet, siden han var otte måneder gammel. Da han var 25 år gammel, blev han idømt fem års fængsel og udvist på grund af mange tilfælde af grov kriminalitet, herunder flere væbnede røverier, narkotikakriminalitet, tyverier og besiddelse af både våben og stjålne effekter.

Efter at have gennemgået de generelle betragtninger bl.a. om begrebet "privatliv" og om forholdet mellem forældre og voksne børn og mellem voksne søskende samt redegjort for kriterierne som sammenfattet i Üner-dommen og om staternes margin of appreciation, konstaterede EMD i præmis 39, at udvisningen udgjorde et indgreb i klagerens ret til respekt for privatliv, at udvisningen var overensstemmelse med loven og at den tjente et legitimt formål.

Herefter gennemgik EMD i præmis 40-45, hvorvidt udvisningen af klageren var nødvendig i et demokratisk samfund, og udtalte i præmis 41-46:

"41. As flows from the Court's case-law (see paragraph 33), the point of departure for the Court's analysis under Article 8 of the Convention in the present case is the fact that an alien does not have a Convention right to reside in a particular country, a rule which applies to settled migrants like the applicant. However, if a

[14] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

Member State's decision to expel a settled migrant, lawfully residing in the State in question, interferes with his or her family or privacy rights, protected by paragraph 1 of Article 8, the national authorities are under a duty, provided by paragraph 2 of the same provision, to evaluate the individual situation of the migrant in accordance with the criteria set out in the Court's case-law (see paragraph 36 above). In the application of these criteria, the Court has not qualified the relative weight to be accorded to each criteria in the individual assessment, as this analysis is, in the first place, for the national authorities subject to European supervision. However, in Maslov (cited above, § 75), the Court made clear that when a case concerns a settled migrant, who has lawfully spent all or major part of his or her childhood and youth in the host country, "very serious reasons are required to justify expulsion". It is clear that in the light of the facts in the present case, the Court is called upon to examine whether such "very serious reasons" were adequately adduced by the national authorities when assessing the applicant's case and, if so, whether the Court considers itself in a position to substitute its view for that of the domestic courts."

42. The Court recognises that the City Court made a thorough assessment of the applicant's personal circumstances, carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law (see paragraph 19 above). It was fully aware that very strong reasons are required to justify the deportation of settled migrants (see Maslov, cited above, § 75). It found, making an overall assessment, that although the applicant had no ties to Croatia, due to his criminal past, which included two convictions for three robberies committed when he was an adult, the nature and seriousness of the crimes committed, namely a robbery in a private home and an armed bank robbery, both committed during the probation period for the most recent suspended expulsion order, and the fact that the applicant had twice violated the conditions for suspended expulsion orders, there were such very serious reasons justifying expulsion.

43. That balancing and proportionality test was approved by the High Court in its judgment of 26 August 2013.

44. Thus assessing whether the national authorities adduced relevant and sufficient reasons for expelling the applicant, the Court observes that after entering adulthood, the applicant has been convicted twice for robbery which by the very nature of the crime in question is a serious act including elements of violence or the threat of violence. He has also been convicted of other offences against property. In the Court's view, when assessing the 'nature and seriousness' of the offences committed by the applicant, the national authorities were thus entitled to take the view that they attained a level of gravity warranting expulsion unless other counterbalancing criteria militated against imposing that measure in the light of the Court's case-law. In this regard, the Court attaches particular weight to the fact that the expulsion of the applicant did not interfere with his family rights as he is an adult and has not made any arguments to the effect that there are additional elements of dependence between himself and his parents or siblings (see paragraph 35 above). Therefore, the interference with the applicant's Article 8 rights was limited to his right to privacy. Furthermore, the applicant has no children, thus obviating the need to take into account weighty reasons directed at protecting a child's best interests. Moreover, and importantly, the Court recalls that under its case-law, the evaluation of the applicant's 'social' and 'cultural ties' with the host country, here Denmark, is a criteria to be included in the analysis (see paragraph 36 above). On this basis, the Court considers it of importance that the City Court examined the particular situation of the applicant and found that although he has lived most of his life in Denmark he 'must be considered very poorly integrated into Danish society'. In fact, it can be readily deduced from the file that the applicant has primarily lived a life of crime and consistently demonstrated a lack of will

to comply with Danish law. The Court makes clear that unlike in Maslov (cited above), the national authorities based their decision to expel the applicant not on crimes perpetrated when the applicant was a juvenile.

45. In the light of the above, the Court reiterates that in the interpretation and application of Article 8 of the Convention in cases of the kind in question, emphasis must be placed on securing a fair balance between the public interest and the Article 8 rights of aliens residing in the Member States. Ascertaining whether 'very weighty reasons' justify the expulsion of a settled migrant, like the applicant, who has lived almost all his life in the host country, must inevitably require a delicate and holistic assessment of all the criteria flowing from the Court's case-law, an assessment that must be carried out by the national authorities under the final supervision of the Court. Taking account of all of the elements described above, the Court concludes that the interference with the applicant's private life was supported by relevant and sufficient reasons. There are no indications whatsoever that the domestic authorities may have based their decisions on stereotypes about Roma, as it appears to be alleged by the third party intervener, and the applicant never made such a complaint. The Court is also satisfied that the applicant's expulsion was not disproportionate given all the circumstances of the case. It notes that the City Court and the High Court explicitly assessed whether the expulsion order could be deemed to be contrary to Denmark's international obligations. The Court points out in this respect that, although opinions may differ on the outcome of a judgment, 'where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts' (see, Ndidi v. the United Kingdom (no. 41215/14, § 76, 14 September 2017; and, mutatis mutandis, Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012 and Axel Springer AG v. Germany [GC], no. 39954/08, § 88, 7 February 2012).

46. Accordingly, there has been no violation of Article 8 of the Convention.

I sagen *A.W. Khan v. the United Kingdom (2010)* var klageren indrejst i opholdslandet som treårig og var meddelt tidsubegrænset opholdstilladelse. Han blev som 28-årig idømt syv års fængsel for narkotikakriminalitet, men blev løsladt efter tre år på grund af god opførsel. Myndighederne traf efterfølgende afgørelse om udvisning på baggrund af den begåede kriminalitet. Klageren havde dels sin mor og sine søskende i opholdslandet, dels en kæreste, som han havde fået et barn med. På tidspunktet for sagens behandling for EMD var klageren 34 år gammel.

I præmis 31-32 gennemgik EMD klagerens forhold til sin mor og sine søskende, som fandtes at udgøre privatliv. I præmis 33-35 gennemgik EMD klagerens forhold til sin kæreste og deres fælles barn, som fandtes at udgøre familieliv. Herefter konkluderede EMD i præmis 36, at der var tale om et ingreb både i klagerens privatliv og hans familieliv.

Herefter gennemgik EMD i præmis 37-42 om indgrebet var i overensstemmelse med loven, om det skete til varetagelse af et af de legitime hensyn og om det var nødvendigt i et demokratisk samfund. EMD henviste i denne forbindelse til de relevante kriterier som sammenfattet i Üner-dommen og udtalte i præmis 40-43:

"40. The Court reiterates that in view of the devastating effects of drugs on people's lives, it understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge (Dalia v France, cited above, § 54; Bhagli v France, cited above, § 48). The applicant's offence was particularly serious as it involved the importation of a significant quantity of heroin. The severity of the offence is reflected

in the fact that the applicant was sentenced to seven years' imprisonment, taking account of his decision to plead guilty at a very early stage. The severity of this offence must therefore weigh heavily in the balance.

41. Nevertheless, the Court must also take into account the fact that the applicant had not previously committed any serious criminal offences in the United Kingdom, and has committed no further offences following his release in June 2006. Under the approach taken in the Boultif judgment (cited above, §51), the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has a certain impact on the assessment of the risk which the applicant poses to society.

42. As regards the applicant's private life, the Court accepts that the applicant has lived most of his life in the United Kingdom, having arrived there at the age of three, and no longer has any real social, cultural or family ties to Pakistan. The applicant has not returned to Pakistan, even for a short visit, and he has no immediate family in Pakistan.

43. In the United Kingdom the applicant has established close ties with his mother and two brothers, with whom he has lived for most of his life. The relationship clearly entails an additional degree of dependence which results from the relative ill-health of all of the parties. Although there is no evidence to suggest that the family would not be able to cope without the applicant, his removal would likely cause greater difficulties than would otherwise be the case."

I præmis 44-47 gennemgik EMD, hvorvidt klagerens familieliv med sin kæreste og deres fælles barn kunne tillægges vægt i proportionalitetsafvejningen, hvilket ikke fandtes at være tilfældet henset til omstændighederne på tidspunktet for etableringen af familielivet. I præmis 48 udtalte EMD, at der også måtte tages hensyn til varigheden af indrejseforbuddet, som var højst ti år.

Herefter udtalte EMD i præmis 50-51:

"50. In light of the above, having particular regard to the length of time that the applicant has been in the United Kingdom and his very young age at the time of his entry, the lack of any continuing ties to Pakistan, the strength of his ties with the United Kingdom, and the fact that the applicant has not reoffended following his release from prison in 2006, the Court finds that the applicant's deportation from the United Kingdom would not be proportionate to the legitimate aim pursued and would therefore not be necessary in a democratic society.

51. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Pakistan."

I sagen vedrørende A.W. Khans bror, *A.H. Khan v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som syvårig og var tidligere blevet dømt for samleje med en mindreårig, to forsøg på røveri samt overfald. Som 30-årig blev han ydermere idømt fem års fængsel for røveri og udvist. Klageren blev udsendt ni år efter sin sidste dom. På tidspunktet for EMD´s afgørelse af sagen var han far til seks børn i alderen fra 12 til 17 år. Klageren var på daværende tidspunkt ikke i et forhold med mødrene til sine børn.

EMD udtalte i præmis 37, at:

"[…] the Court finds that, on balance, the applicant lived in the United Kingdom from 1978, when he was aged seven, returning to Pakistan only for visits. It is therefore accepted that he has lived in the United Kingdom since an early age, a factor which means that serious reasons would be required before his deportation could be found to be proportionate (see Maslov v. Austria [GC], no. 1638/03, § 75, 23 June 2008)."

EMD fandt den af klageren begåede kriminalitet alvorlig og fremhævede, at det forhold, at han havde begået kriminalitet igen kort tid efter løsladelsen, viste, at han ikke var rehabiliteret og derfor fortsat udgjorde en fare for offentligheden, hvorfor der var gode grunde til at udsende ham (præmis 38).

Hvad angik klagerens forhold til sin mor og sine søskende udtalte EMD i præmis 39:

"The Court must now consider the applicant's circumstances in the United Kingdom, with a view to determining whether his family and private life, and his consequent level of integration into British society, were such as to outweigh the seriousness of his criminal history. Looking first at the nationalities of the persons involved, the Court notes that, unlike the applicant, his mother and siblings are all now naturalised British citizens. […]"

Herefter gennemgik EMD klagerens forhold til sine børn og deres mødre samt til sin aktuelle kæreste, hvorefter EMD udtalte i præmis 41:

"Finally, the Court turns to the question of the respective solidity of the applicant's ties to the United Kingdom and to Pakistan. The Court notes that, unlike his younger brother, the applicant returned to Pakistan for visits following his arrival in the United Kingdom and also married there. In the absence of any evidence to the contrary, the Court assumes that this marriage is still, legally at least, subsisting. The applicant therefore maintained some level of connection to his country of origin and was not deported as a stranger to the country. As regards his ties to the United Kingdom, the Court has addressed the question of his family life, both with his parents and siblings and with his various partners and children, above, and found it to be limited in its extent. Furthermore, the applicant's private life in the United Kingdom, as observed by the Tribunal, has been constrained by his convictions and spells in prison. Whilst he was mainly educated in the United Kingdom and has worked, he does not appear to have established a lengthy or consistent employment history. In short, and despite the length of his stay, the applicant did not achieve a significant level of integration into British society. The Court is aware that, as a settled migrant who spent much of his childhood in the United Kingdom, serious reasons would be required to render the applicant's deportation proportionate (see Maslov, cited above, § 75). However, having regard to his substantial offending history, including offences of violence and recidivism following the commencement of deportation proceedings against him, the Court is of the view that such serious reasons are present in the applicant's case. His private and family life in the United Kingdom were not such as to outweigh the risk he presented of future offending and harm to the public and his deportation was therefore proportionate to the legitimate aim of preventing crime. As such, the applicant's deportation to Pakistan did not amount to a violation of Article 8."

I sagen *A.A. v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som 13-årig sammen med sine to søstre som familiesammenført til deres mor. To år senere blev han som 15-årig idømt fire års tilbageholdelse på en ungdomsinstitution for voldtægt begået mod en mindreårig, men blev løsladt tidligere på grund af god opførsel. Fem år efter den begåede kriminalitet blev klagerens udvisningsafgørelse endelig. Da EMD behandlede sagen, havde klageren opholdt sig i opholdslandet i 11 år. Han boede hos sin mor og besøgte sine to søstre regelmæssigt.

I præmis 46-50 gennemgik EMD sin hidtidige praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem myndige børn og forældre udgør privatliv og/eller familieliv. EMD udtalte i præmis 49:

"49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life". However, it is not necessary to decide the question given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Thus, regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on "family life" rather than "private life", it observes that in practice the factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged (Üner, cited above, §§ 57-60)."

EMD konstaterede i præmis 51-55, at indgrebet var i overensstemmelse med loven og forfulgte et af de legitime hensyn.

Ved vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund, gennemgik EMD i præmis 56 kriterierne som sammenfattet i Üner-dommen og udtalte på den baggrund i præmis 57-58, at de nationale domstole i hver enkelt sag må vurdere, hvilken vægt der skal tillægges de enkelte elementer i foretagelsen af den konkrete afvejning, indenfor staternes margin of appreciation. Om de relevante elementer i den foreliggende sag udtalte EMD i præmis 59-64:

"59. In the present case, the Court considers the relevant factors to be the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in United Kingdom; the time which has elapsed since the offence was committed and the applicant's conduct during that period; and the solidity of social, cultural and family ties with the host country and with the country of destination.

60. The Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Maslov, cited above, § 85). There can be no doubt that the applicant's offence was a serious one and the Court considers the comments of the sentencing judge as to the applicant's conduct and the effect of the attack on the victim to be relevant factors to be taken into account (see paragraph 8 above). The sentence imposed – four years in a Young Offenders' Institution – demonstrates the gravity of the offence. However, the fact that the applicant was a minor at the time the offence was committed is a relevant consideration in assessing the proportionality of a deportation (see Maslov, cited above, § 72). In this regard, the Court recalls that where offences committed by a minor underlie an exclusion order, regard must be had to the best interests of the child. In particular, the obligation to take the best interests of the child into account includes an obligation to facilitate his reintegration, an aim that the Court has previously held will not be achieved by severing family or social ties through expulsion (see Maslov, cited above, §§ 82-83).

61. The Court observes that the total length of the applicant's stay in the United Kingdom to date is eleven years. He arrived in the country at the age of 13 and has therefore now spent almost half his life in the United Kingdom. The Court notes that the applicant committed the offence which rendered him liable to deportation less than two years after his arrival in the United Kingdom. Further, following his conviction, he spent some two years in detention, during which time he was served with a deportation order. While the applicant was granted Indefinite Leave to Remain during this period, the Court is persuaded by the Government's submissions that leave was granted in ignorance of the applicant's conviction and, as a result, considers that no significance can be attached to the fact that Indefinite Leave to Remain was granted following the conviction (compare and contrast Omojudi, cited above, § 42). It is also true that the applicant has been aware since July 2003 of the fact that he was liable to be deported on account of his conviction. However, the Court nonetheless observes that he has now spent seven years at liberty in the United Kingdom following his release and despite having exhausted appeal rights in January 2008, no steps appear to have been taken in respect of his deportation until September 2010 (see paragraphs 23-25 above).

62. As to the lapse of time and the applicant's conduct since commission of the offence in 2002, the Court observes at the outset that the applicant has committed no further offences. While in detention, the applicant took advantage of the educational opportunities available to him and obtained a number of high school qualifications (see paragraph 11 above). At the time of his release from detention in August 2004, his risk of reoffending was assessed to be low (see paragraph 11 above), an assessment subsequently reiterated by his probation officer in 2005 and accepted by the AIT in 2007 (see paragraphs 15 and 20 above). Since his release, the applicant's conduct appears to have been exemplary. He enrolled in college in September 2004 in order to sit his A-level examinations, which he obtained in summer 2005 (see paragraph 14 above). He was subsequently offered a place at university to study towards an undergraduate degree, which he obtained in 2008, followed by a postgraduate degree, which he completed in 2009 (see paragraphs 18 and 24 above). He commenced stable employment with a local authority in 2010 (see paragraph 24 above).

63. The Government have not pointed to any concern regarding the applicant's conduct in the seven years since his release from prison and rely solely on the seriousness of the offence to justify concerns as to his continued presence in the United Kingdom and his risk to the public (see paragraphs 41-42 and 44 above). The Court reiterates that the factors to be taken into consideration in cases involving deportation following a criminal offence are partially designed to evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities (see paragraph 57 above). In particular, the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has an impact on the assessment of the risk which the applicant poses to society (see Boultif, cited above, § 51; Maslov, cited above, § 90; and A.W. Khan, cited above, § 41). Accordingly, the Court considers the present factor to be of particular importance when assessing whether the seriousness of the offence in itself is sufficient to justify the applicant's deportation for the prevention of disorder or crime.

64. Finally, as regards the applicant's ties with the United Kingdom and with Nigeria, the Court observes that the applicant continues to reside with his mother and has close relationships with his two sisters and an uncle, all of whom reside in England. He has completed the majority of his high school and further education in the United Kingdom and has now commenced a career with a local authority in London. He is also a member of

a church community. While he spent a significant period of his childhood in Nigeria, he has now not visited the country for eleven years. He has had no contact with his father since 1991".

I præmis 65-68 gennemgik EMD betydningen af opholdslandets passivitet i forhold til at udsende klageren i overensstemmelse med den trufne udvisningsafgørelse og redegjorde for baggrunden for at inddrage forhold indtruffet og klagerens opførsel i perioden efter denne afgørelse i sin afvejning, herunder vigtigheden af at facilitere reintegration af unge lovovertrædere i samfundet.

Herefter konkluderede EMD i præmis 69-70:

"69. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's deportation from the United Kingdom would be disproportionate to the legitimate aim of the "prevention of disorder and crime" and would therefore not be necessary in a democratic society.

70. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Nigeria."

I sagen *Bajsultanov v. Austria (2012)* var klageren meddelt asyl i opholdslandet. Han blev idømt i alt 20 måneders fængsel for bl.a. flere tilfælde af vold samt udvist. EMD fastsatte længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen. Klagerens ægtefælle var meddelt asyl afledt af klagerens forhold og de havde to børn, der på tidspunktet for EMD's behandling af sagen var otte og fem år.

Efter i præmis 79-82 at have konstateret, at udvisningen af klageren udgjorde et indgreb i hans ret til respekt for familieliv, og at dette indgreb var i overensstemmelse med loven og forfulgte et af de legitime hensyn, gennemgik EMD i præmis 83 de generelle principper, som indgår i afvejningen af, om indgrebet var nødvendigt i et demokratisk samfund, jf. kriterierne som sammenfattet i Boultif- og Üner-dommene.

Om karakteren og alvorligheden af den begåede kriminalitet udtalte EMD i præmis 84:

"Turning to the first set of criteria relating to the criminal offences committed by the applicant, the Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks' imprisonment, suspended with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions."

EMD udtalte i præmis 85 til 87:

"85. As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there.

86. On the other hand, the applicant lived in Chechnya for almost twenty-three years, went to school there and subsequently worked occasionally in different jobs. The applicant's parents and siblings still live in Chechnya, and the applicant has maintained regular contact with his father.

87. The Court therefore considers, in line with the Austrian authorities, that the applicant still has stronger social and cultural ties to his country of origin than to his host country."

I præmis 88-90 gennemgik EMD klagerens familieliv og ægtefællens mulighed for at følge med klageren tilbage til hjemlandet i relation til artikel 3 og i forhold til, om der ville være uoverstigelige hindringer forbundet hermed.

EMD udtalte i præmis 91-92:

"Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention."

I sagen *El Boujaïdi v. France (1997)* var klageren indrejst i opholdslandet som syvårig. Han blev idømt seks års fængsel og udvist med indrejseforbud for bestandig for narkotikakriminalitet begået da han var 19 år. Efter at være blevet løsladt da han var 24 år, blev klageren på ny anholdt og idømt et års fængsel for forsøg på røveri og for ikke at være udrejst i overensstemmelse med udvisningen. Klageren blev udsendt, da han var 26 år gammel. På dette tidspunkt boede han sammen med en statsborger i opholdslandet, med hvem han havde fået et barn nogle måneder forud for udsendelsen. Mens der på tidspunktet, hvor udvisningsbeslutningen blev endelig, endnu ikke var etableret et forhold mellem klageren og samleversken og derfor ifølge EMD ikke bestod et "familieliv", der kunne tages i betragtning, udtalte EMD i præmis 33:

"However, the Court observes that he arrived in France in 1974 at the age of 7 and lived there until 26 August 1993. He received most of his schooling there and worked there for several years. In addition, his parents, his three sisters and his brother – with whom it was not contested that he had remained in contact – live there (see paragraph 7 above). Consequently, the Court is in no doubt that enforcement of the exclusion order amounted to interference with the applicant's right to respect for his private and family life."

Ved vurderingen af, om indrejseforbuddet var nødvendigt i et demokratisk samfund, udtalte EMD i præmis 40-41:

"40. The Court's task therefore consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

The Court notes that Mr El Boujaïdi arrived in France at the age of 7 and lived there lawfully from 1974 until 19 June 1991 (the date of his release – see paragraph 13 above). He received most of his education there, he worked there and his parents, his three sisters and his brother live there (see paragraph 7 above).

However, while he asserted that he had no close family in Morocco, he did not claim that he knew no Arabic or that he had never returned to Morocco before the exclusion order was enforced. It also seems that he has never shown any desire to acquire French nationality. Accordingly, even though most of his family and social ties are in France, it has not been established that he has lost all links with his country of origin other than his nationality. In addition, the applicant had a previous conviction – a sentence of thirty months' imprisonment having been imposed on him by the Annecy Criminal Court for heroin dealing in 1987 – when the Lyons Court of Appeal sentenced him to six years' imprisonment and ordered his permanent exclusion from French territory for drug use and drug trafficking (see paragraphs 10 and 11 above). Once he was released, and at a time when he was unlawfully present in France, he continued to lead a life of crime and committed an attempted robbery (see paragraph 13 above). The seriousness of the offence on account of which the measure in issue was imposed on the applicant and his subsequent conduct count heavily against him.

41. Having regard to the foregoing, the Court does not find that enforcement of the order for the applicant's permanent exclusion from French territory was disproportionate to the legitimate aims pursued. There has accordingly been no breach of Article 8."

I sagen *Loy v. Germany (2014)* var klageren indrejst i opholdslandet som femårig. Som 26-årig blev han idømt fire måneders betinget fængsel for vold mod sine børns mor og tre år senere blev han idømt et års betinget fængsel for vold på en natklub. To år senere blev han idømt to et halvt års fængsel for narkotikakriminalitet. Det år, han fyldte 32 år, blev klageren udvist af opholdslandet med indrejseforbehold uden fastsat tidsbegrænsning, og to år senere blev han udsendt til hjemlandet. På udvisningstidspunktet var klageren skilt fra sin tidligere ægtefælle, som var statsborger i opholdslandet, og med hvem klageren havde fået to børn, som ligeledes var statsborgere i opholdslandet og 21 og 17 år gamle på tidspunktet for klagerens udvisning. Han giftede sig igen, efter hans udvisningsdom var blevet afsagt.

EMD konstaterede i præmis 28, at indgrebet var i overensstemmelse med lovgivningen og tjente et legitimt formål. Til brug for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund og proportionalt med det forfulgte hensyn, gennemgik EMD i præmis 30 kriterierne som sammenfattet i Üner- og Maslov-dommene og konstaterede derefter i præmis 31, at den af klageren begåede kriminalitet, som også omfattede narkotikakriminalitet, var alvorlig. I præmis 32 konstaterede EMD, at klageren havde boet næsten 30 år i opholdslandet og havde tidsubgrænset opholdstilladelse, da udvisningsafgørelsen blev endelig.

I præmis 34-36 fandt EMD med hensyn til karakteren af klagerens familieliv med henholdsvis børnene af det tidligere ægteskab, "that the applicant's family ties with his children were not very developed" og med den nuværende ægtefælle, at "Their family life, such as it was, was thus always against the background of pending expulsion proceedings. They separated soon after the marriage. In these circumstances, no decisive weight can be attached to the family relationship with his spouse."

Herefter udtalte EMD i præmis 37 om klagerens tilknytning til opholdslandet:

"The Court also looks for significant relations within the society of the host country (see Trabelsi, cited above, § 62; Mutlag, cited above, § 58; Lukic v. Germany (dec.), no. 25021/08, 20 September 2011) and notes that apart from mentioning that he went to school and completed a vocational training in Germany in his submissions the applicant submits nothing by way of evidence of his participation in social life apart from the length of his residence. Apart from referring to his children and his former spouse he made reference to the fact that his father, stepmother and siblings live in Germany. He claims that he has contact with his sister, but gives no further details. No information on other social contacts was provided. Therefore, in the present case only few significant relations can be established."

I præmis 38 gennemgik EMD klagerens tilknytning til hjemlandet og konstaterede, at han havde boet der, til han var fem år gammel, og at han angiveligt talte noget serbisk. I præmis 39 konstaterede EMD, at indrejseforbuddet ikke nødvendigvis behøvede at være permanent, idet klageren kunne søge om at få det tidsbegrænset.

I præmis 40 udtalte EMD, at:

"Against the background of the gravity of the applicant's drug related offence, together with the earlier crimes of violence committed by the applicant, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family and his private life reasonably against the State's interest in preventing disorder and crime. Appreciating the consequences of the expulsion for the applicant, the Court cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to impose this measure."

EMD afviste derefter sagen som *inadmissable*, idet klagen blev vurderet *manifestly ill-founded*.

I sagen *Alam v. Denmark (2017)* var klageren indrejst fra Pakistan som halvandetårig som familiesammenført til sin far. Som 30-årig blev hun idømt 16 års fængsel for manddrab og brandstiftelse og udvist for bestandig. Hun talte udover dansk også engelsk, tysk, pashto, urdu og punjabi. Hendes far var død, men hendes mor og fem søskende boede i Danmark og var danske statsborgere. Klageren havde tidligere været i Pakistan, hvor hun havde to halvsøskende, og hendes mor rejste ofte til Pakistan, hvor hun ejede et hus. Klagerens børn var på tidspunktet for EMD's behandling af sagen 16 og 13 år gamle. De talte dansk og den ældste også lidt pashto.

EMD udtalte i præmis 33, at:

"*The Court recognises that the City Court made a thorough assessment of the applicant's personal circumstances, carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law (see paragraph 18 above**). It specifically noted the children's age, which had significant importance when compared with the sentence imposed (see paragraphs 25 above and 34 below), and found that considerations for the applicant's children could not lead to another decision. [(…])"*

Om de nationale domstoles vurdering af klagerens tilknytning til opholdslandet, bl.a. på baggrund af skolegang og uddannelse, samt til hjemlandet udtalte EMD videre i præmis 33, at:

"[…] It made an overall assessment, taking into account especially that the applicant had had all her upbringing, schooling and education in Denmark, that she had maintained a real attachment to Pakistan and Pakistani culture, that she had two children in Denmark, and that she had been convicted of very serious crimes. That balancing and proportionality test was approved by the High Court in its judgment of 4 September 2014 (see paragraph 20 above)."

Efter at have gennemgået spørgsmålet om klagerens børns mulige fortabelse af opholdstilladelse i præmis 34, udtalte EMD i præmis 35, at:

*"Having regard to the above, the Court has no reason to call into question the conclusions reached by the domestic courts on the basis of the balancing exercise which they carried out. Those conclusions were neither arbitrary nor manifestly unreasonable. The Court is thus satisfied that the interference with the applicant's private and family life was supported by relevant and sufficient reasons and that her expulsion would not be disproportionate given all the circumstances of the case. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention."*I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

Klageren gjorde under sagen for EMD gældende, at han var velintegreret i opholdslandet og henviste til, at han talte tysk og med enkelte undtagelser altid havde haft beskæftigelse, ligesom hverken han eller hans familie havde været afhængige af offentlig understøttelse før hans afsoning. Opholdslandets regering gjorde for EMD gældende, at ingen af familiemedlemmerne havde særlig stærke bånd til opholdslandet og at hverken klageren eller hans ægtefælle var velintegrerede til trods for opholdets betragtelige varighed. Således havde klageren ifølge regeringen ikke stabil beskæftigelse, han havde forladt sig på offentlig understøttelse, havde betragtelig gæld og deltog ikke aktivt i samfundet.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

EMD udtalte i præmis 45, at:

"As regards the length of the applicant's stay in Switzerland, the Court observes that he arrived in Switzerland in 1989 at the age of nine and lived in Switzerland for more than twenty years. His stay in Switzerland was, thus, of a considerable length of time."

I præmis 46-50 gennemgik EMD klagerens opførsel og domstolsbehandlingen af hans sag efter begåelsen af lovovertrædelsen samt klagerens families forhold, herunder muligheden for klagerens ægtefælle og børn for at tage ophold i klagerens hjemland.

I præmis 51 og 52 gennemgik EMD klagerens tilknytning til henholdsvis opholdslandet og hjemlandet:

"51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'."

EMD udtalte herefter i præmis 53-55:

"53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

I sagen *I.M. v. Switzerland (2019)* blev klageren udvist af opholdslandet efter at være blevet dømt for voldtægt ti år forinden. Han led af forskellige sygdomme og var vurderet 80 % invalid. Klagerens tidligere ægtefælle og deres fællesbørn, hvoraf tre var myndige, havde alle ophold i opholdslandet, og klageren var afhængig af hjælp fra de myndige børn i form af pleje og økonomisk bistand.

I præmis 69 gennemgik EMD de generelle kriterier, som Storkammeret havde sammenfattet i Üner-sommen, som skal vejlede de nationale domstole i sager om udvisning af kriminelle udlændinge ved vurderingen af, om indgrebet er nødvendigt i et demokratisk samfund. EMD udtalte herefter i præmis 70 (uofficiel dansk oversættelse):

"Der skal ligeledes i givet fald tages højde for de særlige omstændigheder i forbindelse med den foreliggende sag, som f.eks. forhold af lægelig art eller indrejseforbuddets midlertidige eller definitive karakter (Shala mod Schweiz, nr. 52873/09, præmis 46, 15. november 2012, og de citerede referencer)."

I præmis 71-73 udtalte EMD om de nationale myndigheders skønsbeføjelser og begrundelsespligt (uofficiel dansk oversættelse):

"71. Domstolen henviser til, at de nationale myndigheder har visse skønsbeføjelser til at udtale sig om nødvendigheden af et indgreb i udøvelsen af en rettighed, der er beskyttet i medfør af artikel 8, og om den pågældende foranstaltnings proportionalitet med det legitime mål, der forfølges. Domstolens opgave består i at bestemme, om der i forbindelse med anfægtede foranstaltninger er respekteret en rimelig afvejning mellem de tilstedeværende interesser, dvs. på den ene side den pågældende persons interesser, der er beskyttet i medfør af Konventionen, og på den anden side samfundets interesser (Slivenko, nævnt ovenfor, præmis 113, og Boultif, nævnt ovenfor, præmis 47).

72. Domstolen henviser ligeledes til, at de nationale domstole skal begrunde deres afgørelser tilstrækkeligt udførligt, for navnlig at gøre det muligt for Domstolen at sikre det europæiske tilsyn, som Domstolen er betroet (jf., mutatis mutandis, X mod Letland [Storkammeret], nr. 27853/09, præmis 107, EMD 2013, og El Ghatet mod Schweiz, nr. 56971/10, præmis 47, 8. november 2016). Et utilstrækkeligt ræsonnement fra de nationale myndigheders side uden en reel afvejning af de tilstedeværende interesser strider mod kravene i Konventionens artikel 8. Det er tilfældet, når de nationale myndigheder ikke på en overbevisende måde formår at overbevise om, at indgrebet i en ret, der er beskyttet i medfør af Konventionen, står i forhold til de forfulgte mål, og at det herefter svarer til et "bydende nødvendigt socialt behov" i overensstemmelse med den ovennævnte retspraksis (El Ghatet, nævnt ovenfor, præmis 47, og mutatis mutandis, Schweizerische Radio- und Fernsehgesellschaft SRG mod Schweiz, nr. 34124/06, præmis 65, 21. juni 2012, Saber og Boughassal mod Spanien, nr. 76550/13 og 45938/14, præmis 51, 18. december 2018).

73. Hvis det til gengæld viser sig, at de nationale myndigheder har foretaget en tilstrækkelig og overbevisende undersøgelse af de faktiske forhold og relevante betragtninger, herunder en passende afvejning af klagers interesser og samfundets mere generelle interesser, tilkommer det ikke Domstolen at lade sin vurdering træde i stedet for den vurdering, der er foretaget af de nationale myndigheder, herunder i forhold til behandlingen af proportionaliteten i den omtvistede sag, medmindre der findes væsentlige årsager til at gøre dette (jf. i

denne henseende Ndidi mod Det Forenede Kongerige, nr. 41215/14, præmis 76, 14. september 2017, Hamesevic mod Danmark (dec.), nr. 25748/15, præmis 43, 16. maj 2017 og Alam mod Danmark (dec.), nr. 33809/15, præmis 35, 6. juni 2017)."

EMD konstaterede om de nationale domstoles konkrete vurdering af indgrebets nødendighed i et demokratisk samfund i præmis 76-79 (uofficiel dansk oversættelse):

"76. Domstolen bemærker, at den administrative forbundsdomstol har udtalt sig om alvoren af den begåede lovovertrædelse, kortfattet behandlet spørgsmålet om risikoen for gentagelse af den strafbare handling og bemærket de problemer, som klager måtte blive konfronteret med ved sin tilbagevenden til Kosovo. Domstolen henviser imidlertid til, at forbundsdomstolen har begrænset sin analyse i forhold til Konventionens artikel 8 til alene disse dele. Da forbundsdomstolen traf afgørelse mere end tolv år efter lovovertrædelsen, tog den på ingen måde højde for udviklingen i klagers adfærd, siden lovovertrædelsen blev begået (K.M. mod Schweiz, nr. 6009/10, præmis 54, 2. juni 2015, og de nævnte referencer). Den vurderede heller ikke indvirkningen af den betydelige forværring af den pågældende persons helbredstilstand (invaliditetsgrad på 80 % siden 1. oktober 2012) i forhold til risikoen for gentagelse af de strafbare forhold og har ikke behandlet flere kriterier, der er fastlagt i Domstolens retspraksis ved vurdering af nødvendigheden af udvisningsforanstaltningen. Den administrative forbundsdomstol har navnlig ikke taget højde for fastheden af klagers sociale, kulturelle og familiemæssige tilknytning til værtslandet Schweiz og destinationslandet Kosovo samt de særlige omstændigheder i den foreliggende sag, som for eksempel de lægelige oplysninger (Üner, nævnt ovenfor, præmis 58, og Shala, nævnt ovenfor, præmis 46). For så vidt angår navnlig respekten for familielivet, selv om domstolene har anerkendt klagers afhængighed, i det mindste hans økonomiske afhængighed af de myndige børn, er der ikke foretaget en mere dybtgående analyse af indvirkningerne af denne afhængighed på klagers udøvelse af rettighederne i medfør af Konventionens artikel 8.

77. Domstolen vurderer henset til ovenstående, at der ved anvendelse af de kriterier, der er fastlagt i dens retspraksis (ovenstående præmis 68 og 69), ikke kan udledes nogen tydelig konklusion med hensyn til, hvorvidt klagers private og familiemæssige interesse i fortsat at kunne bo på den indklagede stats territorium går forud for sidstnævntes offentlige interesse i at udvise klager med henblik på at varetage missionen med opretholdelse af den offentlige orden (jf., mutatis mutandis, El Ghatet, nævnt ovenfor, præmis 52). Hvis de nationale myndigheder havde foretaget en grundig afvejning af de pågældende interesser og taget højde for de forskellige kriterier, der er fastlagt i Domstolens retspraksis, og hvis de havde anført relevante og tilstrækkelige grunde, der kunne berettige deres afgørelse, ville Domstolen i givet fald, i tråd med nærhedsprincippet, kunne have været foranlediget til at vurdere, at de nationale myndigheder hverken havde undladt at foretage en retfærdig afvejning af klagers og den indklagede stats interesser eller overskredet de skønsbeføjelser, som de har inden for immigrationsområdet (jf., El Ghatet, nævnte ovenfor, præmis 52).

78. Domstolen vurderer imidlertid, at den administrative forbundsdomstol i den foreliggende sag har foretaget en overfladisk behandling af udsendelsesforanstaltningens proportionalitet. Henset til fraværet af en reel afvejning af de interesser, der står på spil, vurderer Domstolen, at de nationale myndigheder ikke på en overbevisende måde har formået at bevise, at udsendelsesforanstaltningen skulle være proportionel med de forfulgte legitime mål og dermed nødvendig i et demokratisk samfund.

79. Der ville herefter foreligge en krænkelse af Konventionens artikel 8, hvis klager udvises."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

EMD gennemgik præmis 47-49 sin praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem (pleje)forældre og unge voksne udgør privatliv eller tillige familieliv, og udtalte i præmis 50, at:

"50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined

is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

Der kan endvidere henvises til følgende sager:

- *Loukili v. the Netherlands (2023)*.
- *Azzaqui v. the Netherlands (2023)*.
- *Noorzae v. Denmark (2023)*.

- *Nguyen v. Denmark (2024).*

4.2.7.2. Mindre alvorlig kriminalitet

I sagen *Maslov v. Austria (2008)* var klageren indrejst i opholdslandet som seksårig og var blevet udvist på grund af kriminalitet i form af mere end 40 kvalificerede indbrud, nogle i forbindelse med banderelationer, brugstyveri af køretøj og et enkelt tilfælde af vold. Klageren var mindreårig, da han begik disse forhold, og da afgørelsen om udvisning blev endelig. Medlemsstaten havde begrundet udvisningen med hensynet til forebyggelse af uro og forbrydelse. Klageren blev efterfølgende udsendt i en alder af 19 år. Klageren havde på dette tidspunkt ikke stiftet egen familie.

Efter i præmis 66 og 67 at have fastslået, at udvisningen var i overensstemmelse med loven og forfulgte et af de legitime hensyn, vurderede EMD, om indgrebet var nødvendigt i et demokratisk samfund. EMD henviste til de fundamentale principper, som er sammenfattet i Üner-dommen, og udtalte i præmis 70-75:

"70. The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Moreover, it has to be borne in mind that where, as in the present case, the interference with the applicant's rights under Article 8 pursues, as a legitimate aim, the "prevention of disorder or crime" (see paragraph 67 above), the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities.

71. In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family of his own, the relevant criteria are
– the nature and seriousness of the offence committed by the applicant;
– the length of the applicant's stay in the country from which he or she is to be expelled;
– the time elapsed since the offence was committed and the applicant's conduct during that period; and
– the solidity of social, cultural and family ties with the host country and with the country of destination.

72. The Court would also clarify that the age of the person concerned can play a role when applying some of the above criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult (see, for instance, Moustaquim v. Belgium, 18 February 1991, § 44, Series A no. 193, and Radovanovic v. Austria, no. 42703/98, § 35, 22 April 2004).

73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec(2000)15 and Rec(2002)4 (see paragraphs 34-35 above).

74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see Üner, cited above, § 55), including those who were born in the host country or moved there in their early childhood,

the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there (see Üner, § 58 in fine).

75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

Herefter gennemgik EMD i præmis 77-80 karakteren og alvorligheden af den af klageren begåede kriminalitet og udtalte i præmis 81 blandt andet:

"81. In the Court's view, the decisive feature of the present case is the young age at which the applicant committed the offences and, with one exception, their non-violent nature. This also clearly distinguishes the present case from Boultif and Üner […]."

I denne sammenhæng gennemgik EMD i præmis 82-83 de situationer, hvor princippet om barnets tarv skal finde anvendelse, og hvilke forpligtelser anvendelsen af dette princip indebærer.

I præmis 84-85 udtalte EMD om forskellen i vurderingen af sager, hvor en mindreårig har begået ikke-voldelig kriminalitet, over for sager, hvor mindreårige har begået meget alvorlige voldelige forbrydelser:

"84. In sum, the Court sees little room for justifying an expulsion of a settled migrant on account of mostly non-violent offences committed when a minor (see Moustaquim, cited above, § 44, concerning an applicant who had been convicted of offences committed as a juvenile, namely numerous counts of aggravated theft, one count each of handling stolen goods and destruction of a vehicle, two counts of assault and one count of threatening behaviour, and Jakupovic v. Austria, no. 36757/97, § 27, 6 February 2003, in which the exclusion order was based on two convictions for burglary committed when a minor and where, in addition, the applicant was still a minor when he was expelled).

85. Conversely, the Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Bouchelkia, cited above, § 51, where the Court found no violation of Article 8 as regards a deportation order made on the basis of the applicant's conviction of aggravated rape committed at the age of 17; in the decisions Hizir Kilic v. Denmark (dec.), no. 20277/05, and Ferhat Kilic v. Denmark (dec.), no. 20730/05, both of 22 January 2007, the Court declared inadmissible the applicants' complaints about exclusion orders imposed following their convictions for attempted robbery, aggravated assault and manslaughter committed at the age of 16 and 17 respectively)."

Om længden af klagerens ophold i opholdslandet konstaterede EMD i præmis 86:

"The applicant came to Austria in 1990, at the age of six, and spent the rest of his childhood and youth there. He was lawfully resident in Austria with his parents and siblings and was granted a permanent-settlement permit in March 1999."

I præmis 87-95 gennemgik EMD den forløbne tid efter begåelsen af kriminaliteten og klagernes opførsel i den periode.

Vedrørende fastheden af de sociale, kulturelle og familiære bånd i opholdslandet og i hjemlandet udtalte EMD i præmis 96-97:

"96. The Court observes that the applicant spent the formative years of his childhood and youth in Austria. He speaks German and received his entire schooling in Austria where all his close family members live. He therefore has his principal social, cultural and family ties in Austria.

97. As to the applicant's ties with his country of origin, the Court notes that he has convincingly explained that he did not speak Bulgarian at the time of his expulsion as his family belonged to the Turkish minority in Bulgaria. It was not disputed that he was unable to read or write Cyrillic as he had never gone to school in Bulgaria. It has not been shown, nor even alleged, that he had any other close ties with his country of origin."

Endelig forholdt EMD sig i præmis 98 til varigheden af det meddelte indrejseforbud.

EMD konkluderede i præmis 100 og 101, at:

"100. Having regard to the foregoing considerations, in particular the – with one exception – non-violent nature of the offences committed when a minor and the State's duty to facilitate his reintegration into society, the length of the applicant's lawful residence in Austria, his family, social and linguistic ties with Austria and the lack of proven ties with his country of origin, the Court finds that the imposition of an exclusion order, even of a limited duration, was disproportionate to the legitimate aim pursued, 'the prevention of disorder or crime'. It was therefore not 'necessary in a democratic society'

101. Consequently, there has been a violation of Article 8 of the Convention."

I sagen *Miah v. the United Kingdom (2010)* indrejste klageren i opholdslandet som 11-årig og tog ophold hos sin far, dennes nye ægtefælle samt sine to brødre. Da klageren var 14 år gammel, døde faren. Som 19-årig blev han idømt to års fængsel på en institution for ungdomskriminelle for indbrud og tyveri. Klageren blev efterfølgende flere gange idømt bøder for bl.a. tyveri. Da klageren var 26 år gammel, blev han idømt 12 måneders fængsel for tyveri, og samme år blev han udvist. Klageren havde indtil fængslingen boet hjemme hos stedmoren og havde til hensigt at flytte hjem igen efter løsladelsen. Klageren blev året efter udsendt til Bangladesh.

Efter at have gengivet Storkammerets vurderinger i *Maslov*-dommen, udtalte EMD i præmis 25:

"Turning to the present case, the Court accepts that the applicant has spent a significant period of time in the United Kingdom and that the majority of his social, cultural and family ties are there rather than in Bangladesh. However, despite the relatively young age at which he arrived in the United Kingdom, the Court is not persuaded that he has severed all links to Bangladesh. His mother still lives Bangladesh and, as the Tribunal found, he would be able to rely on her and any extended family for support. In contrast to Mr Maslov, the present applicant speaks the language of his country of origin. Although both Mr Maslov and the applicant were convicted of mostly non-violent offences, the applicant's offences are of a quite different character. With the exception of the first burglary offence, they were all committed when the applicant was an adult and there cannot be the same duty to facilitate the reintegration of an adult offender rather than deport him as

there would be for a juvenile offender who is convicted of the same offences. The applicant's offences appear to have been committed in order to fund a drug addiction, a factor which must go some way to mitigating if not the seriousness of the offences then at least the sentences imposed. Indeed, the domestic courts have made efforts to rehabilitate the applicant by imposing a series of non-custodial sentences. Nonetheless, by the time of the final offence, they were entitled to take the view that further such efforts would be inappropriate. Therefore, while the applicant is correct to observe that his final sentence of twelve months' imprisonment was at the lower end of the scale to which a presumption in favour of deportation would apply, the domestic authorities were entitled to take into account that this was the last in a series of offences and that the applicant had failed to respond to other, less severe sentences. Finally, while the duration of the deportation imposed on the applicant is of the same duration as that imposed in Maslov, it does not exclude him from the United Kingdom for as much time as he spent there and does not do so for a decisive period in his life. The Court therefore finds that the domestic authorities have not exceeded the margin of appreciation afforded to them in such cases. A fair balance has been struck in this case and the Court therefore agrees with the Tribunal that the applicant's deportation was proportionate to the legitimate aim pursued. Accordingly, this part of the application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention."

EMD afviste derefter sagen som inadmissible.

I sagen *Radovanovic v. Austria (2004)* var klageren kort efter fødslen i opholdslandet flyttet til hjemlandet, hvor han boede hos sine bedsteforældre og gik i skole. Som tiårig vendte han tilbage til sine forældre og sin søster i opholdslandet, hvor han færdiggjorde skolen og blev udlært som slagter. Som mindreårig begik han kriminalitet i form af blandt andet groft røveri og indbrud og blev idømt 30 måneders fængsel, heraf 24 betinget, og udvist for bestandig. Efter at have afsonet fængselsstraffen blev klageren i det år, han fyldte 19 år, udsendt til hjemlandet.

EMD bemærkede i præmis 33:

"The Court notes that the applicant, a single young adult at the time of his expulsion, is not a second generation immigrant as, despite his birth in Austria, he did not permanently live there until the age of ten. Given the young age at which he arrived, the Court will nevertheless assess the necessity of the interference by applying the same criteria it usually applies in cases of second generation immigrants who have not yet founded a family of their own in the host country. These criteria, so far as material, are the nature and gravity of the offence committed by the applicant and the length of his stay in the host country. In addition the applicant's family ties and the social ties he established in the host country by receiving his schooling and by spending the decisive years of his youth there are to be taken into account (see Benhebba v. France, no. 53441/99, §§ 32-33, 15 June 2003)."

EMD sammenholdt i præmis 34 sagen med en række sager, hvor der ikke var sket krænkelse af artikel 8, om udvisning af second generation immigrants, som var ankommet til opholdslandet i en ung alder og var idømt langvarige ubetingede fængselsstraffe for alvorlig kriminalitet i form af narkotikakriminalitet, som EMD ser med alvor på. Trods den kortere varighed af klagerens ophold i opholdslandet tillagde EMD det stor vægt, at selvom der var tale om groft røveri, var klageren kun idømt seks måneders ubetinget fængsel. Uden at underkende kriminalitetens grovhed noterede EMD sig, at klageren havde været mindreårig, at han ikke var

tidligere straffet og at hovedparten af den relativt lange straf var gjort betinget. Derfor kunne EMD ikke tilslutte sig de nationale myndigheders vurdering af, at klageren udgjorde en sådan fare for public order, at det nødvendiggjorde indgrebet, jf. præmis 35.

Herefter udtalte EMD i præmis 36-38:

"36. Given the applicant's birth in Austria, where he later also completed his secondary education and vocational training while living with his family, and also taking into account that his family had already lawfully stayed in Austria for a long time and that the applicant himself had an unlimited residence permit when he committed the offence, and considering that, after the death of his grandparents in Serbia and Montenegro, he no longer has any relatives there, the Court finds that his family and social ties with Austria were much stronger than with Serbia and Montenegro.

37. The Court therefore considers that, in the circumstances of the present case, the imposition of a residence prohibition of unlimited duration was an overly rigorous measure. A less intrusive measure, such as a residence prohibition of a limited duration would have sufficed. The Court thus concludes that the Austrian authorities, by imposing a residence prohibtion of unlimited duration against the applicant, have not struck a fair balance between the interests involved and that the means employed were disproportionate to the aim pursued in the circumstances of the case (see mutatis mutandis, Ezzouhdi, cited above, § 35; and Yilmaz, cited above, §§ 48-49).

38. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Emre v. Schweiz (2008)* var klageren indrejst i opholdslandet som femårig sammen med sine forældre. Klageren blev flere gange dømt for kriminalitet, herunder kriminalitet begået mens han var mindreårig, og blev som 22-årig udvist.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det kortfattede Press Release issued by the Registrar af 22. maj 2008, der er gengivet i sin helhed i afsnit 4.2.1.2. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

EMD gentog i dommens præmis 69 det ovennævnte princip om betydningen af længden af opholdet, som blandt andet kom til udtryk i Üner-dommens præmis 58[15], og uddybede i forlængelse heraf i præmis 70 (uofficiel dansk oversættelse):

[15] *"Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there."*

"Domstolen har understreget vigtigheden af dette sidste punkt med hensyn til immigranter, der har tilbragt størstedelen af deres liv i værtslandet. I et sådant tilfælde bør det reelt bemærkes, at de modtog deres uddannelse der, fik størstedelen af deres sociale tilknytninger der og derfor udviklede deres identitet der. Da de er født eller ankommet til værtslandet på grund af deres forældres emigration, har de normalt deres vigtigste familiemæssige tilknytning der. Nogle af disse immigranter har endog kun bevaret nationalitetstilknytningen til fødelandet (Benhebba mod Frankrig, nr. 53441/99, præmis 33, 10. juli 2003, Mehemi, nævnt ovenfor, præmis 36, og Boujlifa, nævnt ovenfor, s. 2264, præmis 44, og, a contrario, Bouchelkia mod Frankrig, dom af 29. januar 1997, Samlingen af domme og afgørelser 1997- I, og Baghli mod Frankrig, nr. 34374/97, EMD 1999-VIII, nævnt ovenfor, henholdsvis præmis 50 og præmis 48)."

I præmis 77 udtalte EMD om varigheden af klagerens ophold i opholdslandet (uofficiel dansk oversættelse):

"For så vidt angår varigheden af opholdet i det land, hvorfra klager skal udvises, bemærker Domstolen, at klager, der er født den 18. december 1980, ankom til Schweiz den 21. september 1986, dvs. inden han var seks år gammel. På tidspunktet for forbundsdomstolens dom af 3. maj 2004 var han 23½ år gammel. Han havde dermed tilbragt mere end 17½ år i Schweiz."

I præmis 79-80 udtalte EMD om fastheden af klagerens sociale, kulturelle og familiemæssige tilknytning til værtslandet (uofficiel dansk oversættelse):

"79. For så vidt angår de særlige tilknytninger, som klager har til sit værtsland, bemærkede forbundsdomstolen, at han havde haft hele sin skolegang og boet det meste af sit liv i Schweiz, hvor hans forældre og hans brødre også er bosat. Den ene af hans brødre har schweizisk statsborgerskab. Selv om der på den anden side er en vis uenighed mellem parterne om klagers arbejdsmæssige integration i Schweiz (ovenstående præmis 44 og 58), finder Domstolen sig ikke forpligtet til at tage stilling til dette anliggende.

80. Sammenlignet med disse forhold, der til trods for klagers kriminelle aktivitet viser en vis integration i Schweiz, forekommer de sociale, kulturelle og familiemæssige tilknytninger, som han opretholder til Tyrkiet, at være meget ubetydelige. Det fremgår af sagsakterne, at klager kun har opholdt sig 1½ måned i landet i juni og juli 2002, og at kun hans bedstemor stadig bor der. Domstolen er ikke overbevist om, at det korte ophold i Tyrkiet efter klagers første udsendelse, – en foranstaltning, der anfægtes i nærværende klage, kan tages i betragtning. Det er desuden ikke sikkert, at klager har et tilstrækkeligt kendskab til det tyrkiske sprog. Selv om forholdet mellem forældre og voksne børn ikke er omfattet af beskyttelsen i artikel 8 uden påvisning af "yderligere afhængighedsforhold mellem dem ud over almindelige følelsesmæssige bånd" (jf. mutatis mutandis, Kwakye-Nti og Dufie mod Nederlandene (dec.), nr. 311519/96, 7. november 2000), bemærker Domstolen ligeledes, at forbundsdomstolen selv erkendte, at klagers familiemæssige tilknytning til Tyrkiet var meget mindre betydningsfuld end hans tilknytning til værtslandet. Domstolen har i øvrigt på ingen måde rejst tvivl om, at klager ville "få betydelige vanskeligheder, hvis han vendte tilbage til Tyrkiet"."

I præmis 80-83 gennemgik EMD klagerens sociale, kulturelle og familiemæssige tilknytning til hjemlandet og "Særlige forhold i sagen: sagens medicinske aspekt".

Endelig gennemgik EMD i præmis 84-85 opholdsforbuddet i opholdslandet.

EMD konkluderede i præmis 86-87 (uofficiel dansk oversættelse):

"86. I betragtning af ovenstående og navnlig den relative grovhed [alvorlighed, red.] af domfældelserne mod klager, hans svage tilknytning til hjemlandet og den endelige karakter af udsendelsesforanstaltningen finder Domstolen, at den indklagede stat ikke kan anses for at have foretaget en rimelig afvejning mellem klagers og hans families interesser på den ene side og statens egen interesse i at kontrollere indvandringen på den anden.

87. Der er følgelig sket en krænkelse af artikel 8."

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis 5 og 6 måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden.

EMD udtalte i præmis 56 vedrørende klagerens alder ved ankomsten til opholdslandet:

"The Court notes that the applicant is not a so-called "second generation immigrant" as he first entered Germany at the age of ten. Given the relatively young age at which he arrived, the Court will nevertheless assess the necessity of the interference by applying criteria which are similar to those it usually applies in cases of second generation immigrants (see Radovanovic v. Austria, no. 42703/98, § 33, 22 April 2004; Üner v. the Netherlands, no. 46410/99, § 40, 5 July 2005)."

EMD gennemgik herefter i præmis 57 Boultif-kriterierne og udtalte i præmis 58:

"In addition, the Court will also take into account the particular ties which these immigrants have developed with the host country where they will have spent most of their life (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, § 36; Radovanovic, cited above, § 33; Üner, cited above, § 40)"

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som f.eks. narkotikahandel.

Ved vurderingen af klagerens tilknytning til opholdslandet, udtalte EMD i præmis 61, at:

"61. With regard to the applicant's personal and family situation, the Court notes that the applicant, at the time of the expulsion order of 22 January 1999, had been lawfully residing in Germany for 27 years, having moved to that country at the age of ten in order to live there with his parents and brother and where he received his secondary school education. While the parties do not agree on the extent of the applicant's professional work, he had been employed for a certain period of that time. Since 1988 he had been in possession of a permanent residence permit. While it is true that the applicant and his wife had been separated during the first five years of their marriage as the applicant's wife and their first son did not follow the applicant to Germany until 1989, the family had been living together in Germany for ten years and there is no indication that their marriage and family life was anything less than effective."

I præmis 62-65 gennemgik EMD klagerens tilknytning til hjemlandet, familiens mulighed for af følge med ham tilbage samt varigheden af det meddelte indrejseforbud.

EMD udtalte i præmis 66, at:

"The Court considers that the applicant's expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant's children could be expected to face if they followed him to Turkey, the Court considers that an unlimited exclusion from the German territory violates the applicant's rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention."

4.2.7.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende deres opholdstilladelse, da klagerne var blevet myndige.

EMD udtalte i præmis 76, at:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to

reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

[citat af præmis 68-70 i Nunez-dommen, red.]"

På den baggrund gennemgik EMD i præmis 79-85 de hensyn af immigrationspolitisk karakter, som kan tale for at identificere børn med deres forældres handlinger i svigssager, medmindre der foreligger ekstraordinære omstændigheder, og vurderingen heraf i den konkrete sag.

Vedrørende tidspunktet for dannelsen af klagernes familiemæssige og andre sociale bånd til opholdslandet, udtalte EMD i præmis 82:

"Moreover, as found by the High Court, it was not until their arrest in May 2001 that the applicants had become aware of the irregular character of their residence status and, presumably also, that they had exceed the time-limit for their voluntary repatriation (see paragraphs 29 to 31 above). It thus appears that their family- and other social ties in the host State had already been formed when it was brought to their attention that the persistence of those ties would be precarious. […]"

De nævnte præmisser er indsat i afsnittene 4.2.1.3 og 4.2.1.4.

I præmis 86-87 udtalte EMD:

"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 og 89 gennemgik EMD klagernes tilknytning til hjemlandet og betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

4.2.7.4. Ulovligt ophold

I sagen *Jeunesse v. the Netherlands (2014)* var klageren indrejst i opholdslandet på et visum fra en tidligere hollandsk koloni og havde giftet sig med en statsborger i opholdslandet. Hun blev i landet efter udløbet af sit visum og fik med sin ægtefælle tre børn, som alle var statsborgere i opholdslandet. Klageren søgte flere gange om opholdstilladelse, hvilket hver gang blev afslået, da klageren som udgangspunkt skulle søge fra hjemlandet. Efter 16 års ophold blev klageren forsøgt udsendt fra opholdslandet under henvisning til, at hun ikke havde et lovligt opholdsgrundlag. Børnene var på tidspunktet for Storkammerets afgørelse 14, knap ni og knap fire år.

EMD gennemgik i præmis 115-120 de forskellige hensyn, som indgik i afvejningen, og udtalte om klagerens ophold i opholdslandet i præmis 116, at:

"The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for more than sixteen years and that she has no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Netherlands authorities, while she repeatedly submitted residence requests and awaited the outcome of appeals. The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities."

EMD udtalte i præmis 121-122:

"121. The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. 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.

122. The Court, whilst confirming the relevant principles set out above (see paragraphs 106-109), finds that, on the basis of the above considerations (see paragraphs 115-120) and viewing the relevant factors cumulatively, the circumstances of the applicant's case must be regarded as exceptional. Accordingly, the Court concludes that a fair balance has not been struck between the competing interests involved. There has thus been a failure by the Netherlands authorities to secure the applicant's right to respect for her family life as protected by Article 8 of the Convention."

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes op-

holdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende deres opholdstilladelse, da klagerne var blevet myndige.

EMD udtalte i præmis 76, at:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

[citat af præmis 68-70 i Nunez-dommen, red.]"

På den baggrund gennemgik EMD i præmis 79-85 de hensyn af immigrationspolitisk karakter, som kan tale for at identificere børn med deres forældres handlinger i svigssager, medmindre der foreligger ekstraordinære omstændigheder, og vurderingen heraf i den konkrete sag.

Vedrørende tidspunktet for dannelsen af klagernes familiemæssige og andre sociale bånd til opholdslandet, udtalte EMD i præmis 82:

"Moreover, as found by the High Court, it was not until their arrest in May 2001 that the applicants had become aware of the irregular character of their residence status and, presumably also, that they had exceed the time-limit for their voluntary repatriation (see paragraphs 29 to 31 above). It thus appears that their family- and other social ties in the host State had already been formed when it was brought to their attention that the persistence of those ties would be precarious. […]"

De nævnte præmisser er indsat i afsnittene 4.2.1.3 og 4.2.1.4.

I præmis 86-87 udtalte EMD:

"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 og 89 gennemgik EMD klagernes tilknytning til hjemlandet og betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

I sagen *Nnyanzi v. the United Kingdom (2008)* var klagerens ansøgning om asyl blevet afvist, hvorefter opholdslandet gjorde tiltag med henblik på, at klageren skulle forlade landet. EMD udtalte i præmis 76-78:

"76. The Court does not consider it necessary to determine whether the applicant's accountancy studies, involvement with her church and friendship of unspecified duration with a man during her stay of almost ten years in the United Kingdom constitute private life within the meaning of Article 8 § 1 of the Convention. Even assuming this to be the case, it finds that her proposed removal to Uganda is "in accordance with the law" and is motivated by a legitimate aim, namely the maintenance and enforcement of immigration control. As to the necessity of the interference, the Court finds that any private life that the applicant has established

during her stay in the United Kingdom when balanced against the legitimate public interest in effective immigration control would not render her removal a disproportionate interference. In this regard, the Court notes that, unlike the applicant in the case of Üner (cited above), the present applicant is not a settled migrant and has never been granted a right to remain in the respondent State. Her stay in the United Kingdom, pending the determination of her several asylum and human rights claims, has at all times been precarious and her removal, on rejection of those claims, is not rendered disproportionate by any alleged delay on the part of the authorities in assessing them.

77. Nor does the Court find there to be sufficient evidence that the applicant's removal with her asthma condition, which she asserts is exacerbated by stress, would have such adverse effects on her physical and moral integrity as to breach her rights under Article 8 of the Convention.

78. Accordingly, the applicant's removal to Uganda would not give rise to a violation of Article 8 of the Convention."

I sagen *Darren Omoregie a.o. v. Norway (2008)* var klageren indrejst som 22-årig og havde fået afslag på asyl, men undlod at efterkomme udrejsebeslutningen og arbejdede endvidere ulovligt i opholdslandet. Nogle måneder senere giftede han sig med en statsborger fra opholdslandet og søgte om familiesammenføring, hvilket blev afslået, og klageren blev på ny pålagt at udrejse, hvilket han ikke efterkom. Der blev endvidere truffet afgørelse om at udvise klageren med indrejseforbud i fem år med mulighed for genindrejse efter ansøgning allerede efter to år. Under domstolsbehandlingen af udvisningsafgørelsen blev klagerens ægtefælle gravid med deres fælles barn, som blev født fem år efter klagerens indrejse. Klageren fik på ny afslag på familiesammenføring og efter fem et halvt års ophold blev han udsendt.

I præmis 59-63 gennemgik EMD klagerens opholdsretlige status på tidspunktet for og efter etableringen af familieliv i opholdslandet og hvorvidt denne kunne give klageren og ægtefællen anledning til at have berettigede forventninger med hensyn til mulighederne for klagerens fortsatte ophold i opholdslandet. I præmis 64 udtalte EMD:

"Against this background the Court does not consider that the first and second applicants, by confronting the Norwegian authorities with the first applicant's presence in the country as a fait accompli, were entitled to expect that any right of residence would be conferred upon him (see Roslina Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003; Yash Priya v. Denmark (dec.) 13594/03; 6 July 2006; cf. Rodrigues da Silva and Hoogkamer, cited above, § 43)."

Om tilknytningen til henholdsvis klagerens hjemland og opholdsland samt om indrejseforbuddets varighed udtalte EMD i præmis 66-68, at:

"66. It should further be noted that the first applicant had lived in Nigeria since he was six months old until he left the country at the age of 22, had studied at university for four years and had three brothers with whom he was still in contact. Whereas his links to Nigeria were particularly strong, his links to Norway were comparatively weak, apart from the family bounds he had formed there with the second and third applicants pending the proceedings. The third applicant was still of an adaptable age at the time when the disputed measures were decided and implemented (see Ajayi and Others, cited above; Sarumi, cited above; and Sezai

Demir c. France (dec.), no. 33736/03, 30 May 2006). The second applicant would probably experience some difficulties and inconveniences in settling in Nigeria, despite her experience from a period spent in another African country, South Africa, and the fact that English was also the official language of Nigeria. However, the Court does not find that there were insurmountable obstacles in the way of the applicants' developing family life in the first applicant's country of origin. In any event, nothing should prevent the second and third applicants from coming to visit the first applicant for periods in Nigeria.

67. Finally, the Court notes that the decision prohibiting the first applicant re-entry for five years was imposed as an administrative sanction, the purpose of which was to ensure that resilient immigrants do not undermine the effective implementation of rules on immigration control. Moreover, it was open to the first applicant to apply for re-entry already after two years.

68. Against this background, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed their margin of appreciation when deciding to expel the first applicant and to prohibit his re-entry for five years. The Court is not only satisfied that the impugned interference was supported by relevant and sufficient reasons but also that in reaching the disputed decision the domestic authorities struck a fair balance between the personal interests of the applicants on the one hand and the public interest in ensuring an effective implementation of immigration control on the other hand. In view of the first applicant's immigration status, the present case disclosed no exceptional circumstances requiring the respondent State to grant him a right of residence in Norway so as to enable the applicants to maintain and develop family life in that country. In sum, the Court finds that the national authorities could reasonably consider that the interference was "necessary" within the meaning of Article 8 § 2 of the Convention.
Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

EMD gennemgik præmis 47-49 sin praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem (pleje)forældre og unge voksne udgør privatliv eller tillige familieliv, og udtalte i præmis 50, at:

"50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham

lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage

by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

4.2.7.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Slivenko v. Latvia (2003)* var klagerne, som var af russisk oprindelse, blevet udsendt fra Letland under henvisning til, at de var familiemedlemmer til en russisk militærperson og derfor forpligtede til at forlade Letland i forbindelse med tilbagetrækningen af de russiske tropper fra Letland som følge af landets opnåelse af uafhængighed fra USSR. Sagen vedrørte klagernes privatliv, idet de havde levet hele eller hovedparten af deres liv i Letland.

EMD udtalte vedrørende spørgsmålet om, hvorvidt der forelå et indgreb i klagernes privatliv, i præmis 96:

"As regards the facts of the present case, the first applicant arrived in Latvia in 1959, when she was only one month old. Until 1999, by which time she was 40 years of age, she continued to live in Latvia. She attended school there, found employment and married. Her daughter, the second applicant, was born in Latvia in 1981 and lived there until the age of 18, when she was compelled to leave the country together with her mother, having just completed her secondary education (see paragraphs 16 and 46 above). It is undisputed that the applicants left Latvia against their own will, as a result of the unsuccessful outcome of the proceedings concerning the legality of their stay in Latvia. They were thus removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being. Furthermore, as a result of the removal, the applicants lost the flat in which they had lived in Riga (see paragraphs 32 and 46 above). In these circumstances, the Court cannot but find that the applicants' removal from Latvia constituted an interference with their "private life" and their "home" within the meaning of Article 8 § 1 of the Convention."

EMD gennemgik i præmis 116-118 nogle overordnede betragtninger vedrørende tilbagetrækning af fremmede tropper fra en uafhængig stat i forhold til aktivt tjenestegørende og pensionerede militærpersoner og deres familier. I præmis 119 fastslog EMD, at klagernes ægtefælle/far var pensioneret på tidspunktet for

sagen om lovligheden af klagernes fortsatte ophold i Letland. I præmis 120-121 konstaterede EMD, at der i visse situationer var mulighed for dispensation fra kravet om at forlade Letland, og i præmis 122 udtalte EMD, at spørgsmålet om, hvorvidt en udsendelse i lyset af klagernes personlige situation var proportional med det legitime formål: statens sikkerhed, måtte afgøres på baggrund af sagens konkrete omstændigheder. EMD udtalte herom i præmis 123-125:

"123. The respondent Government argued that the applicants had not been sufficiently integrated into Latvian society (see paragraph 88 above). In this connection the Court observes that the applicants have spent virtually all their lives in Latvia (see paragraph 96 above). It is true that the applicants are not of Latvian origin, and that they arrived and lived in Latvia – then part of the USSR – in connection with the service of members of their family (the first applicant's father and her husband) in the Soviet armed forces. However, the applicants also developed personal, social and economic ties in Latvia unrelated to their status as relatives of Soviet (and later Russian) military officers. This is shown by the fact that the applicants did not live in army barracks or any other restricted area, but in a block of flats in which there were also civilians. Nor did they study or work in a military institution. The first applicant was able to find employment in Latvian companies after Latvia regained its independence in 1991.

124. As regards the respondent Government's argument about the level of the applicants' proficiency in Latvian, the Court observes that, in so far as this is a relevant consideration, it has not been shown that the degree of the applicants' fluency in the language – although the precise level is in dispute – was insufficient for them to lead a normal everyday life in Latvia. In particular, there is no evidence that the level of the applicants' knowledge of Latvian was in any way different from that of other native Russian speakers living in Latvia, including those who were able to obtain the status of "ex-USSR citizens" in order to remain in Latvia on a permanent basis.

125. Although in 1999 the applicants moved to Russia to join Nikolay Slivenko and eventually obtained Russian citizenship, by that time they had apparently not developed personal, social or economic ties in Russia similar to those they had established in Latvia. In short, the Court finds that at the relevant time the applicants were sufficiently integrated into Latvian society."

I præmis 126-127 gennemgik EMD det af regeringen påberåbte argument for forskelsbehandlingen af klagerne, at det havde betydning for den nationale sikkerhed, at den første klager var kommet til Letland som medlem af en familie til en sovjetisk militærofficer (den første klagers far/den anden klagers bedstefar).

EMD udtalte i præmis 128-129:

"128. Having regard to all the circumstances, the Court considers that the Latvian authorities overstepped the margin of appreciation enjoyed by the Contracting Parties in such a matter, and that they failed to strike a fair balance between the legitimate aim of the protection of national security and the interest of the protection of the applicants' rights under Article 8. Therefore, the applicants' removal from the territory of Latvia cannot be regarded as having been 'necessary in a democratic society'.

129. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Osman v. Denmark (2011)* ansås klagerens opholdstilladelse i medlemsstaten som bortfaldet som følge af hendes langvarige ophold i familiens tidligere opholdsland Kenya. Klageren, der var somalisk statsborger, havde boet i Kenya fra hun var tre-fire år, indtil hun som syvårig indrejste i opholdslandet som familiesammenført. Hun havde herefter opholdt sig i opholdslandet, indtil hun som 15-årig af forældrene blev sendt tilbage til Kenya. Kort tid før hun fyldte 18 år, kontaktede klageren den danske ambassade i Kenya med henblik på at kunne vende tilbage til sin familie i opholdslandet, hvilket blev afslået af de danske myndigheder. Hun indrejse herefter som 19-årig i medlemsstaten, hvor hun ikke længere havde lovligt ophold.

EMD konstaterede i præmis 60, at:

"The Court observes that the applicant spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old. She speaks Danish and received schooling in Denmark until August 2002. Her divorced parents and older siblings live in Denmark. The applicant therefore had social, cultural and family ties in Denmark."

Om betydningen af klagerens tidligere lovlige ophold i opholdslandet, herunder af at have tilbragt de formative år af sin barndom og ungdom i opholdslandet, udtalte EMD i præmis 65:

"65. It also reiterates that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in a host country, very serious reasons are required to justify expulsion (see, Maslov v. Austria [GC], quoted above, § 75). In the present case the applicant was refused restoration of her lapsed residence permit, as opposed to being expelled due to having committed a crime. Nevertheless, it is undisputed that she spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old, that she spoke Danish, that she had received schooling in Denmark until August 2002, and that all her close family remained in Denmark. In these circumstances, the Court also considers that very serious reasons were required to justify the authorities' refusal to restore the applicant's residence permit, when she applied from Kenya in August 2005."

I præmis 69-75 udtalte EMD sig om hensynet til børns ret til respekt for privat- og familieliv i forhold til den danske lovgivning om genopdragelsesrejser og forældremyndighedsindehaverens rolle, hvorefter EMD i præmis 76-77 udtalte:

"76. Having regard to all the above circumstances, it cannot be said that the applicant's interests have sufficiently been taken into account in the authorities' refusal to reinstate her residence permit in Denmark or that a fair balance was struck between the applicants' interests on the one hand and the State's interest in controlling immigration on the other.

77. There has accordingly been a violation of Article 8 of the Convention."

Sagen *Hasanbasic v. Switzerland (2013)* omhandlede en klager, hvis opholdstilladelse blev annulleret af de nationale myndigheder i opholdslandet, idet klageren over for disse myndigheder havde tilkendegivet, at han ville rejse tilbage til sit hjemland med henblik på permanent at bosætte sig der. Klageren genindrejste dog

fire måneder senere i opholdslandet, hvorefter hans ægtefælle, som stadig opholdt sig i opholdslandet, indgav en ansøgning om ny opholdstilladelse på baggrund af familiesammenføring. EMD har kategoriseret sagen *som refusal to renew residence visa*, hvorfor den er medtaget under dette punkt.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det komplette *legal summary* under afsnit 4.2.1.5. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

Efter i præmis 51 og 52 at have fastslået, at indgrebet var i overensstemmelse med loven og forfulgte et eller flere af de legitime hensyn, gennemgik EMD i præmis 53-56 de generelle principper, som var relevante i den konkrete sag for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund.

I præmis 57-63 anvendte EMD disse principper på forholdene den konkrete sag. EMD udtalte i præmis 57 (uofficiel dansk oversættelse):

"57. Domstolen bemærker indledningsvist, at de to klagere længe har boet lovligt i Schweiz. Den mandlige klager ankom til Schweiz i 1986, den kvindelige klager ankom allerede i 1969. Varigheden af deres ophold udgør således på det tidspunkt, hvor Forbundsdomstolen afsagde sin dom i 2009, henholdsvis 23 og 40 år. Den kvindelige klager har endvidere haft en etableringstilladelse i Schweiz siden 1979, og dermed en tilladelse af en mere stabil karakter end en almindelig opholdstilladelse. Det er i øvrigt ikke bestridt, at Schweiz i en lang periode har været centrum for klagernes privat- og familieliv.

Domstolen konstaterer ligeledes, at klagerne har opholdt sig uafbrudt i Schweiz, bortset fra i en periode på fire måneder fra mellem august og december 2004, efter at de nationale myndigheder havde afvist den kvindelige klagers anmodning om familiesammenføring (ovenstående præmis 14). Den foreliggende sag adskiller sig på dette punkt væsentligt fra sagen Gezginci (nævnt ovenfor, præmis 69 og 70), hvori klager gentagne gange tog til udlandet i længerevarende perioder.

Domstolen vurderer under disse omstændigheder, at det tilkommer de nationale myndigheder på en overbevisende måde og ved hjælp af relevante og tilstrækkelige årsager at bevise, at der eksisterer et samfundsmæssigt bydende nødvendigt behov for at udvise den pågældende person, og navnlig, at denne foranstaltning står i forhold til det forfulgte legitime mål."

I præmis 58 gennemgik EMD den mandlige klagers lovstridige adfærd og fandt, at de pågældende forseelser ikke vejede tungt, og at klageren ikke kunne anses for at udgøre en fare eller trussel for sikkerheden eller den offentlige orden. I præmis 59 gennemgik EMD betydningen af klagerens store gæld til myndighederne i opholdslandet og de betydelige beløb, som klagerne havde modtaget i offentlig støtte og fandt, at opholdslandets myndigheder kunne tage højde for klagernes gæld og afhængighed af offentlig bistand, såfremt denne afhængighed måtte have indflydelse på landets økonomiske velvære, men at disse forhold kun udgjorde et aspekt blandt flere, som EMD skulle tage højde for. I præmis 60-61 gennemgik EMD klagernes familieliv, herunder med deres voksne børn, som var bosat i opholdslandet, og betydningen af, at den mandlige klager ville have mulighed for at besøge familien i opholdslandet.

I præmis 62-63 gennemgik EMD fastheden af de sociale, kulturelle og familiemæssige bånd til opholdslandet og hjemlandet og klagernes tilknytning til hjemlandet (uofficiel dansk oversættelse):

"62. Et andet kriterium, der skal tages højde for i afvejningen af interesserne, er fastheden af de sociale, kulturelle og familiemæssige bånd med Schweiz og med Bosnien-Hercegovina. Forbundsdomstolen har selv i den foreliggende sag erkendt, at klagerne har et betydeligt socialt netværk i Schweiz, og at deres tilbagevenden til oprindelseslandet på grund af den betydelige varighed af deres ophold i Schweiz uden tvivl ville stille dem over for visse vanskeligheder (ovenstående præmis 20).

63. De schweiziske myndigheder har ganske vist ligeledes henvist til, at klagerne havde ladet et hus opføre i deres oprindelsesland, og at ét af børnene fra den mandlige klagers første ægteskab samt hans søster bor i oprindelseslandet. Domstolen tager ligeledes til efterretning, at den mandlige klager den 24. august 2003 havde meddelt de schweiziske myndigheder, at han definitivt ville vende tilbage til Bosnien-Hercegovina, hvilket er ét af de nationale myndigheders hovedargumenter for afvisning af en fornyelse af opholdstilladelsen. Domstolen vurderer, at dette argument skal bedømmes i lyset af de efterfølgende indtrufne forhold, dvs. efter Forbundsdomstolens dom af 6. marts 2009."

Herefter gennemgik EMD i præmis 64-65 betydningen af klagerens helbredsmæssige forhold og den risiko for en forværring heraf, en flytning til hjemlandet ville indebære.

EMD udtalte i præmis 66-67 (uofficiel dansk oversættelse):

"66. Domstolen vedgår henset til ovenstående, at landets økonomiske velfærd ganske vist kan tjene som et legitimt mål i forbindelse med en afvisning af at forny en opholdstilladelse. Denne årsag skal ikke desto mindre vurderes ud fra en retfærdig afvejning og i lyset af samtlige omstændigheder i sagen. Domstolen vurderer imidlertid ud fra den betydelige varighed af klagernes ophold i Schweiz og deres ubestridte sociale integration i landet, at den anfægtede foranstaltning ikke var berettiget ud fra et bydende nødvendigt samfundsmæssigt behov og ikke stod i forhold til de påberåbte legitime formål. Den indklagede stat har følgelig overskredet sin skønsmargen i den foreliggende sag.

67. Der er følgelig sket en krænkelse af Konventionens artikel 8."

4.2.8. Klagerens alder ved udrejse fra hjemlandet

Længden af klagerens ophold i hjemlandet har betydning for den samlede vurdering af klagerens tilknytning til hjemlandet. Dette forhold kobles ofte sammen med klagerens sproglige kundskaber og personlige, kulturelle og sociale tilknytning i den samlede proportionalitetsvurdering. EMD har dog i sin praksis ikke altid eksplicit lagt vægt på, i hvilken alder klageren udrejste fra hjemlandet, men mere tillagt det vægt, i hvilken alder klageren er indrejst i opholdslandet.

Som anført i afsnit 3.3.3.2 afhænger vægtningen af de enkelte elementer i proportionalitetsafvejningen af de konkrete omstændigheder i hver enkelt sag, se f.eks. Maslov v. Austria (2008), hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[16] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

4.2.8.1. Alvorlig kriminalitet

I sagen *Üner v. the Netherlands (2006)* blev klageren idømt syv års fængsel for drab og udvist for bestandig. Klageren var indrejst som 12-årig sammen med sin mor og sine søskende som familiesammenført til faren. På tidspunktet, hvor afgørelsen om udvisning blev endelig, havde han opholdt sig 17 år i opholdslandet og havde to mindreårige børn med sin nederlandske partner. Han var flyttet fra partneren efter halvandet års samliv, da det ældste barn var omkring ni måneder gammel, men forblev i tæt kontakt med partneren og barnet i de følgende omkring otte måneder indtil fængslingen. Partneren og det ældste barn besøgte klageren i fængslet mindst en gang om ugen og ofte hyppigere. Mens klageren var fængslet, fik parret endnu et barn, som klageren ligeledes så hver uge. Klageren havde på tidspunktet for EMD´s afgørelse opholdt sig 25 år i opholdslandet.

EMD fastslog i præmis 61, at der forelå et indgreb både i klagerens ret til respekt for familieliv og hans ret til respekt for privatliv. EMD udtalte imidlertid:

"[...] Even so, having regard to the particular issues at stake in the present case and the positions taken by the parties, the Court will pay special attention to the applicant's right to respect for his family life."

[16] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

EMD udtalte i præmis 62, at:

"The Court considers at the outset that the applicant lived for a considerable length of time in the Netherlands, the country that he moved to at the age of 12 together with his mother and brothers in order to join his father, and where he held a permanent residence status. Moreover, he subsequently went on to found a family there. In these circumstances, the Court does not doubt that the applicant had strong ties with the Netherlands. That said, it cannot overlook the fact that the applicant 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. As the Chamber put it in paragraph 46 of its judgment, '... the disruption of their family life would not have the same impact as it would [have had] if they had been living together as a family for a much longer time'. Moreover, while it is true that the applicant came to the Netherlands at a relatively young age, the Court is not prepared to accept that he had spent so little time in Turkey that, at the time he was returned to that country, he no longer had any social or cultural (including linguistic) ties with Turkish society."

I præmis 63-65 forholdt EMD sig til den begåede kriminalitet, tidspunktet for prøveløsladelse, klagerens børns alder og deres og partnerens statsborgerskab i opholdslandet i forhold til muligheden for at følge med klageren til dennes hjemland samt det pålagte indrejseforbuds varighed. EMD udtalte i præmis 67:

"In the light of the above, the Court finds that a fair balance was struck in this case in that the applicant's expulsion and exclusion from the Netherlands were proportionate to the aims pursued and therefore necessary in a democratic society.

Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *A.A. v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som 13-årig sammen med sine to søstre som familiesammenført til deres mor. To år senere blev han som 15-årig idømt fire års tilbageholdelse på en ungdomsinstitution for voldtægt begået mod en mindreårig, men blev løsladt tidligere på grund af god opførsel. Fem år efter den begåede kriminalitet blev klagerens udvisningsafgørelse endelig. Da EMD behandlede sagen, havde klageren opholdt sig i opholdslandet i 11 år. Han boede hos sin mor og besøgte sine to søstre regelmæssigt.

I præmis 46-50 gennemgik EMD sin hidtidige praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem myndige børn og forældre udgør privatliv og/eller familieliv. EMD udtalte i præmis 49:

"49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life". However, it is not necessary to decide the question given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Thus, regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on "family life" rather than "private life", it observes that in practice the factors to be

examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged (Üner, cited above, §§ 57-60)."

EMD konstaterede i præmis 51-55, at indgrebet var i overensstemmelse med loven og forfulgte et af de legitime hensyn.

Ved vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund, gennemgik EMD i præmis 56 kriterierne som sammenfattet i Üner-dommen og udtalte på den baggrund i præmis 57-58, at de nationale domstole i hver enkelt sag må vurdere, hvilken vægt der skal tillægges de enkelte elementer i foretagelsen af den konkrete afvejning, indenfor staternes margin of appreciation. Om de relevante elementer i den foreliggende sag udtalte EMD i præmis 59-64:

"59. In the present case, the Court considers the relevant factors to be the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in United Kingdom; the time which has elapsed since the offence was committed and the applicant's conduct during that period; and the solidity of social, cultural and family ties with the host country and with the country of destination.

60. The Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Maslov, cited above, § 85). There can be no doubt that the applicant's offence was a serious one and the Court considers the comments of the sentencing judge as to the applicant's conduct and the effect of the attack on the victim to be relevant factors to be taken into account (see paragraph 8 above). The sentence imposed – four years in a Young Offenders' Institution – demonstrates the gravity of the offence. However, the fact that the applicant was a minor at the time the offence was committed is a relevant consideration in assessing the proportionality of a deportation (see Maslov, cited above, § 72). In this regard, the Court recalls that where offences committed by a minor underlie an exclusion order, regard must be had to the best interests of the child. In particular, the obligation to take the best interests of the child into account includes an obligation to facilitate his reintegration, an aim that the Court has previously held will not be achieved by severing family or social ties through expulsion (see Maslov, cited above, §§ 82-83).

61. The Court observes that the total length of the applicant's stay in the United Kingdom to date is eleven years. He arrived in the country at the age of 13 and has therefore now spent almost half his life in the United Kingdom. The Court notes that the applicant committed the offence which rendered him liable to deportation less than two years after his arrival in the United Kingdom. Further, following his conviction, he spent some two years in detention, during which time he was served with a deportation order. While the applicant was granted Indefinite Leave to Remain during this period, the Court is persuaded by the Government's submissions that leave was granted in ignorance of the applicant's conviction and, as a result, considers that no significance can be attached to the fact that Indefinite Leave to Remain was granted following the conviction (compare and contrast Omojudi, cited above, § 42). It is also true that the applicant has been aware since July 2003 of the fact that he was liable to be deported on account of his conviction. However, the Court nonetheless observes that he has now spent seven years at liberty in the United Kingdom following his release and despite having exhausted appeal rights in January 2008, no steps appear to have been taken in respect of his deportation until September 2010 (see paragraphs 23-25 above).

62. As to the lapse of time and the applicant's conduct since commission of the offence in 2002, the Court observes at the outset that the applicant has committed no further offences. While in detention, the applicant took advantage of the educational opportunities available to him and obtained a number of high school qualifications (see paragraph 11 above). At the time of his release from detention in August 2004, his risk of reoffending was assessed to be low (see paragraph 11 above), an assessment subsequently reiterated by his probation officer in 2005 and accepted by the AIT in 2007 (see paragraphs 15 and 20 above). Since his release, the applicant's conduct appears to have been exemplary. He enrolled in college in September 2004 in order to sit his A-level examinations, which he obtained in summer 2005 (see paragraph 14 above). He was subsequently offered a place at university to study towards an undergraduate degree, which he obtained in 2008, followed by a postgraduate degree, which he completed in 2009 (see paragraphs 18 and 24 above). He commenced stable employment with a local authority in 2010 (see paragraph 24 above).

63. The Government have not pointed to any concern regarding the applicant's conduct in the seven years since his release from prison and rely solely on the seriousness of the offence to justify concerns as to his continued presence in the United Kingdom and his risk to the public (see paragraphs 41-42 and 44 above). The Court reiterates that the factors to be taken into consideration in cases involving deportation following a criminal offence are partially designed to evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities (see paragraph 57 above). In particular, the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has an impact on the assessment of the risk which the applicant poses to society (see Boultif, cited above, § 51; Maslov, cited above, § 90; and A.W. Khan, cited above, § 41). Accordingly, the Court considers the present factor to be of particular importance when assessing whether the seriousness of the offence in itself is sufficient to justify the applicant's deportation for the prevention of disorder or crime.

64. Finally, as regards the applicant's ties with the United Kingdom and with Nigeria, the Court observes that the applicant continues to reside with his mother and has close relationships with his two sisters and an uncle, all of whom reside in England. He has completed the majority of his high school and further education in the United Kingdom and has now commenced a career with a local authority in London. He is also a member of a church community. While he spent a significant period of his childhood in Nigeria, he has now not visited the country for eleven years. He has had no contact with his father since 1991."

I præmis 65-68 gennemgik EMD betydningen af opholdslandets passivitet i forhold til at udsende klageren i overensstemmelse med den trufne udvisningsafgørelse og redegjorde for baggrunden for at inddrage forhold indtruffet og klagerens opførsel i perioden efter denne afgørelse i sin afvejning, herunder vigtigheden af at facilitere reintegration af unge lovovertrædere i samfundet.

Herefter konkluderede EMD i præmis 69-70:

"69. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's deportation from the United Kingdom would be disproportionate to the legitimate aim of the "prevention of disorder and crime" and would therefore not be necessary in a democratic society.

70. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Nigeria."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

EMD udtalte i præmis 45, at:

"As regards the length of the applicant's stay in Switzerland, the Court observes that he arrived in Switzerland in 1989 at the age of nine and lived in Switzerland for more than twenty years. His stay in Switzerland was, thus, of a considerable length of time."

I præmis 46-50 gennemgik EMD klagerens opførsel og domstolsbehandlingen af hans sag efter begåelsen af lovovertrædelsen samt klagerens families forhold, herunder muligheden for klagerens ægtefælle og børn for at tage ophold i klagerens hjemland.

I præmis 51 og 52 gennemgik EMD klagerens tilknytning til henholdsvis opholdslandet og hjemlandet:

"51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'."

EMD udtalte herefter i præmis 53-55:

"53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to

Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Loy v. Germany (2014)* var klageren indrejst i opholdslandet som femårig. Som 26-årig blev han idømt fire måneders betinget fængsel for vold mod sine børns mor og tre år senere blev han idømt et års betinget fængsel for vold på en natklub. To år senere blev han idømt to et halvt års fængsel for narkotikakriminalitet. Det år, han fyldte 32 år, blev klageren udvist af opholdslandet med indrejseforbehold uden fastsat tidsbegrænsning, og to år senere blev han udsendt til hjemlandet. På udvisningstidspunktet var klageren skilt fra sin tidligere ægtefælle, som var statsborger i opholdslandet, og med hvem klageren havde fået to børn, som ligeledes var statsborgere i opholdslandet og 21 og 17 år gamle på tidspunktet for klagerens udvisning. Han giftede sig igen, efter hans udvisningsdom var blevet afsagt.

EMD konstaterede i præmis 28, at indgrebet var i overensstemmelse med lovgivningen og tjente et legitimt formål. Til brug for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund og proportionalt med det forfulgte hensyn, gennemgik EMD i præmis 30 kriterierne som sammenfattet i Üner- og Maslov-dommene og konstaterede derefter i præmis 31, at den af klageren begåede kriminalitet, som også omfattede narkotikakriminalitet, var alvorlig. I præmis 32 konstaterede EMD, at klageren havde boet næsten 30 år i opholdslandet og havde tidsubgrænset opholdstilladelse, da udvisningsafgørelsen blev endelig.

I præmis 34-36 fandt EMD med hensyn til karakteren af klagerens familieliv med henholdsvis børnene af det tidligere ægteskab, "that the applicant's family ties with his children were not very developed" og med den nuværende ægtefælle, at "Their family life, such as it was, was thus always against the background of pending expulsion proceedings. They separated soon after the marriage. In these circumstances, no decisive weight can be attached to the family relationship with his spouse."

Herefter udtalte EMD i præmis 37 om klagerens tilknytning til opholdslandet:

"The Court also looks for significant relations within the society of the host country (see Trabelsi, cited above, § 62; Mutlag, cited above, § 58; Lukic v. Germany (dec.), no. 25021/08, 20 September 2011) and notes that apart from mentioning that he went to school and completed a vocational training in Germany in his submissions the applicant submits nothing by way of evidence of his participation in social life apart from the length of his residence. Apart from referring to his children and his former spouse he made reference to the fact that his father, stepmother and siblings live in Germany. He claims that he has contact with his sister, but gives no further details. No information on other social contacts was provided. Therefore, in the present case only few significant relations can be established."

Vedrørende klagerens tilknytning til hjemlandet udtalte EMD i præmis 38:

"As to the applicant's ties to his country of origin, the Court notes that the applicant lived in the former Yugoslavia until 1979, and it appears that he speaks some Serbian, although he claims that he is not able to read or write the language."

I præmis 39 konstaterede EMD, at indrejseforbuddet ikke nødvendigvis behøvede at være permanent, idet klageren kunne søge om at få det tidsbegrænset.

I præmis 40 udtalte EMD, at:

"Against the background of the gravity of the applicant's drug related offence, together with the earlier crimes of violence committed by the applicant, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family and his private life reasonably against the State's interest in preventing disorder and crime. Appreciating the consequences of the expulsion for the applicant, the Court cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to impose this measure."

EMD afviste derefter sagen som *inadmissable*, idet klagen blev vurderet *manifestly ill-founded*.

I sagen *Bajsultanov v. Austria (2012)* var klageren meddelt asyl i opholdslandet. Han blev idømt i alt 20 måneders fængsel for bl.a. flere tilfælde af vold samt udvist. EMD fastsatte længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen. Klagerens ægtefælle var meddelt asyl afledt af klagerens forhold og de havde to børn, der på tidspunktet for EMD's behandling af sagen var otte og fem år.

Efter i præmis 79-82 at have konstateret, at udvisningen af klageren udgjorde et indgreb i hans ret til respekt for familieliv, og at dette indgreb var i overensstemmelse med loven og forfulgte et af de legitime hensyn, gennemgik EMD i præmis 83 de generelle principper, som indgår i afvejningen af, om indgrebet var nødvendigt i et demokratisk samfund, jf. kriterierne som sammenfattet i Boultif- og Üner-dommene.

Om karakteren og alvorligheden af den begåede kriminalitet udtalte EMD i præmis 84:

"Turning to the first set of criteria relating to the criminal offences committed by the applicant, the Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated

bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks' imprisonment, suspended with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions."

EMD udtalte i præmis 85 til 87:

"85. As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there.

86. On the other hand, the applicant lived in Chechnya for almost twenty-three years, went to school there and subsequently worked occasionally in different jobs. The applicant's parents and siblings still live in Chechnya, and the applicant has maintained regular contact with his father.

87. The Court therefore considers, in line with the Austrian authorities, that the applicant still has stronger social and cultural ties to his country of origin than to his host country."

I præmis 88-90 gennemgik EMD klagerens familieliv og ægtefællens mulighed for at følge med klageren tilbage til hjemlandet i relation til artikel 3 og i forhold til, om der ville være uoverstigelige hindringer forbundet hermed.

EMD udtalte i præmis 91-92:

"Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig

indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

Vedrørende spørgsmålet om, hvorvidt klageren havde privatliv og familieliv i Nederlandene, udtalte EMD i præmis 47-50:

"47. The Court has further laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, for instance, Konstatinov v. the Netherlands, no. 16351/03, § 52, 26 April 2007, and Z. and T. v. the United Kingdom (dec.), no. 27034/05, ECHR 2006-III). However, it has not insisted on such further elements of dependency in a number of cases concerning young adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; Osman v. Denmark, no. 38058/09, §§ 55-56, 14 June 2011; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019).

48. Even if a person of 26 years of age could still be considered a "young adult", the Court notes that at least in 2011 the applicant was not living full-time with his foster parents anymore (see paragraph 21 above). Moreover, it has not been argued and there is no indication that there are any further elements of dependency between the applicant and his foster parents.

49. The above notwithstanding, the Court deems it not necessary to decide on the question whether or not the ties between the applicant and his foster parents constituted family life within the meaning of Article 8. It reiterates that, in practice, the factors to be examined in order to assess the compatibility with Article 8 of a denial of a right of residence – in so far as those factors are relevant in a particular case – are the same regardless of whether family or private life is engaged (see, mutatis mutandis, A.A. v. the United Kingdom, no. 8000/08, §§ 49 and 57, 20 September 2011).

50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already

been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the

Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Savran v. Denmark (2021)* var klageren indrejst i opholdslandet som seksårig sammen med sin mor og sine søskende som familiesammenført til sin far. Han var efterfølgende hjemlandet fem-ti gange på familiebesøg af omkring to måneders varighed, senest i det år, hvor han fyldte 16 år. Klageren var som 16-årig blevet idømt et år og tre måneders fængsel, heraf ni måneder betinget, for røveri. Som 24-årig blev han fundet skyldig i vold med døden til følge begået tre år forinden, men fundet straffri som følge af psykisk sygdom. Han blev idømt retspsykiatrisk behandling samt udvist for bestandig. Fem år senere blev udvisningen prøvet og opretholdt, og klageren blev udsendt til sit hjemland.

Storkammeret udtalte i præmis 175:

"In the present case, the applicant arrived in Denmark at the age of six; he was educated and spent his formative years there; he was issued with a residence permit and remained lawfully resident in the country for fourteen years and eight months (see paragraphs 27 and 30 above). The Court thus accepts that he was a "settled migrant" and therefore Article 8 under its "private life" aspect is engaged."

I præmis 176-178 gennemgik EMD, om klagerens forhold til sin mor og sine søskende udgjorde familie- eller privatliv, og konkluderede, at der var tale om privatliv.

I præmis 179-180 udtalte Storkammeret, at afvisningen af at ophæve udvisningsbeslutningen udgjorde et indgreb i klagerens privatliv, og at indgrebet var hjemlet i lov og forfulgte et af de legitime hensyn, forebyggelse af uro og forbrydelse.

I præmis 181-189 gennemgik EMD de generelle principper vedrørende nødvendighedsvurderingen.

EMD bemærkede i præmis 190, at der var forløbet en betragtelig tid fra det tidspunkt, hvor udvisningsbeslutningen blev endelig, til tidspunktet for afgørelsen om eventuel ophævelse af udvisningsbeslutningen, og at det var op til de nationale domstole at lade alle relevante ændringer i klagerens forhold i denne periode indgå i vurderingen af, om det på tidspunktet for afgørelsen om eventuel ophævelse af udvisningsbeslutningen var proportionalt at udvise klageren, herunder særligt ændringer vedrørende hans opførsel og helbred.

EMD gennemgik i præmis 191-196 betydningen af klagerens helbredstilstand og i præmis 197 betydningen af de fremskridt, der var sket i klagerens opførsel i perioden mellem gerningstidspunktet og den endelige

afgørelse vedrørende evt. ophævelse af udvisningen, jf. det tredje Maslov-kriterium, hvilket imidlertid ikke blev taget i betragtning ved de nationale domstoles vurdering af risikoen for gentagelseskriminalitet.

I præmis 198 udtalte EMD om fastheden af klagerens sociale, kulturelle og familiemæssige bånd til opholdslandet og til hjemlandet:

"A further issue to be considered is the solidity of the applicant's social, cultural and family ties with the host country and the country of destination (the fourth Maslov criterion). Whilst the applicant's ties with Turkey seem to have been limited, it cannot be said that he was completely unfamiliar with that country (see paragraphs 30, 59 and 65 above). However, it appears that the High Court gave little consideration to the length of the applicant's stay in and his ties to his host country Denmark (the second and fourth Maslov criteria respectively; see paragraph 182 above), stressing as it did the fact that he had not founded his own family and had no children in Denmark (see paragraph 66 above). As to the latter aspect, the Court reiterates its finding in paragraph 178 above that, even if he had no "family life", the applicant could still claim protection of his right to respect for his "private life" within the meaning of Article 8 (see Maslov, cited above, § 93). In this regard, the Court attaches particular weight to the fact, also noted by the domestic courts in the criminal proceedings and by the City Court in the revocation proceedings, that the applicant was a settled migrant who had been living in Denmark since the age of six (see paragraph 59 above). Although the applicant's child and young adulthood were clearly difficult, suggesting integration difficulties, he had received most of his education in Denmark and his close family members (mother and siblings) all live there. He had also been attached to the Danish labour market for about five years (see paragraphs 27 and 30 above). "

Afslutningsvis gennemgik EMD I præmis 199-200 betydningen af varigheden af indrejseforbuddet for den samlede proportionalitetsvurdering.

Herefter konkluderede EMD i præmis 201-202:

"201. In the light of the above, it appears that in the revocation proceedings, despite the significant period of time during which the applicant underwent medical treatment for his mental disorder, the High Court, apart from briefly referring to his lack of family ties in Denmark and to the serious nature and gravity of his criminal offence, did not consider the changes in the applicant's personal circumstances with a view to assessing the risk of his reoffending against the background of his mental state at the time of the commission of the offence and the apparent beneficial effects of his treatment. Nor did it have due regard to the strength of the applicant's ties to Denmark as compared to those to Turkey. The Court further notes that under the domestic law, the administrative and judicial authorities had no possibility of making an individual assessment of the duration of the applicant's exclusion from Danish territory, which was both irreducible and permanent. Therefore, and notwithstanding the respondent State's margin of appreciation, the Court considers that, in the particular circumstances of the present case, the domestic authorities failed to duly take into account and to properly balance the interests at stake (see paragraphs 182 and 183 above).

202. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Otite v. the United Kingdom (2022)* blev klageren idømt fire år og otte måneders fængsel for økonomisk kriminalitet og udvist for bestandig. Klageren var indrejst som 31-årig som familiesammenført til sin ægtefælle, der havde oprindelse i samme land som klageren, og som ligesom parrets tre børn i alderen 12,

17 og 19 år var statsborger i opholdslandet. Klageren havde på tidspunktet for dommen opholdt sig i opholdslandet i 19 år. Han havde været på fri fod i 11 år og havde i fire af de 11 år været involveret i kriminalitet. Familien havde efter det oplyste ikke besøgt klageren under afsoningen.

I præmis 49 gennemgik EMD kriminalitetens alvor og lagde vægt på, at klageren over en fireårig periode havde drevet en dokumentfabrik, hvilket havde involveret et stort antal ofre og betragtelige pengebeløb, og at han ikke havde erkendt overtrædelsernes påvirkning og konsekvenser for ofrene og samfundet, ligesom der var betragtelig risiko for, at han ville fortsætte med at opføre sig som før.

I præmis 52-54 gennemgik EMD indgrebets mulige betydning for klagerens familieliv, herunder børnenes alder og deres manglende kontakt med klageren under hans afsoning, ægtefællens tilknytning til opholdslandet i form af familiemedlemmer og sociale bånd, som ville kunne udgøre et støttende netværk i tilfælde af klagerens udsendelse, ligesom familien allerede havde klaret sig uden klageren under hans langvarige afsoning. Endvidere fandtes familien at kunne tage ophold i klagerens hjemland, hvor ægtefællen havde rødder og hvor børnene ville kunne få statsborgerskab. Endelig ville familien besøge klageren i hjemlandet og holde kontakt via telefon og internet.

Om klagerens egen tilknytning til hjemlandet udtalte EMD i præmis 54:

"*54. […] Furthermore, the applicant only left Nigeria when he was thirty-one years old (see paragraph 5 above), and there is no evidence to suggest that he no longer has family, social, cultural and linguistic ties there (see, for example, Külekci, cited above, § 50).*"

Herefter konkluderede EMD i præmis 56-57:

"56. The foregoing considerations are sufficient to enable the Court to conclude that the strength of the applicant's family and private life in the United Kingdom is not such as to outweigh the public interest in his deportation.

57. Accordingly, his deportation would not violate Article 8 of the Convention."

I sagen *Nguyen v. Denmark (2024)*, der handlede om udvisning på grund af alvorlig kriminalitet, havde Østre Landsret om klagerens alder på 13 år ved indrejsen i opholdslandet udtalt:

"13. In respect of the expulsion order, the High Court reduced the re-entry ban to twelve years, and found as follows: "[The applicant] entered Denmark at the age of 13 and thus spent her childhood in Vietnam. […]"

Heroverfor udtalte EMD i præmis 28:

"28. […] The Court recognises that the domestic courts examined the relevant criteria thoroughly given that very serious reasons were required to justify the expulsion of the applicant, a settled migrant who had entered Denmark at the age of 13 and had been lawfully resident in the host country for most of her childhood and youth […]"

EMD fandt i den konkrete sag, at der var sket en krænkelse af EMRK artikel 8.

4.2.8.2. Mindre alvorlig kriminalitet

I sagen *Jakupovic v. Austria (2003)* blev klageren to gange idømt fængselsstraf af henholdsvis fem måneders og ti ugers varighed, begge udsat i en prøveperiode på tre år, for mindre alvorlig kriminalitet, herunder indbrud og tyveri. Han blev endvidere udvist med indrejseforbud i ti år. Klageren var indrejst i opholdslandet som 11-årig og var på tidspunktet, hvor udvisningsafgørelsen blev endelig, 16 år. Han blev udsendt det samme år, som han fyldte 18 år.

I præmis 28-30 udtalte EMD:

"28. The Court observes that at the time of the expulsion the applicant had not been in Austria for a long time – just four years. Furthermore his situation was not comparable to that of a second generation immigrant, as he had arrived in Austria at the age of eleven, had previously attended school in his country of origin and must therefore have been well acquainted with its language and culture. However, the residence prohibition seriously upset his private and family life: he had arrived in Austria with his brother to join his mother and the new family she had founded there and has apparently no close relatives in Bosnia. The applicant's father remained in Bosnia, a fact which is emphasised by the Government, but the applicant points out that he last saw his father in 1988 and the father has been reported missing since the end of the armed conflict in that country.

29. Thus, the Court considers that very weighty reasons have to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which has recently experienced a period of armed conflict with all its adverse effects on living conditions and with no evidence of close relatives living there."

30. The Government rely in this respect on the applicant's criminal record. The Court finds that this record, which is the essential element of justification for the expulsion, must be examined very carefully. It consists of two convictions for burglary. The Court cannot find that these convictions – even taking into account a further set of criminal proceedings which were discontinued after the victim had been compensated by the applicant – for which the Austrian courts had only imposed conditional sentences of imprisonment can be considered particularly serious as these offences did not involve elements of violence. The only element which may indicate any tendency of the applicant towards violent behaviour was a prohibition to possess arms issued in May 1995. Although the seriousness of such a measure should not be underestimated, it cannot be compared to a conviction for an act of violence, and there is no indication that such charges have ever been brought against the applicant."

EMD udtalte i præmis 32:

"Taking all the above elements into account, the Court finds that by imposing the residence prohibition in the particular circumstances of the case, the Austrian authorities have overstepped their margin of appreciation under Article 8 as the reasons in support of the necessity of the residence prohibition are not sufficiently weighty. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued."

I sagen *Miah v. the United Kingdom (2010)* indrejste klageren i opholdslandet som 11-årig og tog ophold hos sin far, dennes nye ægtefælle samt sine to brødre. Da klageren var 14 år gammel, døde faren. Som 19-årig blev han idømt to års fængsel på en institution for ungdomskriminelle for indbrud og tyveri. Klageren blev efterfølgende flere gange idømt bøder for bl.a. tyveri. Da klageren var 26 år gammel, blev han idømt 12 måneders fængsel for tyveri, og samme år blev han udvist. Klageren havde indtil fængslingen boet hjemme

hos stedmoren og havde til hensigt at flytte hjem igen efter løsladelsen. Klageren blev året efter udsendt til Bangladesh.

Efter at have gengivet Storkammerets vurderinger i *Maslov*-dommen, udtalte EMD i præmis 25:

"Turning to the present case, the Court accepts that the applicant has spent a significant period of time in the United Kingdom and that the majority of his social, cultural and family ties are there rather than in Bangladesh. However, despite the relatively young age at which he arrived in the United Kingdom, the Court is not persuaded that he has severed all links to Bangladesh. His mother still lives Bangladesh and, as the Tribunal found, he would be able to rely on her and any extended family for support. In contrast to Mr Maslov, the present applicant speaks the language of his country of origin. Although both Mr Maslov and the applicant were convicted of mostly non-violent offences, the applicant's offences are of a quite different character. With the exception of the first burglary offence, they were all committed when the applicant was an adult and there cannot be the same duty to facilitate the reintegration of an adult offender rather than deport him as there would be for a juvenile offender who is convicted of the same offences. The applicant's offences appear to have been committed in order to fund a drug addiction, a factor which must go some way to mitigating if not the seriousness of the offences then at least the sentences imposed. Indeed, the domestic courts have made efforts to rehabilitate the applicant by imposing a series of non-custodial sentences. Nonetheless, by the time of the final offence, they were entitled to take the view that further such efforts would be inappropriate. Therefore, while the applicant is correct to observe that his final sentence of twelve months' imprisonment was at the lower end of the scale to which a presumption in favour of deportation would apply, the domestic authorities were entitled to take into account that this was the last in a series of offences and that the applicant had failed to respond to other, less severe sentences. Finally, while the duration of the deportation imposed on the applicant is of the same duration as that imposed in Maslov, it does not exclude him from the United Kingdom for as much time as he spent there and does not do so for a decisive period in his life. The Court therefore finds that the domestic authorities have not exceeded the margin of appreciation afforded to them in such cases. A fair balance has been struck in this case and the Court therefore agrees with the Tribunal that the applicant's deportation was proportionate to the legitimate aim pursued. Accordingly, this part of the application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention."

EMD afviste derefter sagen som inadmissible.

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis 5 og 6 måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden.

EMD udtalte i præmis 56 vedrørende klagerens alder ved ankomsten til opholdslandet:

"The Court notes that the applicant is not a so-called "second generation immigrant" as he first entered Germany at the age of ten. Given the relatively young age at which he arrived, the Court will nevertheless assess

the necessity of the interference by applying criteria which are similar to those it usually applies in cases of second generation immigrants (see Radovanovic v. Austria, no. 42703/98, § 33, 22 April 2004; Üner v. the Netherlands, no. 46410/99, § 40, 5 July 2005).”

EMD gennemgik herefter i præmis 57 Boultif-kriterierne og udtalte i præmis 58:

“In addition, the Court will also take into account the particular ties which these immigrants have developed with the host country where they will have spent most of their life (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, § 36; Radovanovic, cited above, § 33; Üner, cited above, § 40)”

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som fx narkotikahandel.

Vedrørende tilknytningen til opholdslandet udtalte EMD i præmis 61, at:

”With regard to the applicant’s personal and family situation, the Court notes that the applicant, at the time of the expulsion order of 22 January 1999, had been lawfully residing in Germany for 27 years, having moved to that country at the age of ten in order to live there with his parents and brother and where he received his secondary school education. […].”

I præmis 62 udtalte EMD om klagerens tilknytning til hjemlandet:

”On the other hand, the Court is not persuaded that the applicant has become so estranged from the country where he spent the first ten years of his life that he would no longer be able to settle in Turkey, having regard to the fact that the applicant married his Turkish wife in Turkey, where their first son was born and that his wife and son did not follow him to Germany until 1989. It follows that the applicant must have entertained certain links to his country of origin at least until 1989. It can further be presumed that the applicant is familiar with the Turkish language, as he married a Turkish wife.”

EMD gennemgik herefter i præmis 63-64 spørgsmålet om, hvorvidt klagerens ægtefælle og børn med rimelighed kunne forventes at følge med klageren til hjemlandet, og fandt, at børnene ville møde store vanskeligheder ved omplantning til det tyrkiske skolesystem. I præmis 65 gennemgik EMD spørgsmålet om den manglende tidsbegrænsning i klagerens indrejseforbud. Endelig udtalte EMD i præmis 66, at:

”The Court considers that the applicant’s expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant’s offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant’s children could be expected to face if they followed him to Turkey, the Court considers that an unlimited exclusion from the German territory violates the applicant’s rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention.”

I sagen *Yildiz v. Austria (2002)* var den første klager indrejst i opholdslandet som 14-årig for at bo sammen med sine forældre og sine søskende. Han indledte et forhold til den anden klager, som var statsborger i den

første klagers hjemland, men født og opvokset i opholdslandet. Nogle måneder senere traf opholdslandet afgørelse om udvisning af den første klager med indrejseforbud i fem år på baggrund af flere bødestraffe for tyveri og færdselslovsovertrædelser. Da udvisningsafgørelsen blev endelig, havde klagerne sammen fået et barn, den tredje klager. Klageren udrejste til hjemlandet, da barnet var knap to år gammelt. På tidspunktet for EMD's behandling af sagen boede han fortsat i hjemlandet. Den anden og tredje klager besøgte ham jævnligt, indtil parret blev skilt.

EMD udtalte i præmis 43, at:

"The Court will first examine the applicants' family situation and the length of their stay in Austria. It observes that the first applicant is not a second generation immigrant, i.e. a person who was born or has lived the main part of his life in the country from which he is going to be removed. He only came to Austria in 1989 at the age of fourteen and must therefore have links with his country of origin and in particular be able to speak Turkish. On the other hand, he was still an adolescent when he came to Austria, where his close family was and is still living. In December 1996, when the Administrative Court confirmed the residence ban against him, he had been living in Austria for seven years, he had been working there and had been co-habiting for a little less than three years with the second applicant, who is also a Turkish national but was born in Austria and has lived there all her life. Their daughter, the third applicant, was one year and four months old at the material time. In fact, the Austrian authorities issuing the residence ban acknowledged that the first applicant had reached a high degree of integration in Austria. Nevertheless, the Court considers that, as regards the possible effects of the residence ban on his family life, the authorities failed to establish whether the second applicant could be expected to follow him to Turkey, in particular whether she spoke Turkish and maintained any links, other than her nationality, with that country."

I præmis 44 fastslog EMD, at vurderingen af, om indrejseforbuddet udgjorde en krænkelse af artikel 8, skulle foretages på baggrund af de forhold, der gjorde sig gældende, da indrejseforbuddet blev endeligt, uanset at klagerne efterfølgende var blevet skilt, og deres familiesituation således var anderledes på tidspunktet for EMD's behandling af sagen. I præmis 45- 46 udtalte EMD:

"45. Next, the Court will turn to the offences committed by the first applicant, as their gravity is an essential element for assessing the proportionality of the interference with the applicants' family life. The Court notes that in 1993 the first applicant, who was then still a minor, was convicted twice by the criminal courts, once for shop-lifting with a sentence of three days' imprisonment suspended on probation, and once for theft without a sentence being pronounced. Between 1992 and April 1994 he was convicted seven times of traffic offences, in particular driving without a license and once ignoring a red light and high speeding. The fines imposed on him amounted to a total sum of ATS 28,000 (equivalent to EUR 2,035). In sum, the Court finds that these offences were not negligible. However, as is shown by the modest penalties imposed, the domestic authorities considered them to be of a minor nature. Moreover, the first applicant did not commit any further offences between April 1994 and December 1996, when the residence ban proceedings were terminated. Thus, in the Court's view the authorities' fear that he constituted a danger to public order and security in that would commit further offences is mitigated by the particular circumstances of the case (see Boultif v. Switzerland, cited above, § 51, with further references).

46. Having regard to all these elements, the Court considers that the authorities failed to strike a fair balance between the different interests involved and that the interference with the applicants' right to respect for their family life was not proportionate to the legitimate aim pursued.

Accordingly, there has been a breach of Article 8 of the Convention."

4.2.8.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Nunez v. Norway (2009)* havde klageren opnået sin opholdstilladelse på baggrund af svig. Da opholdstilladelsen blev inddraget, havde hun opholdt sig i opholdslandet i fem år fra hun var 21 – 26 år og havde stiftet familie i opholdslandet ved at gifte sig og få børn.

EMD slog indledningsvis fast, at forholdet mellem klageren og hendes børn udgjorde "familieliv" i artikel 8's forstand.

EMD udtalte i præmis 71-73, at henset til hensynene bag den nationale lovgivning og de nationale myndigheders afgørelse i sagen fandt EMD, at statens interesse i at udsende klageren vejede tungt i proportionalitetsafvejningen.

I præmis 74 konstaterede EMD, at klageren ved sin indrejse i opholdslandet var voksen:

"The Court further observes that when the applicant re-entered Norway in breach of the re-entry ban in July 1996, she was an adult and had no links to the country. Whilst aware that she had re-entered illegally, she married a Norwegian national in October 1996. In April 2001 they separated. From the spring 2001 she co-habited with Mr O. and two daughters were born by the couple in June 2002 and December 2003, respectively. In the Court's view, at no stage from her re-entering Norway illegally in July 1996 until being put on notice in January 2002 (see paragraph 11 above) could she reasonably had entertained any expectation of being able to remain in the country."

EMD udtalte i præmis 76, at:

"Moreover, when the applicant arrived in Norway at the age of twenty-one, she had lived all her life in the Dominican Republic. During her stay in Norway she co-habited from the spring of 2001 to October 2005 with Mr O. who was also a national of her home country. Her links to Norway could hardly be said to outweigh her attachment to her home country and, as noted above, had in any event been formed through unlawful residence and without any legitimate expectation of being able remain in the country."

Herefter gennemgik EMD i præmis 78-82 hensynet til barnets bedste og de nationale myndigheders lange sagsbehandlingstid og udtalte i præmis 83-85:

"83. In light of the above, the Court shares the view of the Supreme Court's minority that the applicant's expulsion with a two-year re-entry ban would no doubt constitute a very far-reaching measure vis-à-vis the children.

84. Having regard to all of the above considerations, notably the children's long lasting and close bonds to their mother, the decision in the custody proceedings, the disruption and stress that the children had already

experienced and the long period that elapsed before the immigration authorities took their decision to order the applicant's expulsion with a re-entry ban, the Court is not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention. Reference is made in this context also to Article 3 of the UN Convention on the Rights of the Child, according to which the best interests of the child shall be a primary consideration in all actions taken by public authorities concerning children (see Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, § 135, ECHR 2010-...). The Court is therefore not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicant's need to be able to remain in Norway in order to maintain her contact with her children in their best interests, on the other hand.

85. In sum, the Court concludes that the applicant's expulsion from Norway with a two-year re-entry ban would entail a violation of Article 8 of the Convention."

I sagen *Antwi and others v. Norway (2012)* havde klageren ligeledes opnået sin opholdstilladelse på baggrund af svig. Klageren var i opholdslandet blevet gift og havde fået et barn. Syv år efter indrejsen fik opholdslandet kendskab til hans reelle identitet og året efter blev han udvist fra opholdslandet.

EMD udtalte i præmis 90:

"In applying the above principles [fra Nunez-dommen, red.] to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Nunez, cited above, § 71, and Darren Omoregie and Others v. Norway, no. 265/07, § 67, 31 July 2008; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Nunez and Darren Omoregie and Others, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Nunez, cited above, § 73)."

EMD udtalte ikke specifikt, om klagerens alder ved udrejsen fra hjemlandet havde nogen betydning, men udtalte i præmis 91-92:

"91. Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country.

92. Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country."

Efter at have gennemgået ægtefællens og datterens forhold, udtalte EMD i præmis 103-105:

"103. There being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion.

104. The above considerations are not altered by the duration of the prohibition on re-entry – five years. In this connection, the Court reiterates that in a comparable case, Darren Omoregie (cited above, §§ 63-68), it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case.

105. In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand.

Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban would not entail a violation of Article 8 of the Convention."

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende deres opholdstilladelse, da klagerne var blevet myndige.

EMD udtalte i præmis 76, at:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the

applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

[citat af præmis 68-70 i Nunez-dommen, red.]"

På den baggrund gennemgik EMD i præmis 79-85 de hensyn af immigrationspolitisk karakter, som kan tale for at identificere børn med deres forældres handlinger i svigssager, medmindre der foreligger ekstraordinære omstændigheder, og vurderingen heraf i den konkrete sag. De nævnte præmisser er indsat i afsnittene 4.2.1.3 og 4.2.1.4.

I præmis 86-87 udtalte EMD:

"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 udtalte EMD:

"88. In contrast, the applicants' links to Pakistan were not particularly strong, bearing in mind the timing and duration of their residence there. They had not seen their father since returning to Norway in 1996 and their

mother had died. Neither the fact that the applicants should have inherited a part of a house from their mother, currently occupied by their father, nor that they might be familiar with another uncle living in the same area as their father, nor any other factors, point to any solid links to Pakistan as suggested by the Government. According to the applicants they were unable to write Urdu and were speaking a "childish" Urdu. They both mastered English well, which was an official language in Pakistan. Although the applicants still had certain links to Pakistan and there would not appear to be insurmountable obstacles to them returning to the country, they might, as found by the High Court, encounter social and professional difficulties if they were to do so (see paragraph 36 above)."

I præmis 89 gennemgik EMD betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

4.2.8.4. Ulovligt ophold

I sagen *Darren Omoregie a.o. v. Norway (2008)* var klageren indrejst som 22-årig og havde fået afslag på asyl, men undlod at efterkomme udrejsebeslutningen og arbejdede endvidere ulovligt i opholdslandet. Nogle måneder senere giftede han sig med en statsborger fra opholdslandet og søgte om familiesammenføring, hvilket blev afslået, og klageren blev på ny pålagt at udrejse, hvilket han ikke efterkom. Der blev endvidere truffet afgørelse om at udvise klageren med indrejseforbud i fem år med mulighed for genindrejse efter ansøgning allerede efter to år. Under domstolsbehandlingen af udvisningsafgørelsen blev klagerens ægtefælle gravid med deres fælles barn, som blev født fem år efter klagerens indrejse. Klageren fik på ny afslag på familiesammenføring og efter fem et halvt års ophold blev han udsendt.

I præmis 59-63 gennemgik EMD klagerens opholdsretlige status på tidspunktet for og efter etableringen af familieliv i opholdslandet og hvorvidt denne kunne give klageren og ægtefællen anledning til at have berettigede forventninger med hensyn til mulighederne for klagerens fortsatte ophold i opholdslandet. I præmis 64 udtalte EMD:

"Against this background the Court does not consider that the first and second applicants, by confronting the Norwegian authorities with the first applicant's presence in the country as a fait accompli, were entitled to expect that any right of residence would be conferred upon him (see Roslina Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003; Yash Priya v. Denmark (dec.) 13594/03; 6 July 2006; cf. Rodrigues da Silva and Hoogkamer, cited above, § 43)."

Om tilknytningen til henholdsvis klagerens hjemland og opholdsland samt om indrejseforbuddets varighed udtalte EMD i præmis 66-68, at:

"66. It should further be noted that the first applicant had lived in Nigeria since he was six months old until he left the country at the age of 22, had studied at university for four years and had three brothers with whom he was still in contact. Whereas his links to Nigeria were particularly strong, his links to Norway were comparatively weak, apart from the family bounds he had formed there with the second and third applicants pending the proceedings. […]

67. Finally, the Court notes that the decision prohibiting the first applicant re-entry for five years was imposed as an administrative sanction, the purpose of which was to ensure that resilient immigrants do not undermine the effective implementation of rules on immigration control. Moreover, it was open to the first applicant to apply for re-entry already after two years.

68. Against this background, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed their margin of appreciation when deciding to expel the first applicant and to prohibit his re-entry for five years. The Court is not only satisfied that the impugned interference was supported by relevant and sufficient reasons but also that in reaching the disputed decision the domestic authorities struck a fair balance between the personal interests of the applicants on the one hand and the public interest in ensuring an effective implementation of immigration control on the other hand. In view of the first applicant's immigration status, the present case disclosed no exceptional circumstances requiring the respondent State to grant him a right of residence in Norway so as to enable the applicants to maintain and develop family life in that country. In sum, the Court finds that the national authorities could reasonably consider that the interference was 'necessary' within the meaning of Article 8 § 2 of the Convention.
Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende deres opholdstilladelse, da klagerne var blevet myndige.

EMD udtalte i præmis 76, at:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed

a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

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I præmis 86-87 udtalte EMD:

"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 udtalte EMD:

"88. In contrast, the applicants' links to Pakistan were not particularly strong, bearing in mind the timing and duration of their residence there. They had not seen their father since returning to Norway in 1996 and their mother had died. Neither the fact that the applicants should have inherited a part of a house from their mother, currently occupied by their father, nor that they might be familiar with another uncle living in the

same area as their father, nor any other factors, point to any solid links to Pakistan as suggested by the Government. According to the applicants they were unable to write Urdu and were speaking a "childish" Urdu. They both mastered English well, which was an official language in Pakistan. Although the applicants still had certain links to Pakistan and there would not appear to be insurmountable obstacles to them returning to the country, they might, as found by the High Court, encounter social and professional difficulties if they were to do so (see paragraph 36 above)."

I præmis 89 gennemgik EMD betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

Vedrørende spørgsmålet om, hvorvidt klageren havde privatliv og familieliv i Nederlandene, udtalte EMD i præmis 47-50:

"47. The Court has further laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, for instance, Konstatinov v. the Netherlands, no. 16351/03, § 52, 26 April 2007, and Z. and T. v. the United Kingdom (dec.), no. 27034/05, ECHR 2006-III). However, it has not insisted on such further elements of dependency in a number of cases concerning young adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov,

cited above, §§ 62 and 64; Osman v. Denmark, no. 38058/09, §§ 55-56, 14 June 2011; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019).

48. Even if a person of 26 years of age could still be considered a "young adult", the Court notes that at least in 2011 the applicant was not living full-time with his foster parents anymore (see paragraph 21 above). Moreover, it has not been argued and there is no indication that there are any further elements of dependency between the applicant and his foster parents.

49. The above notwithstanding, the Court deems it not necessary to decide on the question whether or not the ties between the applicant and his foster parents constituted family life within the meaning of Article 8. It reiterates that, in practice, the factors to be examined in order to assess the compatibility with Article 8 of a denial of a right of residence – in so far as those factors are relevant in a particular case – are the same regardless of whether family or private life is engaged (see, mutatis mutandis, A.A. v. the United Kingdom, no. 8000/08, §§ 49 and 57, 20 September 2011).

50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

4.2.8.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Slivenko v. Latvia (2003)* var klagerne, som var af russisk oprindelse, blevet udsendt fra Letland under henvisning til, at de var familiemedlemmer til en russisk militærperson og derfor forpligtede til at forlade Letland i forbindelse med tilbagetrækningen af de russiske tropper fra Letland som følge af landets opnåelse af uafhængighed fra USSR. Sagen vedrørte klagernes privatliv, idet de havde levet hele eller hovedparten af deres liv i Letland.

EMD udtalte vedrørende spørgsmålet om, hvorvidt der forelå et indgreb i klagernes privatliv, i præmis 96:

"As regards the facts of the present case, the first applicant arrived in Latvia in 1959, when she was only one month old. Until 1999, by which time she was 40 years of age, she continued to live in Latvia. She attended

school there, found employment and married. Her daughter, the second applicant, was born in Latvia in 1981 and lived there until the age of 18, when she was compelled to leave the country together with her mother, having just completed her secondary education (see paragraphs 16 and 46 above). It is undisputed that the applicants left Latvia against their own will, as a result of the unsuccessful outcome of the proceedings concerning the legality of their stay in Latvia. They were thus removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being. Furthermore, as a result of the removal, the applicants lost the flat in which they had lived in Riga (see paragraphs 32 and 46 above). In these circumstances, the Court cannot but find that the applicants' removal from Latvia constituted an interference with their 'private life' and their 'home' within the meaning of Article 8 § 1 of the Convention."

EMD gennemgik i præmis 116-118 nogle overordnede betragtninger vedrørende tilbagetrækning af fremmede tropper fra en uafhængig stat i forhold til aktivt tjenestegørende og pensionerede militærpersoner og deres familier. I præmis 119 fastslog EMD, at klagernes ægtefælle/far var pensioneret på tidspunktet for sagen om lovligheden af klagernes fortsatte ophold i Letland. I præmis 120-121 konstaterede EMD, at der i visse situationer var mulighed for dispensation fra kravet om at forlade Letland, og i præmis 122 udtalte EMD, at spørgsmålet om, hvorvidt en udsendelse i lyset af klagernes personlige situation var proportional med det legitime formål: statens sikkerhed, måtte afgøres på baggrund af sagens konkrete omstændigheder. EMD udtalte herom i præmis 123-125:

"123. The respondent Government argued that the applicants had not been sufficiently integrated into Latvian society (see paragraph 88 above). In this connection the Court observes that the applicants have spent virtually all their lives in Latvia (see paragraph 96 above). It is true that the applicants are not of Latvian origin, and that they arrived and lived in Latvia – then part of the USSR – in connection with the service of members of their family (the first applicant's father and her husband) in the Soviet armed forces. However, the applicants also developed personal, social and economic ties in Latvia unrelated to their status as relatives of Soviet (and later Russian) military officers. This is shown by the fact that the applicants did not live in army barracks or any other restricted area, but in a block of flats in which there were also civilians. Nor did they study or work in a military institution. The first applicant was able to find employment in Latvian companies after Latvia regained its independence in 1991.

124. As regards the respondent Government's argument about the level of the applicants' proficiency in Latvian, the Court observes that, in so far as this is a relevant consideration, it has not been shown that the degree of the applicants' fluency in the language – although the precise level is in dispute – was insufficient for them to lead a normal everyday life in Latvia. In particular, there is no evidence that the level of the applicants' knowledge of Latvian was in any way different from that of other native Russian speakers living in Latvia, including those who were able to obtain the status of "ex-USSR citizens" in order to remain in Latvia on a permanent basis.

125. Although in 1999 the applicants moved to Russia to join Nikolay Slivenko and eventually obtained Russian citizenship, by that time they had apparently not developed personal, social or economic ties in Russia similar to those they had established in Latvia. In short, the Court finds that at the relevant time the applicants were sufficiently integrated into Latvian society."

I præmis 126-127 gennemgik EMD det af regeringen påberåbte argument for forskelsbehandlingen af klagerne, at det havde betydning for den nationale sikkerhed, at den første klager var kommet til Letland som medlem af en familie til en sovjetisk militærofficer (den første klagers far/den anden klagers bedstefar).

EMD udtalte i præmis 128-129:

"128. Having regard to all the circumstances, the Court considers that the Latvian authorities overstepped the margin of appreciation enjoyed by the Contracting Parties in such a matter, and that they failed to strike a fair balance between the legitimate aim of the protection of national security and the interest of the protection of the applicants' rights under Article 8. Therefore, the applicants' removal from the territory of Latvia cannot be regarded as having been 'necessary in a democratic society'.

129. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Osman v. Denmark (2011)* ansås klagerens opholdstilladelse i medlemsstaten som bortfaldet som følge af hendes langvarige ophold i familiens tidligere opholdsland Kenya. Klageren, der var somalisk statsborger, havde boet i Kenya fra hun var tre-fire år, indtil hun som syvårig indrejste i opholdslandet som familiesammenført. Hun havde herefter opholdt sig i opholdslandet, indtil hun som 15-årig af forældrene blev sendt tilbage til Kenya. Kort tid før hun fyldte 18 år, kontaktede klageren den danske ambassade i Kenya med henblik på at kunne vende tilbage til sin familie i opholdslandet, hvilket blev afslået af de danske myndigheder. Hun indrejse herefter som 19-årig i medlemsstaten, hvor hun ikke længere havde lovligt ophold.

I præmis 60-61 konstaterede EMD, at:

"60. The Court observes that the applicant spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old. She speaks Danish and received schooling in Denmark until August 2002. Her divorced parents and older siblings live in Denmark. The applicant therefore had social, cultural and family ties in Denmark.

61. The applicant also had social, cultural and family ties in Kenya and Somalia. She was born in Somalia and lived there from 1987 to 1991. She resided in Kenya from 1991 to 1995. The applicant spoke Somali. It was unclear whether the applicant had family in Somalia but certain that she had family in Kenya. The applicant returned to Kenya in 2003 and took care of her parental grandmother. Her application in August 2005 to re-enter Denmark was refused but she re-entered the country illegally, apparently in June 2007. The applicant's father was a recognised refugee from Somalia. He visited Kenya at least twice, namely in 2003 and 2005. The second time he remarried there. There was no indication that the applicant's mother could not enter Somalia and Kenya."

EMD forholdt sig ikke udtrykkeligt til betydningen af klagerens ophold i Somalia og Kenya frem til syv-årsalderen. Om betydningen af klagerens tidligere lovlige ophold i opholdslandet udtalte EMD imidlertid i præmis 65:

"It also reiterates that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in a host country, very serious reasons are required to justify expulsion (see, Maslov v. Austria [GC],

quoted above, § 75). In the present case the applicant was refused restoration of her lapsed residence permit, as opposed to being expelled due to having committed a crime. Nevertheless, it is undisputed that she spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old, that she spoke Danish, that she had received schooling in Denmark until August 2002, and that all her close family remained in Denmark. In these circumstances, the Court also considers that very serious reasons were required to justify the authorities' refusal to restore the applicant's residence permit, when she applied from Kenya in August 2005."

Videre bemærkede EMD i præmis 68:

"The Court notes in particular that the applicant was granted a residence permit in Denmark in November 1994 and subsequently entered the country in February 1995, when she was seven year old. Moreover, at the relevant time the applicant had already legally spent more than eight formative years of her childhood and youth in Denmark before, at the age of fifteen, she was sent to Kenya, which was not her native country. […]"

I præmis 69-75 udtalte EMD sig om hensynet til børns ret til respekt for privat- og familieliv i forhold til den danske lovgivning om genopdragelsesrejser og forældremyndighedsindehaverens rolle, hvorefter EMD i præmis 76-77 udtalte:

"76. Having regard to all the above circumstances, it cannot be said that the applicant's interests have sufficiently been taken into account in the authorities' refusal to reinstate her residence permit in Denmark or that a fair balance was struck between the applicants' interests on the one hand and the State's interest in controlling immigration on the other.

77. There has accordingly been a violation of Article 8 of the Convention."

4.2.9. Klagerens efterfølgende rejser til/ophold i hjemlandet

Ved vurderingen af klagerens tilknytning til sit hjemland, har EMD i flere sager lagt vægt på, om klageren har besøgt eller opholdt sig i hjemlandet efter indrejsen i opholdslandet.

Som anført i afsnit 3.3.3.2 afhænger vægtningen af de enkelte elementer i proportionalitetsafvejningen af de konkrete omstændigheder i hver enkelt sag, se f.eks. Maslov v. Austria (2008), hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[17] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

4.2.9.1. Alvorlig kriminalitet

I sagen *A.W. Khan v. the United Kingdom (2010)* var klageren indrejst i opholdslandet som treårig og var meddelt tidsubegrænset opholdstilladelse. Han blev som 28-årig idømt syv års fængsel for narkotikakriminalitet, men blev løsladt efter tre år på grund af god opførsel. Myndighederne traf efterfølgende afgørelse om udvisning på baggrund af den begåede kriminalitet. Klageren havde dels sin mor og sine søskende i opholdslandet, dels en kæreste, som han havde fået et barn med. På tidspunktet for sagens behandling for EMD var klageren 34 år gammel.

I præmis 31-32 gennemgik EMD klagerens forhold til sin mor og sine søskende, som fandtes at udgøre privatliv. I præmis 33-35 gennemgik EMD klagerens forhold til sin kæreste og deres fælles barn, som fandtes at udgøre familieliv. Herefter konkluderede EMD i præmis 36, at der var tale om et ingreb både i klagerens privatliv og hans familieliv.

Herefter gennemgik EMD i præmis 37-42 om indgrebet var i overensstemmelse med loven, om det skete til varetagelse af et af de legitime hensyn og om det var nødvendigt i et demokratisk samfund. EMD henviste i denne forbindelse til de relevante kriterier som sammenfattet i Üner-dommen og udtalte i præmis 40-43:

"40. The Court reiterates that in view of the devastating effects of drugs on people's lives, it understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge (Dalia v France, cited above, § 54; Bhagli v France, cited above, § 48). The applicant's offence was particularly

[17] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

serious as it involved the importation of a significant quantity of heroin. The severity of the offence is reflected in the fact that the applicant was sentenced to seven years' imprisonment, taking account of his decision to plead guilty at a very early stage. The severity of this offence must therefore weigh heavily in the balance.

41. Nevertheless, the Court must also take into account the fact that the applicant had not previously committed any serious criminal offences in the United Kingdom, and has committed no further offences following his release in June 2006. Under the approach taken in the Boultif judgment (cited above, §51), the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has a certain impact on the assessment of the risk which the applicant poses to society.

42. As regards the applicant's private life, the Court accepts that the applicant has lived most of his life in the United Kingdom, having arrived there at the age of three, and no longer has any real social, cultural or family ties to Pakistan. The applicant has not returned to Pakistan, even for a short visit, and he has no immediate family in Pakistan.

43. In the United Kingdom the applicant has established close ties with his mother and two brothers, with whom he has lived for most of his life. The relationship clearly entails an additional degree of dependence which results from the relative ill-health of all of the parties. Although there is no evidence to suggest that the family would not be able to cope without the applicant, his removal would likely cause greater difficulties than would otherwise be the case."

I præmis 44-47 gennemgik EMD, hvorvidt klagerens familieliv med sin kæreste og deres fælles barn kunne tillægges vægt i proportionalitetsafvejningen, hvilket ikke fandtes at være tilfældet henset til omstændighederne på tidspunktet for etableringen af familielivet. I præmis 48 udtalte EMD, at der også måtte tages hensyn til varigheden af indrejseforbuddet, som var højst ti år.

Herefter udtalte EMD i præmis 50-51:

"50. In light of the above, having particular regard to the length of time that the applicant has been in the United Kingdom and his very young age at the time of his entry, the lack of any continuing ties to Pakistan, the strength of his ties with the United Kingdom, and the fact that the applicant has not reoffended following his release from prison in 2006, the Court finds that the applicant's deportation from the United Kingdom would not be proportionate to the legitimate aim pursued and would therefore not be necessary in a democratic society.

51. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Pakistan."

I sagen vedrørende A.W. Khans bror, *A.H. Khan v. the United Kingdom (2011)*, var klageren indrejst i opholdslandet som syvårig og var tidligere blevet dømt for samleje med en mindreårig, to forsøg på røveri samt overfald. Som 30-årig blev klageren ydermere idømt fem års fængsel for røveri samt udvist. Han blev udsendt ni år efter sin sidste dom. På tidspunktet for EMD´s afgørelse af sagen var klageren far til seks børn i alderen fra 12 til 17 år. Klageren var på daværende tidspunkt ikke i et forhold med mødrene til sine børn.

EMD udtalte i præmis 37:

"[…] the Court finds that, on balance, the applicant lived in the United Kingdom from 1978, when he was aged seven, returning to Pakistan only for visits. It is therefore accepted that he has lived in the United Kingdom since an early age, a factor which means that serious reasons would be required before his deportation could be found to be proportionate (see Maslov v. Austria [GC], no. 1638/03, § 75, 23 June 2008)."

EMD fandt den af klageren begåede kriminalitet alvorlig og fremhævede, at det forhold, at han havde begået kriminalitet igen kort tid efter løsladelsen, viste, at han ikke var rehabiliteret og derfor fortsat udgjorde en fare for offentligheden, hvorfor der var gode grunde til at udsende ham (præmis 38).

Herefter gennemgik EMD klagerens familieforhold, hvorefter EMD udtalte i præmis 41, at:

"Finally, the Court turns to the question of the respective solidity of the applicant's ties to the United Kingdom and to Pakistan. The Court notes that, unlike his younger brother, the applicant returned to Pakistan for visits following his arrival in the United Kingdom and also married there. In the absence of any evidence to the contrary, the Court assumes that this marriage is still, legally at least, subsisting. The applicant therefore maintained some level of connection to his country of origin and was not deported as a stranger to the country. As regards his ties to the United Kingdom, the Court has addressed the question of his family life, both with his parents and siblings and with his various partners and children, above, and found it to be limited in its extent. Furthermore, the applicant's private life in the United Kingdom, as observed by the Tribunal, has been constrained by his convictions and spells in prison. Whilst he was mainly educated in the United Kingdom and has worked, he does not appear to have established a lengthy or consistent employment history. In short, and despite the length of his stay, the applicant did not achieve a significant level of integration into British society. The Court is aware that, as a settled migrant who spent much of his childhood in the United Kingdom, serious reasons would be required to render the applicant's deportation proportionate (see Maslov, cited above, § 75). However, having regard to his substantial offending history, including offences of violence and recidivism following the commencement of deportation proceedings against him, the Court is of the view that such serious reasons are present in the applicant's case. His private and family life in the United Kingdom were not such as to outweigh the risk he presented of future offending and harm to the public and his deportation was therefore proportionate to the legitimate aim of preventing crime. As such, the applicant's deportation to Pakistan did not amount to a violation of Article 8."

EMD afviste derefter sagen som *inadmissable*, idet klagen blev anset som *manifestly ill-founded*.

I sagen *A.A. v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som 13-årig sammen med sine to søstre som familiesammenført til deres mor. To år senere blev han som 15-årig idømt fire års tilbageholdelse på en ungdomsinstitution for voldtægt begået mod en mindreårig, men blev løsladt tidligere på grund af god opførsel. Fem år efter den begåede kriminalitet blev klagerens udvisningsafgørelse endelig. Da EMD behandlede sagen, havde klageren opholdt sig i opholdslandet i 11 år. Han boede hos sin mor og besøgte sine to søstre regelmæssigt.

I præmis 46-50 gennemgik EMD sin hidtidige praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem myndige børn og forældre udgør privatliv og/eller familieliv. EMD udtalte i præmis 49:

"49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life". However, it is not necessary to decide the question given that, as Article 8 also protects the right

to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Thus, regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on "family life" rather than "private life", it observes that in practice the factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged (Üner, cited above, §§ 57-60)."

EMD konstaterede i præmis 51-55, at indgrebet var i overensstemmelse med loven og forfulgte et af de legitime hensyn.

Ved vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund, gennemgik EMD i præmis 56 kriterierne som sammenfattet i Üner-dommen og udtalte på den baggrund i præmis 57-58, at de nationale domstole i hver enkelt sag må vurdere, hvilken vægt der skal tillægges de enkelte elementer i foretagelsen af den konkrete afvejning, indenfor staternes margin of appreciation. Om de relevante elementer i den foreliggende sag udtalte EMD i præmis 59-64:

"59. In the present case, the Court considers the relevant factors to be the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in United Kingdom; the time which has elapsed since the offence was committed and the applicant's conduct during that period; and the solidity of social, cultural and family ties with the host country and with the country of destination.

60. The Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Maslov, cited above, § 85). There can be no doubt that the applicant's offence was a serious one and the Court considers the comments of the sentencing judge as to the applicant's conduct and the effect of the attack on the victim to be relevant factors to be taken into account (see paragraph 8 above). The sentence imposed – four years in a Young Offenders' Institution – demonstrates the gravity of the offence. However, the fact that the applicant was a minor at the time the offence was committed is a relevant consideration in assessing the proportionality of a deportation (see Maslov, cited above, § 72). In this regard, the Court recalls that where offences committed by a minor underlie an exclusion order, regard must be had to the best interests of the child. In particular, the obligation to take the best interests of the child into account includes an obligation to facilitate his reintegration, an aim that the Court has previously held will not be achieved by severing family or social ties through expulsion (see Maslov, cited above, §§ 82-83).

61. The Court observes that the total length of the applicant's stay in the United Kingdom to date is eleven years. He arrived in the country at the age of 13 and has therefore now spent almost half his life in the United Kingdom. The Court notes that the applicant committed the offence which rendered him liable to deportation less than two years after his arrival in the United Kingdom. Further, following his conviction, he spent some two years in detention, during which time he was served with a deportation order. While the applicant was granted Indefinite Leave to Remain during this period, the Court is persuaded by the Government's submissions that leave was granted in ignorance of the applicant's conviction and, as a result, considers that no

significance can be attached to the fact that Indefinite Leave to Remain was granted following the conviction (compare and contrast Omojudi, cited above, § 42). It is also true that the applicant has been aware since July 2003 of the fact that he was liable to be deported on account of his conviction. However, the Court nonetheless observes that he has now spent seven years at liberty in the United Kingdom following his release and despite having exhausted appeal rights in January 2008, no steps appear to have been taken in respect of his deportation until September 2010 (see paragraphs 23-25 above).

62. As to the lapse of time and the applicant's conduct since commission of the offence in 2002, the Court observes at the outset that the applicant has committed no further offences. While in detention, the applicant took advantage of the educational opportunities available to him and obtained a number of high school qualifications (see paragraph 11 above). At the time of his release from detention in August 2004, his risk of reoffending was assessed to be low (see paragraph 11 above), an assessment subsequently reiterated by his probation officer in 2005 and accepted by the AIT in 2007 (see paragraphs 15 and 20 above). Since his release, the applicant's conduct appears to have been exemplary. He enrolled in college in September 2004 in order to sit his A-level examinations, which he obtained in summer 2005 (see paragraph 14 above). He was subsequently offered a place at university to study towards an undergraduate degree, which he obtained in 2008, followed by a postgraduate degree, which he completed in 2009 (see paragraphs 18 and 24 above). He commenced stable employment with a local authority in 2010 (see paragraph 24 above).

63. The Government have not pointed to any concern regarding the applicant's conduct in the seven years since his release from prison and rely solely on the seriousness of the offence to justify concerns as to his continued presence in the United Kingdom and his risk to the public (see paragraphs 41-42 and 44 above). The Court reiterates that the factors to be taken into consideration in cases involving deportation following a criminal offence are partially designed to evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities (see paragraph 57 above). In particular, the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has an impact on the assessment of the risk which the applicant poses to society (see Boultif, cited above, § 51; Maslov, cited above, § 90; and A.W. Khan, cited above, § 41). Accordingly, the Court considers the present factor to be of particular importance when assessing whether the seriousness of the offence in itself is sufficient to justify the applicant's deportation for the prevention of disorder or crime.

64. Finally, as regards the applicant's ties with the United Kingdom and with Nigeria, the Court observes that the applicant continues to reside with his mother and has close relationships with his two sisters and an uncle, all of whom reside in England. He has completed the majority of his high school and further education in the United Kingdom and has now commenced a career with a local authority in London. He is also a member of a church community. While he spent a significant period of his childhood in Nigeria, he has now not visited the country for eleven years. He has had no contact with his father since 1991".

I præmis 65-68 gennemgik EMD betydningen af opholdslandets passivitet i forhold til at udsende klageren i overensstemmelse med den trufne udvisningsafgørelse og redegjorde for baggrunden for at inddrage forhold indtruffet og klagerens opførsel i perioden efter denne afgørelse i sin afvejning, herunder vigtigheden af at facilitere reintegration af unge lovovertrædere i samfundet.

Herefter konkluderede EMD i præmis 69-70:

"69. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's deportation from the United Kingdom would be disproportionate to the legitimate aim of the "prevention of disorder and crime" and would therefore not be necessary in a democratic society.

70. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Nigeria."

I sagen *El Boujaïdi v. France (1997)* var klageren indrejst i opholdslandet som syvårig. Han blev idømt seks års fængsel og udvist med indrejseforbud for bestandig for narkotikakriminalitet begået da han var 19 år. Efter at være blevet løsladt da han var 24 år, blev klageren på ny anholdt og idømt et års fængsel for forsøg på røveri og for ikke at være udrejst i overensstemmelse med udvisningen. Klageren blev udsendt, da han var 26 år gammel. På dette tidspunkt boede han sammen med en statsborger i opholdslandet, med hvem han havde fået et barn nogle måneder forud for udsendelsen. Mens der på tidspunktet, hvor udvisningsbeslutningen blev endelig, endnu ikke var etableret et forhold mellem klageren og samleversken og derfor ifølge EMD ikke bestod et "familieliv", der kunne tages i betragtning, udtalte EMD i præmis 33:

"However, the Court observes that he arrived in France in 1974 at the age of 7 and lived there until 26 August 1993. He received most of his schooling there and worked there for several years. In addition, his parents, his three sisters and his brother – with whom it was not contested that he had remained in contact – live there (see paragraph 7 above). Consequently, the Court is in no doubt that enforcement of the exclusion order amounted to interference with the applicant's right to respect for his private and family life."

Ved vurderingen af, om indrejseforbuddet var nødvendigt i et demokratisk samfund, udtalte EMD i præmis 40-41:

"40. The Court's task therefore consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

The Court notes that Mr El Boujaïdi arrived in France at the age of 7 and lived there lawfully from 1974 until 19 June 1991 (the date of his release – see paragraph 13 above). He received most of his education there, he worked there and his parents, his three sisters and his brother live there (see paragraph 7 above).

However, while he asserted that he had no close family in Morocco, he did not claim that he knew no Arabic or that he had never returned to Morocco before the exclusion order was enforced. It also seems that he has never shown any desire to acquire French nationality. Accordingly, even though most of his family and social ties are in France, it has not been established that he has lost all links with his country of origin other than his nationality. In addition, the applicant had a previous conviction – a sentence of thirty months' imprisonment having been imposed on him by the Annecy Criminal Court for heroin dealing in 1987 – when the Lyons Court of Appeal sentenced him to six years' imprisonment and ordered his permanent exclusion from French territory for drug use and drug trafficking (see paragraphs 10 and 11 above). Once he was released, and at a time when he was unlawfully present in France, he continued to lead a life of crime and committed an attempted robbery (see paragraph 13 above). The seriousness of the offence on account of which the measure in issue was imposed on the applicant and his subsequent conduct count heavily against him.

41. Having regard to the foregoing, the Court does not find that enforcement of the order for the applicant's permanent exclusion from French territory was disproportionate to the legitimate aims pursued. There has accordingly been no breach of Article 8."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

I præmis 46-50 gennemgik EMD klagerens opførsel og domstolsbehandlingen af hans sag efter begåelsen af lovovertrædelsen samt klagerens families forhold, herunder muligheden for klagerens ægtefælle og børn for at tage ophold i klagerens hjemland.

I præmis 51 og 52 gennemgik EMD klagerens tilknytning til henholdsvis opholdslandet og hjemlandet:

"51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'."

EMD udtalte herefter i præmis 53-55:

"53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from

enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Savran v. Denmark (2021)* var klageren indrejst i opholdslandet som seksårig sammen med sin mor og sine søskende som familiesammenført til sin far. Han var efterfølgende hjemlandet fem-ti gange på familiebesøg af omkring to måneders varighed, senest i det år, hvor han fyldte 16 år. Klageren var som 16-årig blevet idømt et år og tre måneders fængsel, heraf ni måneder betinget, for røveri. Som 24-årig blev han fundet skyldig i vold med døden til følge begået tre år forinden, men fundet straffri som følge af psykisk sygdom. Han blev idømt retspsykiatrisk behandling samt udvist for bestandig. Fem år senere blev udvisningen prøvet og opretholdt, og klageren blev udsendt til sit hjemland.

Storkammeret udtalte i præmis 175:

"In the present case, the applicant arrived in Denmark at the age of six; he was educated and spent his formative years there; he was issued with a residence permit and remained lawfully resident in the country for fourteen years and eight months (see paragraphs 27 and 30 above). The Court thus accepts that he was a "settled migrant" and therefore Article 8 under its "private life" aspect is engaged."

I præmis 176-178 gennemgik EMD, om klagerens forhold til sin mor og sine søskende udgjorde familie- eller privatliv, og konkluderede, at der var tale om privatliv.

I præmis 179-180 udtalte Storkammeret, at afvisningen af at ophæve udvisningsbeslutningen udgjorde et indgreb i klagerens privatliv, og at indgrebet var hjemlet i lov og forfulgte et af de legitime hensyn, forebyggelse af uro og forbrydelse.

I præmis 181-189 gennemgik EMD de generelle principper vedrørende nødvendighedsvurderingen.

EMD bemærkede i præmis 190, at der var forløbet en betragtelig tid fra det tidspunkt, hvor udvisningsbeslutningen blev endelig, til tidspunktet for afgørelsen om eventuel ophævelse af udvisningsbeslutningen, og

at det var op til de nationale domstole at lade alle relevante ændringer i klagerens forhold i denne periode indgå i vurderingen af, om det på tidspunktet for afgørelsen om eventuel ophævelse af udvisningsbeslutningen var proportionalt at udvise klageren, herunder særligt ændringer vedrørende hans opførsel og helbred.

EMD gennemgik i præmis 191-196 betydningen af klagerens helbredstilstand og i præmis 197 betydningen af de fremskridt, der var sket i klagerens opførsel i perioden mellem gerningstidspunktet og den endelige afgørelse vedrørende evt. ophævelse af udvisningen, jf. det tredje Maslov-kriterium, hvilket imidlertid ikke blev taget i betragtning ved de nationale domstoles vurdering af risikoen for gentagelseskriminalitet.

I præmis 198 udtalte EMD om fastheden af klagerens sociale, kulturelle og familiemæssige bånd til opholdslandet og til hjemlandet:

"A further issue to be considered is the solidity of the applicant's social, cultural and family ties with the host country and the country of destination (the fourth Maslov criterion). Whilst the applicant's ties with Turkey seem to have been limited, it cannot be said that he was completely unfamiliar with that country (see paragraphs 30, 59 and 65 above). However, it appears that the High Court gave little consideration to the length of the applicant's stay in and his ties to his host country Denmark (the second and fourth Maslov criteria respectively; see paragraph 182 above), stressing as it did the fact that he had not founded his own family and had no children in Denmark (see paragraph 66 above). As to the latter aspect, the Court reiterates its finding in paragraph 178 above that, even if he had no "family life", the applicant could still claim protection of his right to respect for his "private life" within the meaning of Article 8 (see Maslov, cited above, § 93). In this regard, the Court attaches particular weight to the fact, also noted by the domestic courts in the criminal proceedings and by the City Court in the revocation proceedings, that the applicant was a settled migrant who had been living in Denmark since the age of six (see paragraph 59 above). Although the applicant's child and young adulthood were clearly difficult, suggesting integration difficulties, he had received most of his education in Denmark and his close family members (mother and siblings) all live there. He had also been attached to the Danish labour market for about five years (see paragraphs 27 and 30 above). "

Afslutningsvis gennemgik EMD I præmis 199-200 betydningen af varigheden af indrejseforbuddet for den samlede proportionalitetsvurdering.

Herefter konkluderede EMD i præmis 201-202:

"201. In the light of the above, it appears that in the revocation proceedings, despite the significant period of time during which the applicant underwent medical treatment for his mental disorder, the High Court, apart from briefly referring to his lack of family ties in Denmark and to the serious nature and gravity of his criminal offence, did not consider the changes in the applicant's personal circumstances with a view to assessing the risk of his reoffending against the background of his mental state at the time of the commission of the offence and the apparent beneficial effects of his treatment. Nor did it have due regard to the strength of the applicant's ties to Denmark as compared to those to Turkey. The Court further notes that under the domestic law, the administrative and judicial authorities had no possibility of making an individual assessment of the duration of the applicant's exclusion from Danish territory, which was both irreducible and permanent. Therefore, and notwithstanding the respondent State's margin of appreciation, the Court considers that, in the particular circumstances of the present case, the domestic authorities failed to duly take into account and to properly balance the interests at stake (see paragraphs 182 and 183 above).

202. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Abdi v. Denmark (2021)* var klageren som fireårig indrejst i opholdslandet, hvor også hans forældre og søskende opholdt sig. Han var tidligere idømt tre måneders betinget fængsel for et røveri begået som 15-årig og fire måneders fængsel, heraf tre måneder betinget, for indbrud begået som 17-årig. Efter det fyldte 18. år var han syv gange idømt bødestraf for overtrædelse af lov om euforiserende stoffer. Senest var klageren idømt to et halvt års fængsel og udvist for bestandig for besiddelse af et ladt skydevåben på offentligt sted begået i det år, hvor han fyldte 24 år. Klageren havde ingen familie i oprindelseslandet, talte kun grundlæggende somali og havde ikke besøgt oprindelseslandet siden udrejsen.

I præmis 39-41 udtalte EMD, at den ikke betvivlede, at klageren på tidspunktet for den kriminalitet, der havde ført til udvisningen, udgjorde en alvorlig trussel for den offentlige orden, men at bortset herfra indikerede den pådømte kriminalitet begået efter at klageren var fyldt 18 år ikke, at han generelt udgjorde en trussel for den offentlige orden, og at klageren ikke tidligere var blevet advaret om udvisning eller idømt betinget udvisning. EMD bemærkede videre i præmis 42, at ikke desto mindre – trods fraværet af relevante tidligere domfældelser og advarsler om udvisning og uanset at klageren var blevet idømt en relativt mild straf i den foreliggende sag – havde de danske domstole besluttet at kombinere udvisningen med et permanent indrejseforbud. Herefter udtalte EMD i præmis 43-45:

"43. This observation should also be seen in the light that the applicant arrived in Denmark at a very young age and had lawfully resided there for approximately twenty years. He thus had very strong ties with Denmark, whereas his ties with Somalia were virtually non-existing.

44. The Court is therefore of the view, given all the circumstances of the case, that the expulsion of the applicant combined with a life-long ban on returning was disproportionate (see, notably, Ezzouhdi v. France, cited above, §§ 34-35; Keles v. Germany, cited above, § 66, and Bousarra v. France, cited above, §§ 53-54).

45. There has accordingly been a violation of Article 8 of the Convention."

Der kan endvidere henvises til følgende sager:

- *Al-Masudi v. Denmark (2023)*.
- *Noorzae v. Denmark (2023)*.
- *Goma v. Denmark (2023)*.

4.2.9.2. Mindre alvorlig kriminalitet

I sagen *Emre v. Schweiz (2008)* var klageren indrejst i opholdslandet som femårig sammen med sine forældre. Klageren blev flere gange dømt for kriminalitet, herunder kriminalitet begået mens han var mindreårig, og blev som 22-årig udvist.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det kortfattede Press Release issued by the Registrar af 22. maj 2008, der er gengivet i sin helhed i afsnit 4.2.1.2. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

EMD gentog i dommens præmis 69 det ovennævnte princip om betydningen af længden af opholdet, som blandt andet kom til udtryk i Üner-dommens præmis 58[18], og uddybede i forlængelse heraf i præmis 70 (uofficiel dansk oversættelse):

"Domstolen har understreget vigtigheden af dette sidste punkt med hensyn til immigranter, der har tilbragt størstedelen af deres liv i værtslandet. I et sådant tilfælde bør det reelt bemærkes, at de modtog deres uddannelse der, fik størstedelen af deres sociale tilknytninger der og derfor udviklede deres identitet der. Da de er født eller ankommet til værtslandet på grund af deres forældres emigration, har de normalt deres vigtigste familiemæssige tilknytning der. Nogle af disse immigranter har endog kun bevaret nationalitetstilknytningen til fødelandet (Benhebba mod Frankrig, nr. 53441/99, præmis 33, 10. juli 2003, Mehemi, nævnt ovenfor, præmis 36, og Boujlifa, nævnt ovenfor, s. 2264, præmis 44, og, a contrario, Bouchelkia mod Frankrig, dom af 29. januar 1997, Samlingen af domme og afgørelser 1997- I, og Baghli mod Frankrig, nr. 34374/97, EMD 1999-VIII, nævnt ovenfor, henholdsvis præmis 50 og præmis 48)."

I præmis 77 og 79 gennemgik EMD varigheden af klagerens ophold i opholdslandet og fastheden af klagerens sociale, kulturelle og familiemæssige tilknytning til værtslandet.

Herefter udtalte EMD i præmis 80 om fastheden af klagerens sociale, kulturelle og familiemæssige tilknytning til hjemlandet (uofficiel dansk oversættelse):

"Sammenlignet med disse forhold, der til trods for klagers kriminelle aktivitet viser en vis integration i Schweiz, forekommer de sociale, kulturelle og familiemæssige tilknytninger, som han opretholder til Tyrkiet, at være meget ubetydelige. Det fremgår af sagsakterne, at klager kun har opholdt sig 1½ måned i landet i juni og juli 2002, og at kun hans bedstemor stadig bor der. Domstolen er ikke overbevist om, at det korte ophold i Tyrkiet efter klagers første udsendelse, – en foranstaltning, der anfægtes i nærværende klage, kan tages i betragtning. Det er desuden ikke sikkert, at klager har et tilstrækkeligt kendskab til det tyrkiske sprog. Selv om forholdet mellem forældre og voksne børn ikke er omfattet af beskyttelsen i artikel 8 uden påvisning af "yderligere afhængighedsforhold mellem dem ud over almindelige følelsesmæssige bånd" (jf. mutatis mutandis, Kwakye-Nti og Dufie mod Nederlandene (dec.), nr. 311519/96, 7. november 2000), bemærker Domstolen ligeledes, at forbundsdomstolen selv erkendte, at klagers familiemæssige tilknytning til Tyrkiet var meget mindre betydningsfuld end hans tilknytning til værtslandet. Domstolen har i øvrigt på ingen måde rejst tvivl om, at klager ville "få betydelige vanskeligheder, hvis han vendte tilbage til Tyrkiet"."

I præmis 81-83 gennemgik EMD "Særlige forhold i sagen: sagens medicinske aspekt".

Endelig gennemgik EMD i præmis 84-85 opholdsforbuddet i opholdslandet.

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[18] *"Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there."*

EMD konkluderede i præmis 86-87 (uofficiel dansk oversættelse):

"86. I betragtning af ovenstående og navnlig den relative grovhed [alvorlighed, red.] af domfældelserne mod klager, hans svage tilknytning til hjemlandet og den endelige karakter af udsendelsesforanstaltningen finder Domstolen, at den indklagede stat ikke kan anses for at have foretaget en rimelig afvejning mellem klagers og hans families interesser på den ene side og statens egen interesse i at kontrollere indvandringen på den anden.

87. Der er følgelig sket en krænkelse af artikel 8."

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis 5 og 6 måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden.

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som f.eks. narkotikahandel.

I præmis 61 gennemgik EMD klagerens tilknytning til opholdslandet.

I præmis 62 udtalte EMD om klagerens tilknytning til hjemlandet:

"On the other hand, the Court is not persuaded that the applicant has become so estranged from the country where he spent the first ten years of his life that he would no longer be able to settle in Turkey, having regard to the fact that the applicant married his Turkish wife in Turkey, where their first son was born and that his wife and son did not follow him to Germany until 1989. It follows that the applicant must have entertained certain links to his country of origin at least until 1989. It can further be presumed that the applicant is familiar with the Turkish language, as he married a Turkish wife."

EMD gennemgik herefter i præmis 63-64 spørgsmålet om, hvorvidt klagerens ægtefælle og børn med rimelighed kunne forventes at følge med klageren til hjemlandet, og fandt, at børnene ville møde store vanskeligheder ved omplantning til det tyrkiske skolesystem. I præmis 65 gennemgik EMD spørgsmålet om den manglende tidsbegrænsning i klagerens indrejseforbud. Endelig udtalte EMD i præmis 66:

"The Court considers that the applicant's expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant's children could be expected to face if they followed him to Turkey, the Court considers that an unlimited exclusion from the German territory violates the applicant's rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention."

4.2.9.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende deres opholdstilladelse, da klagerne var blevet myndige.

EMD udtalte i præmis 76, at:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

[citat af præmis 68-70 i Nunez-dommen, red.]"

På den baggrund gennemgik EMD i præmis 79-85 de hensyn af immigrationspolitisk karakter, som kan tale for at identificere børn med deres forældres handlinger i svigssager, medmindre der foreligger ekstraordinære omstændigheder, og vurderingen heraf i den konkrete sag. De nævnte præmisser er indsat i afsnittene 4.2.1.3 og 4.2.1.4.

I præmis 86-87 udtalte EMD:

"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 udtalte EMD:

"88. In contrast, the applicants' links to Pakistan were not particularly strong, bearing in mind the timing and duration of their residence there. They had not seen their father since returning to Norway in 1996 and their mother had died. Neither the fact that the applicants should have inherited a part of a house from their mother, currently occupied by their father, nor that they might be familiar with another uncle living in the same area as their father, nor any other factors, point to any solid links to Pakistan as suggested by the Government. According to the applicants they were unable to write Urdu and were speaking a "childish" Urdu. They both mastered English well, which was an official language in Pakistan. Although the applicants still had certain links to Pakistan and there would not appear to be insurmountable obstacles to them returning to the country, they might, as found by the High Court, encounter social and professional difficulties if they were to do so (see paragraph 36 above)."

I præmis 89 gennemgik EMD betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

4.2.9.4. Ulovligt ophold

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes op-

holdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende deres opholdstilladelse, da klagerne var blevet myndige.

EMD udtalte i præmis 76, at:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

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På den baggrund gennemgik EMD i præmis 79-85 de hensyn af immigrationspolitisk karakter, som kan tale for at identificere børn med deres forældres handlinger i svigssager, medmindre der foreligger ekstraordinære omstændigheder, og vurderingen heraf i den konkrete sag. De nævnte præmisser er indsat i afsnittene 4.2.1.3 og 4.2.1.4.

I præmis 86-87 udtalte EMD:

"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 udtalte EMD:

"88. In contrast, the applicants' links to Pakistan were not particularly strong, bearing in mind the timing and duration of their residence there. They had not seen their father since returning to Norway in 1996 and their mother had died. Neither the fact that the applicants should have inherited a part of a house from their mother, currently occupied by their father, nor that they might be familiar with another uncle living in the same area as their father, nor any other factors, point to any solid links to Pakistan as suggested by the Government. According to the applicants they were unable to write Urdu and were speaking a "childish" Urdu. They both mastered English well, which was an official language in Pakistan. Although the applicants still had certain links to Pakistan and there would not appear to be insurmountable obstacles to them returning to the country, they might, as found by the High Court, encounter social and professional difficulties if they were to do so (see paragraph 36 above)."

I præmis 89 gennemgik EMD betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

Sagen *Gezginci v. Switzerland (2010)* omhandlede såvel ulovligt ophold som nægtelse af forlængelse af opholdstilladelse. EMD har i et *legal summary* karakteriseret klagerens ophold i opholdslandet som *long term illegal immigration*, hvorfor sagen er placeret i dette afsnit. Dommen foreligger ikke på engelsk i en officiel oversættelse, hvorfor hele EMD´s *legal summary* er citeret herunder:

"Judgment 9.12.2010 [Section I]
Article 8
Expulsion
Deportation order against long-term illegal immigrant: deportation would not constitute a violation

Facts – The applicant is a Turkish national who has lived in Switzerland since 1978, on the basis of residence permits from 1980 to 1998 and unlawfully during the remaining periods. In 1997 the national authorities decided not to renew his residence permit. A few months later they set March 1999 as the deadline for his deportation from Switzerland. However, the applicant did not leave the country. In 2003, after a serious work-related accident, he applied for a residence permit on humanitarian grounds. The authorities refused the application. Shortly afterwards his wife disappeared without trace, leaving him to care for their eleven-year-old daughter. The applicant lodged several unsuccessful appeals against the deportation order, which is still in force.

Law – Article 8: In view of the applicant's very long-standing residence in Switzerland, the refusal to grant him a residence permit on humanitarian grounds amounted to interference with his right to respect for his private life. That interference had been in accordance with the law and had pursued the legitimate aims of ensuring the economic well-being of the country, preventing disorder or crime and protecting the rights and freedoms of others. In order to determine whether it had been necessary in a democratic society, a number of factors had to be taken into consideration. First of all, the applicant's convictions between 1982 and 1992 had not been very serious and since 1993 his conduct did not appear to have been open to criticism from a purely criminal-law standpoint. Next, the applicant had lived in Switzerland for approximately thirty years, not counting periods spent abroad, thanks to the considerable tolerance shown by the authorities since 1999. Furthermore, some members of the applicant's family still lived in Turkey and would be able to help him resettle there and find work; he also spoke Turkish fluently. Similar considerations would apply were he to opt for Romania, a country which he knew from visits, where his wife lived and his daughter had spent much of her life, and where he appeared to have been in gainful employment. Furthermore, it was clear from his attitude that he was unable and unwilling to find employment in Switzerland. As to his daughter, given that she had spent most of her life in Romania and Turkey, was a citizen of both countries and probably spoke both languages, she could reasonably be expected to be able to adjust if she returned there. Lastly, the applicant's health was not liable to significantly hinder his integration in Turkey, given that he would have access there to the necessary medicines and treatment and would undoubtedly receive an invalidity pension. Accordingly, regard being had in particular to the fact that the applicant had been residing unlawfully in Switzerland since 1997, his lack of willingness to integrate there, his failure to abide by the rules of the country and the fact that his ties with his country of origin did not appear to have been completely severed, the respondent State could be said to have struck a fair balance between the interests of the applicant and his daughter on the one hand and its own interest in controlling immigration on the other.

Conclusion: the applicant's deportation would not amount to a violation (five votes to two)." [Understreget her, red.]

4.2.9.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Osman v. Denmark (2011)* ansås klagerens opholdstilladelse i medlemsstaten som bortfaldet som følge af hendes langvarige ophold i familiens tidligere opholdsland Kenya. Klageren, der var somalisk statsborger, havde boet i Kenya fra hun var tre-fire år, indtil hun som syvårig indrejste i opholdslandet som familiesammenført. Hun havde herefter opholdt sig i opholdslandet, indtil hun som 15-årig af forældrene blev sendt tilbage til Kenya. Kort tid før hun fyldte 18 år, kontaktede klageren den danske ambassade i Kenya med henblik på at kunne vende tilbage til sin familie i opholdslandet, hvilket blev afslået af de danske myndigheder. Hun indrejse herefter som 19-årig i medlemsstaten, hvor hun ikke længere havde lovligt ophold.

EMD konstaterede i præmis 60 og 61, at:

"60. The Court observes that the applicant spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old. She speaks Danish and received schooling in Denmark until August 2002. Her divorced parents and older siblings live in Denmark. The applicant therefore had social, cultural and family ties in Denmark.

61. The applicant also had social, cultural and family ties in Kenya and Somalia. She was born in Somalia and lived there from 1987 to 1991. She resided in Kenya from 1991 to 1995. The applicant spoke Somali. It was unclear whether the applicant had family in Somalia but certain that she had family in Kenya. The applicant returned to Kenya in 2003 and took care of her parental grandmother. Her application in August 2005 to re-enter Denmark was refused but she re-entered the country illegally, apparently in June 2007. The applicant's father was a recognised refugee from Somalia. He visited Kenya at least twice, namely in 2003 and 2005. The second time he remarried there. There was no indication that the applicant's mother could not enter Somalia and Kenya."

Om betydningen af klagerens tidligere lovlige ophold i opholdslandet udtalte EMD i præmis 65:

"It also reiterates that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in a host country, very serious reasons are required to justify expulsion (see, Maslov v. Austria [GC], quoted above, § 75). In the present case the applicant was refused restoration of her lapsed residence permit, as opposed to being expelled due to having committed a crime. Nevertheless, it is undisputed that she spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old, that she spoke Danish, that she had received schooling in Denmark until August 2002, and that all her close family remained in Denmark. In these circumstances, the Court also considers that very serious reasons were required to justify the authorities' refusal to restore the applicant's residence permit, when she applied from Kenya in August 2005."

Videre bemærkede EMD i præmis 68:

"The Court notes in particular that the applicant was granted a residence permit in Denmark in November 1994 and subsequently entered the country in February 1995, when she was seven year old. Moreover, at the relevant time the applicant had already legally spent more than eight formative years of her childhood and youth in Denmark before, at the age of fifteen, she was sent to Kenya, which was not her native country. […]"

EMD udtalte generelt om børns ret til respekt for deres privat- og familieliv i forbindelse med deres forældres gennemførelse af genopdragelsesrejser i præmis 69 og 73:

"69. The Court also notes that although the legislation at issue aimed at discouraging parents from sending their children to their countries of origin to be "re-educated" in a manner their parents consider more consistent with their ethnic origins, the children's right to respect for private and family life cannot be ignored.

…

73. Moreover, the applicant's view that her father's decision to send her to Kenya for so long had been against her will and not in her best interest, was disregarded by the authorities with reference to the fact that her parents had custody of her at the relevant time. The Court agrees that the exercise of parental rights constitutes a fundamental element of family life, and that the care and upbringing of children normally and necessarily require that the parents decide where the child must reside and also impose, or authorise others to impose, various restrictions on the child's liberty (see, for example Nielsen v. Denmark, 28 November 1988, § 61, Series A no. 144). Nevertheless, in respecting parental rights, the authorities cannot ignore the child's interest including its own right to respect for private and family life."

Endelig udtalte EMD i præmis 76-77, at:

"76. Having regard to all the above circumstances, it cannot be said that the applicant's interests have sufficiently been taken into account in the authorities' refusal to reinstate her residence permit in Denmark or that a fair balance was struck between the applicants' interests on the one hand and the State's interest in controlling immigration on the other.

77. There has accordingly been a violation of Article 8 of the Convention."

Sagen *Hasanbasic v. Switzerland (2013)* omhandlede en klager, hvis opholdstilladelse blev annulleret af de nationale myndigheder i opholdslandet, idet klageren over for disse myndigheder havde tilkendegivet, at han ville rejse tilbage til sit hjemland med henblik på permanent at bosætte sig der. Klageren genindrejste dog fire måneder senere i opholdslandet, hvorefter hans ægtefælle, som stadig opholdt sig i opholdslandet, indgav en ansøgning om ny opholdstilladelse på baggrund af familiesammenføring. EMD har kategoriseret sagen *som refusal to renew residence visa*, hvorfor den er medtaget under dette punkt.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det komplette *legal summary* under afsnit 4.2.1.5. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

Efter i præmis 51 og 52 at have fastslået, at indgrebet var i overensstemmelse med loven og forfulgte et eller flere af de legitime hensyn, gennemgik EMD i præmis 53-56 de generelle principper, som var relevante i den konkrete sag for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund.

I præmis 57-63 anvendte EMD disse principper på forholdene den konkrete sag. EMD udtalte i præmis 57 (uofficiel dansk oversættelse):

"57. Domstolen bemærker indledningsvist, at de to klagere længe har boet lovligt i Schweiz. Den mandlige klager ankom til Schweiz i 1986, den kvindelige klager ankom allerede i 1969. Varigheden af deres ophold udgør således på det tidspunkt, hvor Forbundsdomstolen afsagde sin dom i 2009, henholdsvis 23 og 40 år. Den kvindelige klager har endvidere haft en etableringstilladelse i Schweiz siden 1979, og dermed en tilladelse af en mere stabil karakter end en almindelig opholdstilladelse. Det er i øvrigt ikke bestridt, at Schweiz i en lang periode har været centrum for klagernes privat- og familieliv.

Domstolen konstaterer ligeledes, at klagerne har opholdt sig uafbrudt i Schweiz, bortset fra i en periode på fire måneder fra mellem august og december 2004, efter at de nationale myndigheder havde afvist den kvindelige klagers anmodning om familiesammenføring (ovenstående præmis 14). Den foreliggende sag adskiller sig på dette punkt væsentligt fra sagen Gezginci (nævnt ovenfor, præmis 69 og 70), hvori klager gentagne gange tog til udlandet i længerevarende perioder.

Domstolen vurderer under disse omstændigheder, at det tilkommer de nationale myndigheder på en overbevisende måde og ved hjælp af relevante og tilstrækkelige årsager at bevise, at der eksisterer et samfundsmæssigt bydende nødvendigt behov for at udvise den pågældende person, og navnlig, at denne foranstaltning står i forhold til det forfulgte legitime mål."

I præmis 58 gennemgik EMD den mandlige klagers lovstridige adfærd og fandt, at de pågældende forseelser ikke vejede tungt, og at klageren ikke kunne anses for at udgøre en fare eller trussel for sikkerheden eller den offentlige orden. I præmis 59 gennemgik EMD betydningen af klagerens store gæld til myndighederne i opholdslandet og de betydelige beløb, som klagerne havde modtaget i offentlig støtte og fandt, at opholdslandets myndigheder kunne tage højde for klagernes gæld og afhængighed af offentlig bistand, såfremt denne afhængighed måtte have indflydelse på landets økonomiske velvære, men at disse forhold kun udgjorde et aspekt blandt flere, som EMD skulle tage højde for. I præmis 60-61 gennemgik EMD klagernes familieliv, herunder med deres voksne børn, som var bosat i opholdslandet, og betydningen af, at den mandlige klager ville have mulighed for at besøge familien i opholdslandet. I præmis 62 gennemgik EMD fastheden af de sociale, kulturelle og familiemæssige bånd til opholdslandet og hjemlandet og konstaterede, at klagerne havde et betydeligt socialt netværk i opholdslandet, og at deres tilbagevenden til hjemlandet på grund af den betydelige varighed af deres ophold i opholdslandet uden tvivl ville stille dem over for visse vanskeligheder. I præmis 63 gennemgik EMD klagernes tilknytning til hjemlandet. I præmis 64-65 gennemgik EMD betydningen af klagerens helbredsmæssige forhold.

EMD udtalte i præmis 66-67 (uofficiel dansk oversættelse):

"66. Domstolen vedgår henset til ovenstående, at landets økonomiske velfærd ganske vist kan tjene som et legitimt mål i forbindelse med en afvisning af at forny en opholdstilladelse. Denne årsag skal ikke desto mindre vurderes ud fra en retfærdig afvejning og i lyset af samtlige omstændigheder i sagen. Domstolen vurderer imidlertid ud fra den betydelige varighed af klagernes ophold i Schweiz og deres ubestridte sociale integration i landet, at den anfægtede foranstaltning ikke var berettiget ud fra et bydende nødvendigt samfundsmæssigt behov og ikke stod i forhold til de påberåbte legitime formål. Den indklagede stat har følgelig overskredet sin skønsmargen i den foreliggende sag.

67. Der er følgelig sket en krænkelse af Konventionens artikel 8."

4.2.10. Klagerens skolegang og uddannelse i hjemlandet

Som anført i afsnit 3.3.3.2 afhænger vægtningen af de enkelte elementer i proportionalitetsafvejningen af de konkrete omstændigheder i hver enkelt sag, se f.eks. Maslov v. Austria (2008) , hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[19] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

4.2.10.1. Alvorlig kriminalitet

I sagen *Bajsultanov v. Austria (2012)* inddrog EMD klagerens skolegang i hjemlandet i vurderingen af hans tilknytning til hjemlandet. I sagen var klageren meddelt asyl i opholdslandet. Han blev idømt i alt 20 måneders fængsel for bl.a. flere tilfælde af vold samt udvist. EMD fastsatte længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen. Klagerens ægtefælle var meddelt asyl afledt af klagerens forhold og de havde to børn, der på tidspunktet for EMD's behandling af sagen var otte og fem år.

Efter i præmis 79-82 at have konstateret, at udvisningen af klageren udgjorde et indgreb i hans ret til respekt for familieliv, og at dette indgreb var i overensstemmelse med loven og forfulgte et af de legitime hensyn, gennemgik EMD i præmis 83 de generelle principper, som indgår i afvejningen af, om indgrebet var nødvendigt i et demokratisk samfund, jf. kriterierne som sammenfattet i Boultif- og Üner-dommene.

Om karakteren og alvorligheden af den begåede kriminalitet udtalte EMD i præmis 84:

"Turning to the first set of criteria relating to the criminal offences committed by the applicant, the Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks' imprisonment, suspended with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based

[19] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions."

EMD udtalte i præmis 85 til 87:

"85. As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there.

86. On the other hand, the applicant lived in Chechnya for almost twenty-three years, went to school there and subsequently worked occasionally in different jobs. The applicant's parents and siblings still live in Chechnya, and the applicant has maintained regular contact with his father.

87. The Court therefore considers, in line with the Austrian authorities, that the applicant still has stronger social and cultural ties to his country of origin than to his host country."

I præmis 88-90 gennemgik EMD klagerens familieliv og ægtefællens mulighed for at følge med klageren tilbage til hjemlandet i relation til artikel 3 og i forhold til, om der ville være uoverstigelige hindringer forbundet hermed.

EMD udtalte i præmis 91-92:

"Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention."

I sagen *Dalia v. France (1998)* var klageren indrejst i opholdslandet i 1976 eller 1977 i en alder af 17-18 år for at slutte sig til sine forældre og søskende. I 1985 blev hun idømt et års fængsel for narkokriminalitet og udvist fra opholdslandet for bestandig. Hun udrejste til hjemlandet i 1987 og tog ophold hos en tante. I 1989 genindrejste hun i opholdslandet på et gyldigt visum og tog ophold hos sin mor. I 1990 fødte hun et barn med statsborgerskab i både opholdslandet og hjemlandet. EMD udtalte i præmis 53:

"53. The Court notes, as the Commission did, that the applicant arrived in France at the age of 17 or 18 to join the rest of her family and lived there until 1987. She returned in July 1989 with a visa valid for thirty days, on expiry of which she remained in France. Her mother and her seven brothers and sisters live in France. In 1986 she married a French national, by whom she did not have any children; the marriage was dissolved in 1989.

In 1990, when the exclusion order was still in force, she gave birth to a child of French nationality. Mrs Dalia's family ties are therefore essentially in France.

Nevertheless, having lived in Algeria until the age of 17 or 18, for two years without her parents (see paragraph 7 above), she has maintained certain family relations, spoken the local language and established social and school relationships. In those circumstances, her Algerian nationality is not merely a legal fact but reflects certain social and emotional links. In short, the interference in issue was not so drastic as that which may result from the expulsion of applicants who were born in the host country or first went there as young children (see the C. v. Belgium judgment of 7 August 1996, Reports 1996-III, p. 924, § 34)."

EMD lagde endvidere vægt på, at klageren havde født sit barn, mens hun opholdt sig ulovligt i opholdslandet, og at indrejseforbuddet var blevet pålagt som straf for farlig heroinhandel (præmis 54). EMD udtalte videre i præmis 54-55:

"54. […] In view of the devastating effects of drugs on people's lives, the Court understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge. Irrespective of the sentence passed on her, the fact that Mrs Dalia took part in such trafficking still weighs as heavily in the balance.

55. Having regard to the foregoing, the Court considers that the refusal to lift the exclusion order made against the applicant cannot be regarded as disproportionate to the legitimate aim pursued. There has therefore been no violation of Article 8."

4.2.10.2. Mindre alvorlig kriminalitet

I sagen *Jakupovic v. Austria (2003)* blev klageren to gange idømt fængselsstraf af henholdsvis fem måneders og ti ugers varighed, begge udsat i en prøveperiode på tre år, for mindre alvorlig kriminalitet, herunder indbrud og tyveri. Han blev endvidere udvist med indrejseforbud i ti år. Klageren var indrejst i opholdslandet som 11-årig og var på tidspunktet, hvor udvisningsafgørelsen blev endelig, 16 år. Han blev udsendt det samme år, som han fyldte 18 år.

I præmis 28-30 udtalte EMD:

"28. The Court observes that at the time of the expulsion the applicant had not been in Austria for a long time – just four years. Furthermore his situation was not comparable to that of a second generation immigrant, as he had arrived in Austria at the age of eleven, had previously attended school in his country of origin and must therefore have been well acquainted with its language and culture. However, the residence prohibition seriously upset his private and family life: he had arrived in Austria with his brother to join his mother and the new family she had founded there and has apparently no close relatives in Bosnia. The applicant's father remained in Bosnia, a fact which is emphasised by the Government, but the applicant points out that he last saw his father in 1988 and the father has been reported missing since the end of the armed conflict in that country.

29. Thus, the Court considers that very weighty reasons have to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which has recently experienced a period of armed conflict with all its adverse effects on living conditions and with no evidence of close relatives living there."

30. The Government rely in this respect on the applicant's criminal record. The Court finds that this record, which is the essential element of justification for the expulsion, must be examined very carefully. It consists of two convictions for burglary. The Court cannot find that these convictions – even taking into account a further set of criminal proceedings which were discontinued after the victim had been compensated by the applicant – for which the Austrian courts had only imposed conditional sentences of imprisonment can be considered particularly serious as these offences did not involve elements of violence. The only element which may indicate any tendency of the applicant towards violent behaviour was a prohibition to possess arms issued in May 1995. Although the seriousness of such a measure should not be underestimated, it cannot be compared to a conviction for an act of violence, and there is no indication that such charges have ever been brought against the applicant."

EMD udtalte i præmis 32:

"Taking all the above elements into account, the Court finds that by imposing the residence prohibition in the particular circumstances of the case, the Austrian authorities have overstepped their margin of appreciation under Article 8 as the reasons in support of the necessity of the residence prohibition are not sufficiently weighty. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued."

4.2.10.3. Opholdstilladelse opnået på baggrund af svig

Der er i forbindelse med udarbejdelsen af dette notat ikke fundet domme vedrørende svig, hvor spørgsmålet om klagerens tilknytning til hjemlandet i form af skolegang og uddannelse har været vurderet af EMD.

4.2.10.4. Ulovligt ophold

I sagen *Darren Omoregie a.o. v. Norway (2008)* var klageren indrejst som 22-årig og havde fået afslag på asyl, men undlod at efterkomme udrejsebeslutningen og arbejdede endvidere ulovligt i opholdslandet. Nogle måneder senere giftede han sig med en statsborger fra opholdslandet og søgte om familiesammenføring, hvilket blev afslået, og klageren blev på ny pålagt at udrejse, hvilket han ikke efterkom. Der blev endvidere truffet afgørelse om at udvise klageren med indrejseforbud i fem år med mulighed for genindrejse efter ansøgning allerede efter to år. Under domstolsbehandlingen af udvisningsafgørelsen blev klagerens ægtefælle gravid med deres fælles barn, som blev født fem år efter klagerens indrejse. Klageren fik på ny afslag på familiesammenføring og efter fem et halvt års ophold blev han udsendt.

I præmis 59-63 gennemgik EMD klagerens opholdsretlige status på tidspunktet for og efter etableringen af familieliv i opholdslandet og hvorvidt denne kunne give klageren og ægtefællen anledning til at have berettigede forventninger med hensyn til mulighederne for klagerens fortsatte ophold i opholdslandet. I præmis 64 udtalte EMD:

"Against this background the Court does not consider that the first and second applicants, by confronting the Norwegian authorities with the first applicant's presence in the country as a fait accompli, were entitled to

expect that any right of residence would be conferred upon him (see Roslina Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003; Yash Priya v. Denmark (dec.) 13594/03; 6 July 2006; cf. Rodrigues da Silva and Hoogkamer, cited above, § 43)."

Om tilknytningen til henholdsvis klagerens hjemland og opholdsland samt om indrejseforbuddets varighed udtalte EMD i præmis 66-68, at:

"66. It should further be noted that the first applicant had lived in Nigeria since he was six months old until he left the country at the age of 22, had studied at university for four years and had three brothers with whom he was still in contact. Whereas his links to Nigeria were particularly strong, his links to Norway were comparatively weak, apart from the family bounds he had formed there with the second and third applicants pending the proceedings. […]

67. Finally, the Court notes that the decision prohibiting the first applicant re-entry for five years was imposed as an administrative sanction, the purpose of which was to ensure that resilient immigrants do not undermine the effective implementation of rules on immigration control. Moreover, it was open to the first applicant to apply for re-entry already after two years.

68. Against this background, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed their margin of appreciation when deciding to expel the first applicant and to prohibit his re-entry for five years. The Court is not only satisfied that the impugned interference was supported by relevant and sufficient reasons but also that in reaching the disputed decision the domestic authorities struck a fair balance between the personal interests of the applicants on the one hand and the public interest in ensuring an effective implementation of immigration control on the other hand. In view of the first applicant's immigration status, the present case disclosed no exceptional circumstances requiring the respondent State to grant him a right of residence in Norway so as to enable the applicants to maintain and develop family life in that country. In sum, the Court finds that the national authorities could reasonably consider that the interference was 'necessary' within the meaning of Article 8 § 2 of the Convention.
Accordingly, there has been no violation of Article 8 of the Convention."

4.2.10.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

Der er i forbindelse med udarbejdelsen af dette notat ikke fundet domme vedrørende inddragelse, nægtelse af forlængelse eller bortfald af en opholdstilladelse, hvor spørgsmålet om klagerens tilknytning til hjemlandet i form af skolegang og uddannelse har været vurderet af EMD.

4.2.11. Klagerens sprogkundskaber fra hjemlandet

EMD har i flere afgørelser lagt vægt på, om klageren kunne tale sproget i klagerens hjemland. Hvis dette var tilfældet, har EMD i flere sager udtalt, at der var en tilknytning til hjemlandet.

Som anført i afsnit 3.3.3.2 afhænger vægtningen af de enkelte elementer i proportionalitetsafvejningen af de konkrete omstændigheder i hver enkelt sag, se f.eks. Maslov v. Austria (2008), hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[20] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

4.2.11.1. Alvorlig kriminalitet

I sagen *Üner v. the Netherlands (2006)* blev klageren idømt syv års fængsel for drab og udvist for bestandig. Klageren var indrejst som 12-årig sammen med sin mor og sine søskende som familiesammenført til faren. På tidspunktet, hvor afgørelsen om udvisning blev endelig, havde han opholdt sig 17 år i opholdslandet og havde to mindreårige børn med sin nederlandske partner. Han var flyttet fra partneren efter halvandet års samliv, da det ældste barn var omkring ni måneder gammel, men forblev i tæt kontakt med partneren og barnet i de følgende omkring otte måneder indtil fængslingen. Partneren og det ældste barn besøgte klageren i fængslet mindst en gang om ugen og ofte hyppigere. Mens klageren var fængslet, fik parret endnu et barn, som klageren ligeledes så hver uge. Klageren havde på tidspunktet for EMD´s afgørelse opholdt sig 25 år i opholdslandet.

EMD fastslog i præmis 61, at der forelå et indgreb både i klagerens ret til respekt for familieliv og hans ret til respekt for privatliv. EMD udtalte imidlertid:

"[...] Even so, having regard to the particular issues at stake in the present case and the positions taken by the parties, the Court will pay special attention to the applicant's right to respect for his family life."

EMD udtalte i præmis 62, at:

"The Court considers at the outset that the applicant lived for a considerable length of time in the Netherlands, the country that he moved to at the age of 12 together with his mother and brothers in order to join his father,

[20] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

and where he held a permanent residence status. Moreover, he subsequently went on to found a family there. In these circumstances, the Court does not doubt that the applicant had strong ties with the Netherlands. That said, it cannot overlook the fact that the applicant 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. As the Chamber put it in paragraph 46 of its judgment, "... the disruption of their family life would not have the same impact as it would [have had] if they had been living together as a family for a much longer time". Moreover, while it is true that the applicant came to the Netherlands at a relatively young age, the Court is not prepared to accept that he had spent so little time in Turkey that, at the time he was returned to that country, he no longer had any social or cultural (including linguistic) ties with Turkish society."

I præmis 63-65 forholdt EMD sig til den begåede kriminalitet, tidspunktet for prøveløsladelse, klagerens børns alder og deres og partnerens statsborgerskab i opholdslandet i forhold til muligheden for at følge med klageren til dennes hjemland samt det pålagte indrejseforbuds varighed. EMD udtalte i præmis 67:

"In the light of the above, the Court finds that a fair balance was struck in this case in that the applicant's expulsion and exclusion from the Netherlands were proportionate to the aims pursued and therefore necessary in a democratic society.

Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *El Boujaïdi v. France (1997)* var klageren indrejst i opholdslandet som syvårig. Han blev idømt seks års fængsel og udvist med indrejseforbud for bestandig for narkotikakriminalitet begået da han var 19 år. Efter at være blevet løsladt da han var 24 år, blev klageren på ny anholdt og idømt et års fængsel for forsøg på røveri og for ikke at være udrejst i overensstemmelse med udvisningen. Klageren blev udsendt, da han var 26 år gammel. På dette tidspunkt boede han sammen med en statsborger i opholdslandet, med hvem han havde fået et barn nogle måneder forud for udsendelsen. Mens der på tidspunktet, hvor udvisningsbeslutningen blev endelig, endnu ikke var etableret et forhold mellem klageren og samleversken og derfor ifølge EMD ikke bestod et "familieliv", der kunne tages i betragtning, udtalte EMD i præmis 33:

"However, the Court observes that he arrived in France in 1974 at the age of 7 and lived there until 26 August 1993. He received most of his schooling there and worked there for several years. In addition, his parents, his three sisters and his brother – with whom it was not contested that he had remained in contact – live there (see paragraph 7 above). Consequently, the Court is in no doubt that enforcement of the exclusion order amounted to interference with the applicant's right to respect for his private and family life."

Ved vurderingen af, om indrejseforbuddet var nødvendigt i et demokratisk samfund, udtalte EMD i præmis 40-41:

"40. The Court's task therefore consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

The Court notes that Mr El Boujaïdi arrived in France at the age of 7 and lived there lawfully from 1974 until 19 June 1991 (the date of his release – see paragraph 13 above). He received most of his education there, he worked there and his parents, his three sisters and his brother live there (see paragraph 7 above).

However, while he asserted that he had no close family in Morocco, he did not claim that he knew no Arabic or that he had never returned to Morocco before the exclusion order was enforced. It also seems that he has never shown any desire to acquire French nationality. Accordingly, even though most of his family and social ties are in France, it has not been established that he has lost all links with his country of origin other than his nationality. In addition, the applicant had a previous conviction – a sentence of thirty months' imprisonment having been imposed on him by the Annecy Criminal Court for heroin dealing in 1987 – when the Lyons Court of Appeal sentenced him to six years' imprisonment and ordered his permanent exclusion from French territory for drug use and drug trafficking (see paragraphs 10 and 11 above). Once he was released, and at a time when he was unlawfully present in France, he continued to lead a life of crime and committed an attempted robbery (see paragraph 13 above). The seriousness of the offence on account of which the measure in issue was imposed on the applicant and his subsequent conduct count heavily against him.

41. Having regard to the foregoing, the Court does not find that enforcement of the order for the applicant's permanent exclusion from French territory was disproportionate to the legitimate aims pursued. There has accordingly been no breach of Article 8."

I sagen *Loy v. Germany (2014)* var klageren indrejst i opholdslandet som femårig. Som 26-årig blev han idømt fire måneders betinget fængsel for vold mod sine børns mor og tre år senere blev han idømt et års betinget fængsel for vold på en natklub. To år senere blev han idømt to et halvt års fængsel for narkotikakriminalitet. Det år, han fyldte 32 år, blev klageren udvist af opholdslandet med indrejseforbehold uden fastsat tidsbegrænsning, og to år senere blev han udsendt til hjemlandet. På udvisningstidspunktet var klageren skilt fra sin tidligere ægtefælle, som var statsborger i opholdslandet, og med hvem klageren havde fået to børn, som ligeledes var statsborgere i opholdslandet og 21 og 17 år gamle på tidspunktet for klagerens udvisning. Han giftede sig igen, efter hans udvisningsdom var blevet afsagt.

EMD konstaterede i præmis 28, at indgrebet var i overensstemmelse med lovgivningen og tjente et legitimt formål. Til brug for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund og proportionalt med det forfulgte hensyn, gennemgik EMD i præmis 30 kriterierne som sammenfattet i Üner- og Maslov-dommene og konstaterede derefter i præmis 31, at den af klageren begåede kriminalitet, som også omfattede narkotikakriminalitet, var alvorlig. I præmis 32 konstaterede EMD, at klageren havde boet næsten 30 år i opholdslandet og havde tidsubgrænset opholdstilladelse, da udvisningsafgørelsen blev endelig.

I præmis 34-36 fandt EMD med hensyn til karakteren af klagerens familieliv med henholdsvis børnene af det tidligere ægteskab, "that the applicant's family ties with his children were not very developed" og med den nuværende ægtefælle, at "Their family life, such as it was, was thus always against the background of pending expulsion proceedings. They separated soon after the marriage. In these circumstances, no decisive weight can be attached to the family relationship with his spouse."

Herefter udtalte EMD i præmis 37 om klagerens tilknytning til opholdslandet:

"The Court also looks for significant relations within the society of the host country (see Trabelsi, cited above, § 62; Mutlag, cited above, § 58; Lukic v. Germany (dec.), no. 25021/08, 20 September 2011) and notes that

apart from mentioning that he went to school and completed a vocational training in Germany in his submissions the applicant submits nothing by way of evidence of his participation in social life apart from the length of his residence. Apart from referring to his children and his former spouse he made reference to the fact that his father, stepmother and siblings live in Germany. He claims that he has contact with his sister, but gives no further details. No information on other social contacts was provided. Therefore, in the present case only few significant relations can be established."

Vedrørende klagerens tilknytning til hjemlandet udtalte EMD i præmis 38:

"As to the applicant's ties to his country of origin, the Court notes that the applicant lived in the former Yugoslavia until 1979, and it appears that he speaks some Serbian, although he claims that he is not able to read or write the language."

I præmis 39 konstaterede EMD, at indrejseforbuddet ikke nødvendigvis behøvede at være permanent, idet klageren kunne søge om at få det tidsbegrænset.

I præmis 40 udtalte EMD, at:

"Against the background of the gravity of the applicant's drug related offence, together with the earlier crimes of violence committed by the applicant, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family and his private life reasonably against the State's interest in preventing disorder and crime. Appreciating the consequences of the expulsion for the applicant, the Court cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to impose this measure."

EMD afviste derefter sagen som *inadmissable*, idet klagen blev vurderet *manifestly ill-founded*.

I sagen *Dalia v. France (1998)* var klageren indrejst i opholdslandet i 1976 eller 1977 i en alder af 17-18 år for at slutte sig til sine forældre og søskende. I 1985 blev hun idømt et års fængsel for narkokriminalitet og udvist fra opholdslandet for bestandig. Hun udrejste til hjemlandet i 1987 og tog ophold hos en tante. I 1989 genindrejste hun i opholdslandet på et gyldigt visum og tog ophold hos sin mor. I 1990 fødte hun et barn med statsborgerskab i både opholdslandet og hjemlandet. EMD udtalte i præmis 53:

"53. The Court notes, as the Commission did, that the applicant arrived in France at the age of 17 or 18 to join the rest of her family and lived there until 1987. She returned in July 1989 with a visa valid for thirty days, on expiry of which she remained in France. Her mother and her seven brothers and sisters live in France. In 1986 she married a French national, by whom she did not have any children; the marriage was dissolved in 1989. In 1990, when the exclusion order was still in force, she gave birth to a child of French nationality. Mrs Dalia's family ties are therefore essentially in France.

Nevertheless, having lived in Algeria until the age of 17 or 18, for two years without her parents (see paragraph 7 above), she has maintained certain family relations, spoken the local language and established social and school relationships. In those circumstances, her Algerian nationality is not merely a legal fact but reflects certain social and emotional links. In short, the interference in issue was not so drastic as that which may

result from the expulsion of applicants who were born in the host country or first went there as young children (see the C. v. Belgium judgment of 7 August 1996, Reports 1996-III, p. 924, § 34).”

EMD lagde endvidere vægt på, at klageren havde født sit barn, mens hun opholdt sig ulovligt i opholdslandet, og at indrejseforbuddet var blevet pålagt som straf for farlig heroinhandel (præmis 54). EMD udtalte videre i præmis 54-55:

“54. […] In view of the devastating effects of drugs on people’s lives, the Court understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge. Irrespective of the sentence passed on her, the fact that Mrs Dalia took part in such trafficking still weighs as heavily in the balance.

55. Having regard to the foregoing, the Court considers that the refusal to lift the exclusion order made against the applicant cannot be regarded as disproportionate to the legitimate aim pursued. There has therefore been no violation of Article 8.”

I sagen *Alam v. Denmark (2017)* var klageren indrejst fra Pakistan som halvandetårig som familiesammenført til sin far. Som 30-årig blev hun idømt 16 års fængsel for manddrab og brandstiftelse og udvist for bestandig. Hun talte udover dansk også engelsk, tysk, pashto, urdu og punjabi. Hendes far var død, men hendes mor og fem søskende boede i Danmark og var danske statsborgere. Klageren havde tidligere været i Pakistan, hvor hun havde to halvsøskende, og hendes mor rejste ofte til Pakistan, hvor hun ejede et hus. Klagerens børn var på tidspunktet for EMD’s behandling af sagen 16 og 13 år gamle. De talte dansk og den ældste også lidt pashto.

EMD udtalte i præmis 33, at:

”*The Court recognises that the City Court made a thorough assessment of the applicant’s personal circumstances, carefully balanced the competing interests and explicitly took into account the criteria set out in the Court’s case-law (see paragraph 18 above**)**. It specifically noted the children’s age, which had significant importance when compared with the sentence imposed (see paragraphs 25 above and 34 below), and found that considerations for the applicant’s children could not lead to another decision. [(…])”*

Om de nationale domstoles vurdering af klagerens tilknytning til opholdslandet, bl.a. på baggrund af skolegang og uddannelse, samt til hjemlandet udtalte EMD videre i præmis 33, at:

”[…] It made an overall assessment, taking into account especially that the applicant had had all her upbringing, schooling and education in Denmark, that she had maintained a real attachment to Pakistan and Pakistani culture, that she had two children in Denmark, and that she had been convicted of very serious crimes. That balancing and proportionality test was approved by the High Court in its judgment of 4 September 2014 (see paragraph 20 above).”

Efter at have gennemgået spørgsmålet om klagerens børns mulige fortabelse af opholdstilladelse i præmis 34, udtalte EMD i præmis 35, at:

”Having regard to the above, the Court has no reason to call into question the conclusions reached by the domestic courts on the basis of the balancing exercise which they carried out. Those conclusions were neither arbitrary nor manifestly unreasonable. The Court is thus satisfied that the interference with the applicant’s

private and family life was supported by relevant and sufficient reasons and that her expulsion would not be disproportionate given all the circumstances of the case. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

EMD udtalte i præmis 45, at:

"As regards the length of the applicant's stay in Switzerland, the Court observes that he arrived in Switzerland in 1989 at the age of nine and lived in Switzerland for more than twenty years. His stay in Switzerland was, thus, of a considerable length of time."

I præmis 46-50 gennemgik EMD klagerens opførsel og domstolsbehandlingen af hans sag efter begåelsen af lovovertrædelsen samt klagerens families forhold, herunder muligheden for klagerens ægtefælle og børn for at tage ophold i klagerens hjemland.

I præmis 51 og 52 gennemgik EMD klagerens tilknytning til henholdsvis opholdslandet og hjemlandet:

"51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'."

EMD udtalte herefter i præmis 53-55:

"53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26

above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Bajsultanov v. Austria (2012)* var klageren meddelt asyl i opholdslandet. Han blev idømt i alt 20 måneders fængsel for bl.a. flere tilfælde af vold samt udvist. EMD fastsatte længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen. Klagerens ægtefælle var meddelt asyl afledt af klagerens forhold og de havde to børn, der på tidspunktet for EMD's behandling af sagen var otte og fem år.

Efter i præmis 79-82 at have konstateret, at udvisningen af klageren udgjorde et indgreb i hans ret til respekt for familieliv, og at dette indgreb var i overensstemmelse med loven og forfulgte et af de legitime hensyn, gennemgik EMD i præmis 83 de generelle principper, som indgår i afvejningen af, om indgrebet var nødvendigt i et demokratisk samfund, jf. kriterierne som sammenfattet i Boultif- og Üner-dommene.

Om karakteren og alvorligheden af den begåede kriminalitet udtalte EMD i præmis 84:

"Turning to the first set of criteria relating to the criminal offences committed by the applicant, the Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks' imprisonment, suspended

with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions."

EMD udtalte i præmis 85 til 87:

"85. As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there.

86. On the other hand, the applicant lived in Chechnya for almost twenty-three years, went to school there and subsequently worked occasionally in different jobs. The applicant's parents and siblings still live in Chechnya, and the applicant has maintained regular contact with his father.

87. The Court therefore considers, in line with the Austrian authorities, that the applicant still has stronger social and cultural ties to his country of origin than to his host country."

I præmis 88-90 gennemgik EMD klagerens familieliv og ægtefællens mulighed for at følge med klageren tilbage til hjemlandet i relation til artikel 3 og i forhold til, om der ville være uoverstigelige hindringer forbundet hermed.

EMD udtalte i præmis 91-92:

"Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken

afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

Vedrørende spørgsmålet om, hvorvidt klageren havde privatliv og familieliv i Nederlandene, udtalte EMD i præmis 47-50:

"47. The Court has further laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, for instance, Konstatinov v. the Netherlands, no. 16351/03, § 52, 26 April 2007, and Z. and T. v. the United Kingdom (dec.), no. 27034/05, ECHR 2006-III). However, it has not insisted on such further elements of dependency in a number of cases concerning young adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; Osman v. Denmark, no. 38058/09, §§ 55-56, 14 June 2011; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019).

48. Even if a person of 26 years of age could still be considered a "young adult", the Court notes that at least in 2011 the applicant was not living full-time with his foster parents anymore (see paragraph 21 above). Moreover, it has not been argued and there is no indication that there are any further elements of dependency between the applicant and his foster parents.

49. The above notwithstanding, the Court deems it not necessary to decide on the question whether or not the ties between the applicant and his foster parents constituted family life within the meaning of Article 8. It reiterates that, in practice, the factors to be examined in order to assess the compatibility with Article 8 of a denial of a right of residence – in so far as those factors are relevant in a particular case – are the same regardless of whether family or private life is engaged (see, mutatis mutandis, A.A. v. the United Kingdom, no. 8000/08, §§ 49 and 57, 20 September 2011).

50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many

authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive

weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Abdi v. Denmark (2021)* var klageren som fireårig indrejst i opholdslandet, hvor også hans forældre og søskende opholdt sig. Han var tidligere idømt tre måneders betinget fængsel for et røveri begået som 15-årig og fire måneders fængsel, heraf tre måneder betinget, for indbrud begået som 17-årig. Efter det fyldte 18. år var han syv gange idømt bødestraf for overtrædelse af lov om euforiserende stoffer. Senest var klageren idømt to et halvt års fængsel og udvist for bestandig for besiddelse af et ladt skydevåben på offentligt sted begået i det år, hvor han fyldte 24 år. Klageren havde ingen familie i oprindelseslandet, talte kun grundlæggende somali og havde ikke besøgt oprindelseslandet siden udrejsen.

I præmis 39-41 udtalte EMD, at den ikke betvivlede, at klageren på tidspunktet for den kriminalitet, der havde ført til udvisningen, udgjorde en alvorlig trussel for den offentlige orden, men at bortset herfra indikerede den pådømte kriminalitet begået efter at klageren var fyldt 18 år ikke, at han generelt udgjorde en trussel for den offentlige orden, og at klageren ikke tidligere var blevet advaret om udvisning eller idømt betinget udvisning. EMD bemærkede videre i præmis 42, at ikke desto mindre – trods fraværet af relevante tidligere domfældelser og advarsler om udvisning og uanset at klageren var blevet idømt en relativt mild straf i den foreliggende sag – havde de danske domstole besluttet at kombinere udvisningen med et permanent indrejseforbud. Herefter udtalte EMD i præmis 43-45:

"43. This observation should also be seen in the light that the applicant arrived in Denmark at a very young age and had lawfully resided there for approximately twenty years. He thus had very strong ties with Denmark, whereas his ties with Somalia were virtually non-existing.

44. The Court is therefore of the view, given all the circumstances of the case, that the expulsion of the applicant combined with a life-long ban on returning was disproportionate (see, notably, Ezzouhdi v. France, cited above, §§ 34-35; Keles v. Germany, cited above, § 66, and Bousarra v. France, cited above, §§ 53-54).

45. There has accordingly been a violation of Article 8 of the Convention."

I sagen *Otite v. the United Kingdom (2022)* blev klageren idømt fire år og otte måneders fængsel for økonomisk kriminalitet og udvist for bestandig. Klageren var indrejst som 31-årig som familiesammenført til sin ægtefælle, der havde oprindelse i samme land som klageren, og som ligesom parrets tre børn i alderen 12, 17 og 19 år var statsborger i opholdslandet. Klageren havde på tidspunktet for dommen opholdt sig i opholdslandet i 19 år. Han havde været på fri fod i 11 år og havde i fire af de 11 år været involveret i kriminalitet. Familien havde efter det oplyste ikke besøgt klageren under afsoningen.

I præmis 49 gennemgik EMD kriminalitetens alvor og lagde vægt på, at klageren over en fireårig periode havde drevet en dokumentfabrik, hvilket havde involveret et stort antal ofre og betragtelige pengebeløb, og at han ikke havde erkendt overtrædelsernes påvirkning og konsekvenser for ofrene og samfundet, ligesom der var betragtelig risiko for, at han ville fortsætte med at opføre sig som før.

I præmis 52-54 gennemgik EMD indgrebets mulige betydning for klagerens familieliv, herunder børnenes alder og deres manglende kontakt med klageren under hans afsoning, ægtefællens tilknytning til opholdslandet i form af familiemedlemmer og sociale bånd, som ville kunne udgøre et støttende netværk i tilfælde

af klagerens udsendelse, ligesom familien allerede havde klaret sig uden klageren under hans langvarige afsoning. Endvidere fandtes familien at kunne tage ophold i klagerens hjemland, hvor ægtefællen havde rødder og hvor børnene ville kunne få statsborgerskab. Endelig ville familien besøge klageren i hjemlandet og holde kontakt via telefon og internet.

Om klagerens egen tilknytning til hjemlandet udtalte EMD i præmis 54:

"*54. […] Furthermore, the applicant only left Nigeria when he was thirty-one years old (see paragraph 5 above), and there is no evidence to suggest that he no longer has family, social, cultural and linguistic ties there (see, for example, Külekci, cited above, § 50).*"

Herefter konkluderede EMD i præmis 56-57:

"56. The foregoing considerations are sufficient to enable the Court to conclude that the strength of the applicant's family and private life in the United Kingdom is not such as to outweigh the public interest in his deportation.

57. Accordingly, his deportation would not violate Article 8 of the Convention."

Der kan endvidere henvises til følgende sager:

- *Loukili v. the Netherlands (2023)*.
- *Azzaqui v. the Netherlands (2023)*.
- *Sharifi v. Denmark (2023)*.
- *Al-Masudi v. Denmark (2023)*.
- *Noorzae v. Denmark (2023)*.
- *Goma v. Denmark (2023)*.

4.2.11.2. Mindre alvorlig kriminalitet

I sagen *Jakupovic v. Austria (2003)* blev klageren to gange idømt fængselsstraf af henholdsvis fem måneders og ti ugers varighed, begge udsat i en prøveperiode på tre år, for mindre alvorlig kriminalitet, herunder indbrud og tyveri. Han blev endvidere udvist med indrejseforbud i ti år. Klageren var indrejst i opholdslandet som 11-årig og var på tidspunktet, hvor udvisningsafgørelsen blev endelig, 16 år. Han blev udsendt det samme år, som han fyldte 18 år.

I præmis 28-30 udtalte EMD:

"28. The Court observes that at the time of the expulsion the applicant had not been in Austria for a long time – just four years. Furthermore his situation was not comparable to that of a second generation immigrant, as he had arrived in Austria at the age of eleven, had previously attended school in his country of origin and must therefore have been well acquainted with its language and culture. However, the residence prohibition seriously upset his private and family life: he had arrived in Austria with his brother to join his mother and the new family she had founded there and has apparently no close relatives in Bosnia. The applicant's father remained in Bosnia, a fact which is emphasised by the Government, but the applicant points out that he last saw his father in 1988 and the father has been reported missing since the end of the armed conflict in that country.

29. Thus, the Court considers that very weighty reasons have to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which has recently experienced a period of armed conflict with all its adverse effects on living conditions and with no evidence of close relatives living there.

30. The Government rely in this respect on the applicant's criminal record. The Court finds that this record, which is the essential element of justification for the expulsion, must be examined very carefully. It consists of two convictions for burglary. The Court cannot find that these convictions – even taking into account a further set of criminal proceedings which were discontinued after the victim had been compensated by the applicant – for which the Austrian courts had only imposed conditional sentences of imprisonment can be considered particularly serious as these offences did not involve elements of violence. The only element which may indicate any tendency of the applicant towards violent behaviour was a prohibition to possess arms issued in May 1995. Although the seriousness of such a measure should not be underestimated, it cannot be compared to a conviction for an act of violence, and there is no indication that such charges have ever been brought against the applicant."

EMD udtalte i præmis 32, at:

"Taking all the above elements into account, the Court finds that by imposing the residence prohibition in the particular circumstances of the case, the Austrian authorities have overstepped their margin of appreciation under Article 8 as the reasons in support of the necessity of the residence prohibition are not sufficiently weighty. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued."

I sagen *Maslov v. Austria (2008)* var klageren indrejst i opholdslandet som seksårig og var blevet udvist på grund af kriminalitet i form af mere end 40 kvalificerede indbrud, nogle i forbindelse med banderelationer, brugstyveri af køretøj og et enkelt tilfælde af vold. Klageren var mindreårig, da han begik disse forhold, og da afgørelsen om udvisning blev endelig. Medlemsstaten havde begrundet udvisningen med hensynet til forebyggelse af uro og forbrydelse. Klageren blev efterfølgende udsendt i en alder af 19 år. Klageren havde på dette tidspunkt ikke stiftet egen familie.

Efter i præmis 66 og 67 at have fastslået, at udvisningen var i overensstemmelse med loven og forfulgte et af de legitime hensyn, vurderede EMD, om indgrebet var nødvendigt i et demokratisk samfund. EMD henviste til de fundamentale principper, som er sammenfattet i Üner-dommen, og udtalte i præmis 70-75:

"70. The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Moreover, it has to be borne in mind that where, as in the present case, the interference with the applicant's rights under Article 8 pursues, as a legitimate aim, the "prevention of disorder or crime" (see paragraph 67 above), the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities.

71. In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family of his own, the relevant criteria are
– the nature and seriousness of the offence committed by the applicant;
– the length of the applicant's stay in the country from which he or she is to be expelled;

– the time elapsed since the offence was committed and the applicant's conduct during that period; and
– the solidity of social, cultural and family ties with the host country and with the country of destination.

72. The Court would also clarify that the age of the person concerned can play a role when applying some of the above criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult (see, for instance, Moustaquim v. Belgium, 18 February 1991, § 44, Series A no. 193, and Radovanovic v. Austria, no. 42703/98, § 35, 22 April 2004).

73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec(2000)15 and Rec(2002)4 (see paragraphs 34-35 above).

74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see Üner, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there (see Üner, § 58 in fine).

75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

Herefter gennemgik EMD i præmis 77-80 karakteren og alvorligheden af den af klageren begåede kriminalitet og udtalte i præmis 81 blandt andet:

"81. In the Court's view, the decisive feature of the present case is the young age at which the applicant committed the offences and, with one exception, their non-violent nature. This also clearly distinguishes the present case from Boultif and Üner […]."

I denne sammenhæng gennemgik EMD i præmis 82-83 de situationer, hvor princippet om barnets tarv skal finde anvendelse, og hvilke forpligtelser anvendelsen af dette princip indebærer.

I præmis 84-85 udtalte EMD om forskellen i vurderingen af sager, hvor en mindreårig har begået ikke-voldelig kriminalitet, over for sager, hvor mindreårige har begået meget alvorlige voldelige forbrydelser:

"84. In sum, the Court sees little room for justifying an expulsion of a settled migrant on account of mostly non-violent offences committed when a minor (see Moustaquim, cited above, § 44, concerning an applicant who had been convicted of offences committed as a juvenile, namely numerous counts of aggravated theft, one count each of handling stolen goods and destruction of a vehicle, two counts of assault and one count of threatening behaviour, and Jakupovic v. Austria, no. 36757/97, § 27, 6 February 2003, in which the exclusion

order was based on two convictions for burglary committed when a minor and where, in addition, the applicant was still a minor when he was expelled).

85. Conversely, the Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Bouchelkia, cited above, § 51, where the Court found no violation of Article 8 as regards a deportation order made on the basis of the applicant's conviction of aggravated rape committed at the age of 17; in the decisions Hizir Kilic v. Denmark (dec.), no. 20277/05, and Ferhat Kilic v. Denmark (dec.), no. 20730/05, both of 22 January 2007, the Court declared inadmissible the applicants' complaints about exclusion orders imposed following their convictions for attempted robbery, aggravated assault and manslaughter committed at the age of 16 and 17 respectively)."

EMD konstaterede i præmis 86:

"The applicant came to Austria in 1990, at the age of six, and spent the rest of his childhood and youth there. He was lawfully resident in Austria with his parents and siblings and was granted a permanent-settlement permit in March 1999."

I præmis 87-95 gennemgik EMD den forløbne tid efter begåelsen af kriminaliteten og klagernes opførsel i den periode.

Vedrørende fastheden af de sociale, kulturelle og familiære bånd i opholdslandet og i hjemlandet, udtalte EMD i præmis 96-97:

"96. The Court observes that the applicant spent the formative years of his childhood and youth in Austria. He speaks German and received his entire schooling in Austria where all his close family members live. He therefore has his principal social, cultural and family ties in Austria.

97. As to the applicant's ties with his country of origin, the Court notes that he has convincingly explained that he did not speak Bulgarian at the time of his expulsion as his family belonged to the Turkish minority in Bulgaria. It was not disputed that he was unable to read or write Cyrillic as he had never gone to school in Bulgaria. It has not been shown, nor even alleged, that he had any other close ties with his country of origin."

Endelig forholdt EMD sig i præmis 98 til varigheden af det meddelte indrejseforbud.

EMD konkluderede i præmis 100 og 101, at:

"100. Having regard to the foregoing considerations, in particular the – with one exception – non-violent nature of the offences committed when a minor and the State's duty to facilitate his reintegration into society, the length of the applicant's lawful residence in Austria, his family, social and linguistic ties with Austria and the lack of proven ties with his country of origin, the Court finds that the imposition of an exclusion order, even of a limited duration, was disproportionate to the legitimate aim pursued, 'the prevention of disorder or crime'. It was therefore not 'necessary in a democratic society'.

101. Consequently, there has been a violation of Article 8 of the Convention."

I sagen *Miah v. the United Kingdom (2010)* indrejste klageren i opholdslandet som 11-årig og tog ophold hos sin far, dennes nye ægtefælle samt sine to brødre. Da klageren var 14 år gammel, døde faren. Som 19-årig

blev han idømt to års fængsel på en institution for ungdomskriminelle for indbrud og tyveri. Klageren blev efterfølgende flere gange idømt bøder for bl.a. tyveri. Da klageren var 26 år gammel, blev han idømt 12 måneders fængsel for tyveri, og samme år blev han udvist. Klageren havde indtil fængslingen boet hjemme hos stedmoren og havde til hensigt at flytte hjem igen efter løsladelsen. Klageren blev året efter udsendt til Bangladesh.

Efter at have gengivet Storkammerets vurderinger i *Maslov*-dommen, udtalte EMD i præmis 25:

"Turning to the present case, the Court accepts that the applicant has spent a significant period of time in the United Kingdom and that the majority of his social, cultural and family ties are there rather than in Bangladesh. However, despite the relatively young age at which he arrived in the United Kingdom, the Court is not persuaded that he has severed all links to Bangladesh. His mother still lives Bangladesh and, as the Tribunal found, he would be able to rely on her and any extended family for support. In contrast to Mr Maslov, the present applicant speaks the language of his country of origin. Although both Mr Maslov and the applicant were convicted of mostly non-violent offences, the applicant's offences are of a quite different character. With the exception of the first burglary offence, they were all committed when the applicant was an adult and there cannot be the same duty to facilitate the reintegration of an adult offender rather than deport him as there would be for a juvenile offender who is convicted of the same offences. The applicant's offences appear to have been committed in order to fund a drug addiction, a factor which must go some way to mitigating if not the seriousness of the offences then at least the sentences imposed. Indeed, the domestic courts have made efforts to rehabilitate the applicant by imposing a series of non-custodial sentences. Nonetheless, by the time of the final offence, they were entitled to take the view that further such efforts would be inappropriate. Therefore, while the applicant is correct to observe that his final sentence of twelve months' imprisonment was at the lower end of the scale to which a presumption in favour of deportation would apply, the domestic authorities were entitled to take into account that this was the last in a series of offences and that the applicant had failed to respond to other, less severe sentences. Finally, while the duration of the deportation imposed on the applicant is of the same duration as that imposed in Maslov, it does not exclude him from the United Kingdom for as much time as he spent there and does not do so for a decisive period in his life. The Court therefore finds that the domestic authorities have not exceeded the margin of appreciation afforded to them in such cases. A fair balance has been struck in this case and the Court therefore agrees with the Tribunal that the applicant's deportation was proportionate to the legitimate aim pursued. Accordingly, this part of the application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention."

EMD afviste derefter sagen som inadmissible.

I sagen *Emre v. Schweiz (2008)* var klageren indrejst i opholdslandet som femårig sammen med sine forældre. Klageren blev flere gange dømt for kriminalitet, herunder kriminalitet begået mens han var mindreårig, og blev som 22-årig udvist.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det kortfattede Press Release issued by the Registrar af 22. maj 2008, der er gengivet i sin helhed i afsnit 4.2.1.2. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

EMD gentog i dommens præmis 69 det ovennævnte princip om betydningen af længden af opholdet, som blandt andet kom til udtryk i Üner-dommens præmis 58[21], og uddybede i forlængelse heraf i præmis 70 (uofficiel dansk oversættelse):

"Domstolen har understreget vigtigheden af dette sidste punkt med hensyn til immigranter, der har tilbragt størstedelen af deres liv i værtslandet. I et sådant tilfælde bør det reelt bemærkes, at de modtog deres uddannelse der, fik størstedelen af deres sociale tilknytninger der og derfor udviklede deres identitet der. Da de er født eller ankommet til værtslandet på grund af deres forældres emigration, har de normalt deres vigtigste familiemæssige tilknytning der. Nogle af disse immigranter har endog kun bevaret nationalitetstilknytningen til fødelandet (Benhebba mod Frankrig, nr. 53441/99, præmis 33, 10. juli 2003, Mehemi, nævnt ovenfor, præmis 36, og Boujlifa, nævnt ovenfor, s. 2264, præmis 44, og, a contrario, Bouchelkia mod Frankrig, dom af 29. januar 1997, Samlingen af domme og afgørelser 1997- I, og Baghli mod Frankrig, nr. 34374/97, EMD 1999-VIII, nævnt ovenfor, henholdsvis præmis 50 og præmis 48)."

I præmis 77 og 79 gennemgik EMD varigheden af klagerens ophold i opholdslandet og fastheden af klagerens sociale, kulturelle og familiemæssige tilknytning til værtslandet.

Herefter udtalte EMD i præmis 80 om fastheden af klagerens sociale, kulturelle og familiemæssige tilknytning til hjemlandet (uofficiel dansk oversættelse):

"Sammenlignet med disse forhold, der til trods for klagers kriminelle aktivitet viser en vis integration i Schweiz, forekommer de sociale, kulturelle og familiemæssige tilknytninger, som han opretholder til Tyrkiet, at være meget ubetydelige. Det fremgår af sagsakterne, at klager kun har opholdt sig 1½ måned i landet i juni og juli 2002, og at kun hans bedstemor stadig bor der. Domstolen er ikke overbevist om, at det korte ophold i Tyrkiet efter klagers første udsendelse, – en foranstaltning, der anfægtes i nærværende klage, kan tages i betragtning. Det er desuden ikke sikkert, at klager har et tilstrækkeligt kendskab til det tyrkiske sprog. Selv om forholdet mellem forældre og voksne børn ikke er omfattet af beskyttelsen i artikel 8 uden påvisning af "yderligere afhængighedsforhold mellem dem ud over almindelige følelsesmæssige bånd" (jf. mutatis mutandis, Kwakye-Nti og Dufie mod Nederlandene (dec.), nr. 311519/96, 7. november 2000), bemærker Domstolen ligeledes, at forbundsdomstolen selv erkendte, at klagers familiemæssige tilknytning til Tyrkiet var meget mindre betydningsfuld end hans tilknytning til værtslandet. Domstolen har i øvrigt på ingen måde rejst tvivl om, at klager ville "få betydelige vanskeligheder, hvis han vendte tilbage til Tyrkiet"."

I præmis 81-83 gennemgik EMD "Særlige forhold i sagen: sagens medicinske aspekt".

Endelig gennemgik EMD i præmis 84-85 opholdsforbuddet i opholdslandet.

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[21] *"Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there."*

EMD konkluderede i præmis 86-87 (uofficiel dansk oversættelse):

"86. I betragtning af ovenstående og navnlig den relative grovhed [alvorlighed, red.] af domfældelserne mod klager, hans svage tilknytning til hjemlandet og den endelige karakter af udsendelsesforanstaltningen finder Domstolen, at den indklagede stat ikke kan anses for at have foretaget en rimelig afvejning mellem klagers og hans families interesser på den ene side og statens egen interesse i at kontrollere indvandringen på den anden.

87. Der er følgelig sket en krænkelse af artikel 8."

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis 5 og 6 måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden.

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som f.eks. narkotikahandel.

I præmis 61 gennemgik EMD klagerens tilknytning til opholdslandet.

I præmis 62 udtalte EMD om klagerens tilknytning til hjemlandet:

"On the other hand, the Court is not persuaded that the applicant has become so estranged from the country where he spent the first ten years of his life that he would no longer be able to settle in Turkey, having regard to the fact that the applicant married his Turkish wife in Turkey, where their first son was born and that his wife and son did not follow him to Germany until 1989. It follows that the applicant must have entertained certain links to his country of origin at least until 1989. It can further be presumed that the applicant is familiar with the Turkish language, as he married a Turkish wife."

EMD gennemgik herefter i præmis 63-64 spørgsmålet om, hvorvidt klagerens ægtefælle og børn med rimelighed kunne forventes at følge med klageren til hjemlandet, og fandt, at børnene ville møde store vanskeligheder ved omplantning til det tyrkiske skolesystem. I præmis 65 gennemgik EMD spørgsmålet om den manglende tidsbegrænsning i klagerens indrejseforbud. Endelig udtalte EMD i præmis 66, at:

"The Court considers that the applicant's expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant's children could be expected to face if they followed him to Turkey, the Court considers that an unlimited exclusion from the German territory violates the applicant's rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention."

I sagen *Yildiz v. Austria (2002)* var den første klager indrejst i opholdslandet som 14-årig for at bo sammen med sine forældre og sine søskende. Han indledte et forhold til den anden klager, som var statsborger i den første klagers hjemland, men født og opvokset i opholdslandet. Nogle måneder senere traf opholdslandet afgørelse om udvisning af den første klager med indrejseforbud i fem år på baggrund af flere bødestraffe for tyveri og færdselslovsovertrædelser. Da udvisningsafgørelsen blev endelig, havde klagerne sammen fået et barn, den tredje klager. Klageren udrejste til hjemlandet, da barnet var knap to år gammelt. På tidspunktet for EMD's behandling af sagen boede han fortsat i hjemlandet. Den anden og tredje klager besøgte ham jævnligt, indtil parret blev skilt.

EMD udtalte i præmis 43, at:

"The Court will first examine the applicants' family situation and the length of their stay in Austria. It observes that the first applicant is not a second generation immigrant, i.e. a person who was born or has lived the main part of his life in the country from which he is going to be removed. He only came to Austria in 1989 at the age of fourteen and must therefore have links with his country of origin and in particular be able to speak Turkish. On the other hand, he was still an adolescent when he came to Austria, where his close family was and is still living. In December 1996, when the Administrative Court confirmed the residence ban against him, he had been living in Austria for seven years, he had been working there and had been co-habiting for a little less than three years with the second applicant, who is also a Turkish national but was born in Austria and has lived there all her life. Their daughter, the third applicant, was one year and four months old at the material time. In fact, the Austrian authorities issuing the residence ban acknowledged that the first applicant had reached a high degree of integration in Austria. Nevertheless, the Court considers that, as regards the possible effects of the residence ban on his family life, the authorities failed to establish whether the second applicant could be expected to follow him to Turkey, in particular whether she spoke Turkish and maintained any links, other than her nationality, with that country."

I præmis 44 fastslog EMD, at vurderingen af, om indrejseforbuddet udgjorde en krænkelse af artikel 8, skulle foretages på baggrund af de forhold, der gjorde sig gældende, da indrejseforbuddet blev endeligt, uanset at klagerne efterfølgende var blevet skilt, og deres familiesituation således var anderledes på tidspunktet for EMD's behandling af sagen. I præmis 45- 46 udtalte EMD:

"45. Next, the Court will turn to the offences committed by the first applicant, as their gravity is an essential element for assessing the proportionality of the interference with the applicants' family life. The Court notes that in 1993 the first applicant, who was then still a minor, was convicted twice by the criminal courts, once for shop-lifting with a sentence of three days' imprisonment suspended on probation, and once for theft without a sentence being pronounced. Between 1992 and April 1994 he was convicted seven times of traffic offences, in particular driving without a license and once ignoring a red light and high speeding. The fines imposed on him amounted to a total sum of ATS 28,000 (equivalent to EUR 2,035). In sum, the Court finds that these offences were not negligible. However, as is shown by the modest penalties imposed, the domestic authorities considered them to be of a minor nature. Moreover, the first applicant did not commit any further offences between April 1994 and December 1996, when the residence ban proceedings were terminated. Thus, in the Court's view the authorities' fear that he constituted a danger to public order and security in that would commit further offences is mitigated by the particular circumstances of the case (see Boultif v. Switzerland, cited above, § 51, with further references).

46. Having regard to all these elements, the Court considers that the authorities failed to strike a fair balance between the different interests involved and that the interference with the applicants' right to respect for their family life was not proportionate to the legitimate aim pursued.

Accordingly, there has been a breach of Article 8 of the Convention."

4.2.11.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende deres opholdstilladelse, da klagerne var blevet myndige.

EMD udtalte i præmis 76, at:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly,

on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

[citat af præmis 68-70 i Nunez-dommen, red.]"

På den baggrund gennemgik EMD i præmis 79-85 de hensyn af immigrationspolitisk karakter, som kan tale for at identificere børn med deres forældres handlinger i svigssager, medmindre der foreligger ekstraordinære omstændigheder, og vurderingen heraf i den konkrete sag. De nævnte præmisser er indsat i afsnittene 4.2.1.3 og 4.2.1.4.

I præmis 86-87 udtalte EMD:

"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 udtalte EMD:

"88. In contrast, the applicants' links to Pakistan were not particularly strong, bearing in mind the timing and duration of their residence there. They had not seen their father since returning to Norway in 1996 and their mother had died. Neither the fact that the applicants should have inherited a part of a house from their mother, currently occupied by their father, nor that they might be familiar with another uncle living in the same area as their father, nor any other factors, point to any solid links to Pakistan as suggested by the Government. According to the applicants they were unable to write Urdu and were speaking a "childish" Urdu. They both mastered English well, which was an official language in Pakistan. Although the applicants still had certain links to Pakistan and there would not appear to be insurmountable obstacles to them returning to the country, they might, as found by the High Court, encounter social and professional difficulties if they were to do so (see paragraph 36 above)."

I præmis 89 gennemgik EMD betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

4.2.11.4. Ulovligt ophold

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende deres opholdstilladelse, da klagerne var blevet myndige.

EMD udtalte i præmis 76, at:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

[citat af præmis 68-70 i Nunez-dommen, red.]"

På den baggrund gennemgik EMD i præmis 79-85 de hensyn af immigrationspolitisk karakter, som kan tale for at identificere børn med deres forældres handlinger i svigssager, medmindre der foreligger ekstraordinære omstændigheder, og vurderingen heraf i den konkrete sag. De nævnte præmisser er indsat i afsnittene 4.2.1.3 og 4.2.1.4.

I præmis 86-87 udtalte EMD:

"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 udtalte EMD:

"88. In contrast, the applicants' links to Pakistan were not particularly strong, bearing in mind the timing and duration of their residence there. They had not seen their father since returning to Norway in 1996 and their mother had died. Neither the fact that the applicants should have inherited a part of a house from their mother, currently occupied by their father, nor that they might be familiar with another uncle living in the same area as their father, nor any other factors, point to any solid links to Pakistan as suggested by the Government. According to the applicants they were unable to write Urdu and were speaking a "childish" Urdu. They both mastered English well, which was an official language in Pakistan. Although the applicants still had certain links to Pakistan and there would not appear to be insurmountable obstacles to them returning to the country, they might, as found by the High Court, encounter social and professional difficulties if they were to do so (see paragraph 36 above)."

I præmis 89 gennemgik EMD betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

Sagen *Gezginci v. Switzerland (2010)* omhandlede såvel ulovligt ophold som nægtelse af forlængelse af opholdstilladelse. EMD har i et *legal summary* karakteriseret klagerens ophold i opholdslandet som *long term illegal immigration*, hvorfor sagen er placeret i dette afsnit. Dommen foreligger ikke på engelsk i en officiel oversættelse, hvorfor hele EMD´s *legal summary* er citeret herunder:

"Judgment 9.12.2010 [Section I]
Article 8
Expulsion
Deportation order against long-term illegal immigrant: deportation would not constitute a violation
Facts – The applicant is a Turkish national who has lived in Switzerland since 1978, on the basis of residence permits from 1980 to 1998 and unlawfully during the remaining periods. In 1997 the national authorities decided not to renew his residence permit. A few months later they set March 1999 as the deadline for his deportation from Switzerland. However, the applicant did not leave the country. In 2003, after a serious work-related accident, he applied for a residence permit on humanitarian grounds. The authorities refused the application. Shortly afterwards his wife disappeared without trace, leaving him to care for their eleven-year-old daughter. The applicant lodged several unsuccessful appeals against the deportation order, which is still in force.
Law – Article 8: In view of the applicant's very long-standing residence in Switzerland, the refusal to grant him a residence permit on humanitarian grounds amounted to interference with his right to respect for his private life. That interference had been in accordance with the law and had pursued the legitimate aims of ensuring the economic well-being of the country, preventing disorder or crime and protecting the rights and freedoms of others. In order to determine whether it had been necessary in a democratic society, a number of factors had to be taken into consideration. First of all, the applicant's convictions between 1982 and 1992 had not been very serious and since 1993 his conduct did not appear to have been open to criticism from a purely criminal-law standpoint. Next, the applicant had lived in Switzerland for approximately thirty years, not counting periods spent abroad, thanks to the considerable tolerance shown by the authorities since 1999. Furthermore, some members of the applicant's family still lived in Turkey and would be able to help him resettle there and find work; he also spoke Turkish fluently. Similar considerations would apply were he to opt for Romania, a country which he knew from visits, where his wife lived and his daughter had spent much of her life, and where he appeared to have been in gainful employment. Furthermore, it was clear from his attitude that he was unable and unwilling to find employment in Switzerland. As to his daughter, given that she had spent most of her life in Romania and Turkey, was a citizen of both countries and probably spoke both languages, she could reasonably be expected to be able to adjust if she returned there. Lastly, the applicant's health was not liable to significantly hinder his integration in Turkey, given that he would have access there to the necessary medicines and treatment and would undoubtedly receive an invalidity pension. Accordingly, regard being had in particular to the fact that the applicant had been residing unlawfully in Switzerland since 1997, his lack of willingness to integrate there, his failure to abide by the rules of the country and the fact that his ties with his country of origin did not appear to have been completely severed, the respondent State could be said to have struck a fair balance between the interests of the applicant and his daughter on the one hand and its own interest in controlling immigration on the other.
Conclusion: the applicant's deportation would not amount to a violation (five votes to two)." [Understreget her, red.]

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og

klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

Vedrørende spørgsmålet om, hvorvidt klageren havde privatliv og familieliv i Nederlandene, udtalte EMD i præmis 47-50:

"47. The Court has further laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, for instance, Konstatinov v. the Netherlands, no. 16351/03, § 52, 26 April 2007, and Z. and T. v. the United Kingdom (dec.), no. 27034/05, ECHR 2006-III). However, it has not insisted on such further elements of dependency in a number of cases concerning young adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; Osman v. Denmark, no. 38058/09, §§ 55-56, 14 June 2011; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019).

48. Even if a person of 26 years of age could still be considered a "young adult", the Court notes that at least in 2011 the applicant was not living full-time with his foster parents anymore (see paragraph 21 above). Moreover, it has not been argued and there is no indication that there are any further elements of dependency between the applicant and his foster parents.

49. The above notwithstanding, the Court deems it not necessary to decide on the question whether or not the ties between the applicant and his foster parents constituted family life within the meaning of Article 8. It reiterates that, in practice, the factors to be examined in order to assess the compatibility with Article 8 of a denial of a right of residence – in so far as those factors are relevant in a particular case – are the same regardless of whether family or private life is engaged (see, mutatis mutandis, A.A. v. the United Kingdom, no. 8000/08, §§ 49 and 57, 20 September 2011).

50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said

that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

4.2.11.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Osman v. Denmark (2011)* ansås klagerens opholdstilladelse i medlemsstaten som bortfaldet som følge af hendes langvarige ophold i familiens tidligere opholdsland Kenya. Klageren, der var somalisk statsborger, havde boet i Kenya fra hun var tre-fire år, indtil hun som syvårig indrejste i opholdslandet som familiesammenført. Hun havde herefter opholdt sig i opholdslandet, indtil hun som 15-årig af forældrene blev sendt tilbage til Kenya. Kort tid før hun fyldte 18 år, kontaktede klageren den danske ambassade i Kenya med henblik på at kunne vende tilbage til sin familie i opholdslandet, hvilket blev afslået af de danske myndigheder. Hun indrejse herefter som 19-årig i medlemsstaten, hvor hun ikke længere havde lovligt ophold.

I præmis 60-61 konstaterede EMD, at:

"60. The Court observes that the applicant spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old. She speaks Danish and received schooling in Denmark until August 2002. Her divorced parents and older siblings live in Denmark. The applicant therefore had social, cultural and family ties in Denmark.

61. The applicant also had social, cultural and family ties in Kenya and Somalia. She was born in Somalia and lived there from 1987 to 1991. She resided in Kenya from 1991 to 1995. The applicant spoke Somali. It was unclear whether the applicant had family in Somalia but certain that she had family in Kenya. The applicant returned to Kenya in 2003 and took care of her parental grandmother. Her application in August 2005 to re-enter Denmark was refused but she re-entered the country illegally, apparently in June 2007. The applicant's father was a recognised refugee from Somalia. He visited Kenya at least twice, namely in 2003 and 2005. The second time he remarried there. There was no indication that the applicant's mother could not enter Somalia and Kenya."

EMD forholdt sig ikke udtrykkeligt til betydningen af klagerens sprogkundskaber fra hjemlandet. Om betydningen af klagerens tidligere lovlige ophold i opholdslandet udtalte EMD imidlertid i præmis 65:

"It also reiterates that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in a host country, very serious reasons are required to justify expulsion (see, Maslov v. Austria [GC],

quoted above, § 75). In the present case the applicant was refused restoration of her lapsed residence permit, as opposed to being expelled due to having committed a crime. Nevertheless, it is undisputed that she spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old, that she spoke Danish, that she had received schooling in Denmark until August 2002, and that all her close family remained in Denmark. In these circumstances, the Court also considers that very serious reasons were required to justify the authorities' refusal to restore the applicant's residence permit, when she applied from Kenya in August 2005."

EMD fandt blandt andet under henvisning til klagerens tilknytning til opholdslandet og hensynet til barnets tarv ("interest"), herunder barnets selvstændige ret til respekt for sit privat- og familieliv:

"76. Having regard to all the above circumstances, it cannot be said that the applicant's interests have sufficiently been taken into account in the authorities' refusal to reinstate her residence permit in Denmark or that a fair balance was struck between the applicants' interests on the one hand and the State's interest in controlling immigration on the other.

77. There has accordingly been a violation of Article 8 of the Convention."

4.2.12. Klagerens personlige, sociale og/eller kulturelle tilknytning til hjemlandet

EMD har i flere sager lagt vægt på klagerens forbindelse til hjemlandet i form af personlig, social og/eller kulturel tilknytning.

Som anført i afsnit 3.3.3.2 afhænger vægtningen af de enkelte elementer i proportionalitetsafvejningen af de konkrete omstændigheder i hver enkelt sag, se f.eks. Maslov v. Austria (2008), hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[22] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

4.2.12.1. Alvorlig kriminalitet

I sagen *Üner v. the Netherlands (2006)* blev klageren idømt syv års fængsel for drab og udvist for bestandig. Klageren var indrejst som 12-årig sammen med sin mor og sine søskende som familiesammenført til faren. På tidspunktet, hvor afgørelsen om udvisning blev endelig, havde han opholdt sig 17 år i opholdslandet og havde to mindreårige børn med sin nederlandske partner. Han var flyttet fra partneren efter halvandet års samliv, da det ældste barn var omkring ni måneder gammel, men forblev i tæt kontakt med partneren og barnet i de følgende omkring otte måneder indtil fængslingen. Partneren og det ældste barn besøgte klageren i fængslet mindst en gang om ugen og ofte hyppigere. Mens klageren var fængslet, fik parret endnu et barn, som klageren ligeledes så hver uge. Klageren havde på tidspunktet for EMD´s afgørelse opholdt sig 25 år i opholdslandet.

EMD fastslog i præmis 61, at der forelå et indgreb både i klagerens ret til respekt for familieliv og hans ret til respekt for privatliv. EMD udtalte imidlertid:

"[...] Even so, having regard to the particular issues at stake in the present case and the positions taken by the parties, the Court will pay special attention to the applicant's right to respect for his family life."

EMD udtalte i præmis 62, at:

"The Court considers at the outset that the applicant lived for a considerable length of time in the Netherlands, the country that he moved to at the age of 12 together with his mother and brothers in order to join his father,

[22] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

and where he held a permanent residence status. Moreover, he subsequently went on to found a family there. In these circumstances, the Court does not doubt that the applicant had strong ties with the Netherlands. That said, it cannot overlook the fact that the applicant 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. As the Chamber put it in paragraph 46 of its judgment, "... the disruption of their family life would not have the same impact as it would [have had] if they had been living together as a family for a much longer time". Moreover, while it is true that the applicant came to the Netherlands at a relatively young age, the Court is not prepared to accept that he had spent so little time in Turkey that, at the time he was returned to that country, he no longer had any social or cultural (including linguistic) ties with Turkish society."

I præmis 63-65 forholdt EMD sig til den begåede kriminalitet, tidspunktet for prøveløsladelse, klagerens børns alder og deres og ægtefællens statsborgerskab i opholdslandet i forhold til muligheden for at følge med klageren til dennes hjemland samt det pålagte indrejseforbuds varighed. EMD udtalte i præmis 67:

"In the light of the above, the Court finds that a fair balance was struck in this case in that the applicant's expulsion and exclusion from the Netherlands were proportionate to the aims pursued and therefore necessary in a democratic society.

Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Dalia v. France (1998)* var klageren indrejst i opholdslandet i 1976 eller 1977 i en alder af 17-18 år for at slutte sig til sine forældre og søskende. I 1985 blev hun idømt et års fængsel for narkokriminalitet og udvist fra opholdslandet for bestandig. Hun udrejste til hjemlandet i 1987 og tog ophold hos en tante. I 1989 genindrejste hun i opholdslandet på et gyldigt visum og tog ophold hos sin mor. I 1990 fødte hun et barn med statsborgerskab i både opholdslandet og hjemlandet. EMD udtalte i præmis 53:

"53. The Court notes, as the Commission did, that the applicant arrived in France at the age of 17 or 18 to join the rest of her family and lived there until 1987. She returned in July 1989 with a visa valid for thirty days, on expiry of which she remained in France. Her mother and her seven brothers and sisters live in France. In 1986 she married a French national, by whom she did not have any children; the marriage was dissolved in 1989. In 1990, when the exclusion order was still in force, she gave birth to a child of French nationality. Mrs Dalia's family ties are therefore essentially in France.

Nevertheless, having lived in Algeria until the age of 17 or 18, for two years without her parents (see paragraph 7 above), she has maintained certain family relations, spoken the local language and established social and school relationships. In those circumstances, her Algerian nationality is not merely a legal fact but reflects certain social and emotional links. In short, the interference in issue was not so drastic as that which may result from the expulsion of applicants who were born in the host country or first went there as young children (see the C. v. Belgium judgment of 7 August 1996, Reports 1996-III, p. 924, § 34)."

EMD lagde endvidere vægt på, at klageren havde født sit barn, mens hun opholdt sig ulovligt i opholdslandet, og at indrejseforbuddet var blevet pålagt som straf for farlig heroinhandel (præmis 54). EMD udtalte videre i præmis 54-55:

"54. […] In view of the devastating effects of drugs on people's lives, the Court understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge. Irrespective of the sentence passed on her, the fact that Mrs Dalia took part in such trafficking still weighs as heavily in the balance.

55. Having regard to the foregoing, the Court considers that the refusal to lift the exclusion order made against the applicant cannot be regarded as disproportionate to the legitimate aim pursued. There has therefore been no violation of Article 8."

I sagen *A.W. Khan v. the United Kingdom (2010)* var klageren indrejst i opholdslandet som treårig og var meddelt tidsubegrænset opholdstilladelse. Han blev som 28-årig idømt syv års fængsel for narkotikakriminalitet, men blev løsladt efter tre år på grund af god opførsel. Myndighederne traf efterfølgende afgørelse om udvisning på baggrund af den begåede kriminalitet. Klageren havde dels sin mor og sine søskende i opholdslandet, dels en kæreste, som han havde fået et barn med. På tidspunktet for sagens behandling for EMD var klageren 34 år gammel.

I præmis 31-32 gennemgik EMD klagerens forhold til sin mor og sine søskende, som fandtes at udgøre privatliv. I præmis 33-35 gennemgik EMD klagerens forhold til sin kæreste og deres fælles barn, som fandtes at udgøre familieliv. Herefter konkluderede EMD i præmis 36, at der var tale om et ingreb både i klagerens privatliv og hans familieliv.

Herefter gennemgik EMD i præmis 37-42 om indgrebet var i overensstemmelse med loven, om det skete til varetagelse af et af de legitime hensyn og om det var nødvendigt i et demokratisk samfund. EMD henviste i denne forbindelse til de relevante kriterier som sammenfattet i Üner-dommen og udtalte i præmis 40-43:

"40. The Court reiterates that in view of the devastating effects of drugs on people's lives, it understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge (Dalia v France, cited above, § 54; Bhagli v France, cited above, § 48). The applicant's offence was particularly serious as it involved the importation of a significant quantity of heroin. The severity of the offence is reflected in the fact that the applicant was sentenced to seven years' imprisonment, taking account of his decision to plead guilty at a very early stage. The severity of this offence must therefore weigh heavily in the balance.

41. Nevertheless, the Court must also take into account the fact that the applicant had not previously committed any serious criminal offences in the United Kingdom, and has committed no further offences following his release in June 2006. Under the approach taken in the Boultif judgment (cited above, §51), the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has a certain impact on the assessment of the risk which the applicant poses to society.

42. As regards the applicant's private life, the Court accepts that the applicant has lived most of his life in the United Kingdom, having arrived there at the age of three, and no longer has any real social, cultural or family ties to Pakistan. The applicant has not returned to Pakistan, even for a short visit, and he has no immediate family in Pakistan.

43. In the United Kingdom the applicant has established close ties with his mother and two brothers, with whom he has lived for most of his life. The relationship clearly entails an additional degree of dependence

which results from the relative ill-health of all of the parties. Although there is no evidence to suggest that the family would not be able to cope without the applicant, his removal would likely cause greater difficulties than would otherwise be the case."

I præmis 44-47 gennemgik EMD, hvorvidt klagerens familieliv med sin kæreste og deres fælles barn kunne tillægges vægt i proportionalitetsafvejningen, hvilket ikke fandtes at være tilfældet henset til omstændighederne på tidspunktet for etableringen af familielivet. I præmis 48 udtalte EMD, at der også måtte tages hensyn til varigheden af indrejseforbuddet, som var højst ti år.

Herefter udtalte EMD i præmis 50-51:

"50. In light of the above, having particular regard to the length of time that the applicant has been in the United Kingdom and his very young age at the time of his entry, the lack of any continuing ties to Pakistan, the strength of his ties with the United Kingdom, and the fact that the applicant has not reoffended following his release from prison in 2006, the Court finds that the applicant's deportation from the United Kingdom would not be proportionate to the legitimate aim pursued and would therefore not be necessary in a democratic society.

51. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Pakistan."

I sagen vedrørende A.W. Khans bror, *A.H. Khan v. the United Kingdom (2011)*, var klageren indrejst i opholdslandet som syvårig og var tidligere blevet dømt for samleje med en mindreårig, to forsøg på røveri samt overfald. Som 30-årig blev klageren ydermere idømt fem års fængsel for røveri samt udvist. Han blev udsendt ni år efter sin sidste dom. På tidspunktet for EMD´s afgørelse af sagen var klageren far til seks børn i alderen fra 12 til 17 år. Klageren var på daværende tidspunkt ikke i et forhold med mødrene til sine børn.

EMD udtalte i præmis 37:

"[…] the Court finds that, on balance, the applicant lived in the United Kingdom from 1978, when he was aged seven, returning to Pakistan only for visits. It is therefore accepted that he has lived in the United Kingdom since an early age, a factor which means that serious reasons would be required before his deportation could be found to be proportionate (see Maslov v. Austria [GC], no. 1638/03, § 75, 23 June 2008)."

EMD fandt den af klageren begåede kriminalitet alvorlig og fremhævede, at det forhold, at han havde begået kriminalitet igen kort tid efter løsladelsen, viste, at han ikke var rehabiliteret og derfor fortsat udgjorde en fare for offentligheden, hvorfor der var gode grunde til at udsende ham (præmis 38).

I præmis 39 udtalte EMD:

"The Court must now consider the applicant's circumstances in the United Kingdom, with a view to determining whether his family and private life, and his consequent level of integration into British society, were such as to outweigh the seriousness of his criminal history. Looking first at the nationalities of the persons involved, the Court notes that, unlike the applicant, his mother and siblings are all now naturalised British citizens. […]"

Herefter gennemgik EMD klagerens familieforhold og udtalte endelig i præmis 41:

"Finally, the Court turns to the question of the respective solidity of the applicant's ties to the United Kingdom and to Pakistan. The Court notes that, unlike his younger brother, the applicant returned to Pakistan for visits following his arrival in the United Kingdom and also married there. In the absence of any evidence to the contrary, the Court assumes that this marriage is still, legally at least, subsisting. The applicant therefore maintained some level of connection to his country of origin and was not deported as a stranger to the country. As regards his ties to the United Kingdom, the Court has addressed the question of his family life, both with his parents and siblings and with his various partners and children, above, and found it to be limited in its extent. Furthermore, the applicant's private life in the United Kingdom, as observed by the Tribunal, has been constrained by his convictions and spells in prison. Whilst he was mainly educated in the United Kingdom and has worked, he does not appear to have established a lengthy or consistent employment history. In short, and despite the length of his stay, the applicant did not achieve a significant level of integration into British society. The Court is aware that, as a settled migrant who spent much of his childhood in the United Kingdom, serious reasons would be required to render the applicant's deportation proportionate (see Maslov, cited above, § 75). However, having regard to his substantial offending history, including offences of violence and recidivism following the commencement of deportation proceedings against him, the Court is of the view that such serious reasons are present in the applicant's case. His private and family life in the United Kingdom were not such as to outweigh the risk he presented of future offending and harm to the public and his deportation was therefore proportionate to the legitimate aim of preventing crime. As such, the applicant's deportation to Pakistan did not amount to a violation of Article 8."

I sagen *El Boujaïdi v. France (1997)* var klageren indrejst i opholdslandet som syvårig. Han blev idømt seks års fængsel og udvist med indrejseforbud for bestandig for narkotikakriminalitet begået da han var 19 år. Efter at være blevet løsladt da han var 24 år, blev klageren på ny anholdt og idømt et års fængsel for forsøg på røveri og for ikke at være udrejst i overensstemmelse med udvisningen. Klageren blev udsendt, da han var 26 år gammel. På dette tidspunkt boede han sammen med en statsborger i opholdslandet, med hvem han havde fået et barn nogle måneder forud for udsendelsen. Mens der på tidspunktet, hvor udvisningsbeslutningen blev endelig, endnu ikke var etableret et forhold mellem klageren og samleversken og derfor ifølge EMD ikke bestod et "familieliv", der kunne tages i betragtning, udtalte EMD i præmis 33:

"However, the Court observes that he arrived in France in 1974 at the age of 7 and lived there until 26 August 1993. He received most of his schooling there and worked there for several years. In addition, his parents, his three sisters and his brother – with whom it was not contested that he had remained in contact – live there (see paragraph 7 above). Consequently, the Court is in no doubt that enforcement of the exclusion order amounted to interference with the applicant's right to respect for his private and family life."

Ved vurderingen af, om indrejseforbuddet var nødvendigt i et demokratisk samfund, udtalte EMD i præmis 40-41:

"40. The Court's task therefore consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

The Court notes that Mr El Boujaïdi arrived in France at the age of 7 and lived there lawfully from 1974 until 19 June 1991 (the date of his release – see paragraph 13 above). He received most of his education there, he worked there and his parents, his three sisters and his brother live there (see paragraph 7 above).

However, while he asserted that he had no close family in Morocco, he did not claim that he knew no Arabic or that he had never returned to Morocco before the exclusion order was enforced. It also seems that he has never shown any desire to acquire French nationality. Accordingly, even though most of his family and social ties are in France, it has not been established that he has lost all links with his country of origin other than his nationality. In addition, the applicant had a previous conviction – a sentence of thirty months' imprisonment having been imposed on him by the Annecy Criminal Court for heroin dealing in 1987 – when the Lyons Court of Appeal sentenced him to six years' imprisonment and ordered his permanent exclusion from French territory for drug use and drug trafficking (see paragraphs 10 and 11 above). Once he was released, and at a time when he was unlawfully present in France, he continued to lead a life of crime and committed an attempted robbery (see paragraph 13 above). The seriousness of the offence on account of which the measure in issue was imposed on the applicant and his subsequent conduct count heavily against him.

41. Having regard to the foregoing, the Court does not find that enforcement of the order for the applicant's permanent exclusion from French territory was disproportionate to the legitimate aims pursued. There has accordingly been no breach of Article 8."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

I præmis 46-50 gennemgik EMD klagerens opførsel og domstolsbehandlingen af hans sag efter begåelsen af lovovertrædelsen samt klagerens families forhold, herunder muligheden for klagerens ægtefælle og børn for at tage ophold i klagerens hjemland.

I præmis 51 og 52 gennemgik EMD klagerens tilknytning til henholdsvis opholdslandet og hjemlandet:

"51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'."

EMD udtalte herefter i præmis 53-55:

"53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Bajsultanov v. Austria (2012)* var klageren meddelt asyl i opholdslandet. Han blev idømt i alt 20 måneders fængsel for bl.a. flere tilfælde af vold samt udvist. EMD fastsatte længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen. Klagerens ægtefælle var meddelt asyl afledt af klagerens forhold og de havde to børn, der på tidspunktet for EMD's behandling af sagen var otte og fem år.

Efter i præmis 79-82 at have konstateret, at udvisningen af klageren udgjorde et indgreb i hans ret til respekt for familieliv, og at dette indgreb var i overensstemmelse med loven og forfulgte et af de legitime hensyn,

gennemgik EMD i præmis 83 de generelle principper, som indgår i afvejningen af, om indgrebet var nødvendigt i et demokratisk samfund, jf. kriterierne som sammenfattet i Boultif- og Üner-dommene.

Om karakteren og alvorligheden af den begåede kriminalitet udtalte EMD i præmis 84:

"Turning to the first set of criteria relating to the criminal offences committed by the applicant, the Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks' imprisonment, suspended with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions."

EMD udtalte i præmis 85 til 87:

"85. As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there.

86. On the other hand, the applicant lived in Chechnya for almost twenty-three years, went to school there and subsequently worked occasionally in different jobs. The applicant's parents and siblings still live in Chechnya, and the applicant has maintained regular contact with his father.

87. The Court therefore considers, in line with the Austrian authorities, that the applicant still has stronger social and cultural ties to his country of origin than to his host country."

I præmis 88-90 gennemgik EMD klagerens familieliv og ægtefællens mulighed for at følge med klageren tilbage til hjemlandet i relation til artikel 3 og i forhold til, om der ville være uoverstigelige hindringer forbundet hermed.

EMD udtalte i præmis 91-92:

"Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention."

I sagen *Alam v. Denmark (2017)* var klageren indrejst fra Pakistan som halvandetårig som familiesammenført til sin far. Som 30-årig blev hun idømt 16 års fængsel for manddrab og brandstiftelse og udvist for bestandig. Hun talte udover dansk også engelsk, tysk, pashto, urdu og punjabi. Hendes far var død, men hendes mor og fem søskende boede i Danmark og var danske statsborgere. Klageren havde tidligere været i Pakistan, hvor hun havde to halvsøskende, og hendes mor rejste ofte til Pakistan, hvor hun ejede et hus. Klagerens børn var på tidspunktet for EMD's behandling af sagen 16 og 13 år gamle. De talte dansk og den ældste også lidt pashto.

EMD udtalte i præmis 33, at:

"The Court recognises that the City Court made a thorough assessment of the applicant's personal circumstances, carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law(see paragraph 18 above). It specifically noted the children's age, which had significant importance when compared with the sentence imposed (see paragraphs 25 above and 34 below), and found that considerations for the applicant's children could not lead to another decision. […]"

Om de nationale domstoles vurdering af klagerens tilknytning til opholdslandet, bl.a. på baggrund af skolegang og uddannelse, samt til hjemlandet udtalte EMD videre i præmis 33, at:

"[…] It made an overall assessment, taking into account especially that the applicant had had all her upbringing, schooling and education in Denmark, that she had maintained a real attachment to Pakistan and Pakistani culture, that she had two children in Denmark, and that she had been convicted of very serious crimes. That balancing and proportionality test was approved by the High Court in its judgment of 4 September 2014 (see paragraph 20 above)."

Efter at have gennemgået spørgsmålet om klagerens børns mulige fortabelse af opholdstilladelse i præmis 34, udtalte EMD i præmis 35, at:

"Having regard to the above, the Court has no reason to call into question the conclusions reached by the domestic courts on the basis of the balancing exercise which they carried out. Those conclusions were neither arbitrary nor manifestly unreasonable. The Court is thus satisfied that the interference with the applicant's private and family life was supported by relevant and sufficient reasons and that her expulsion would not be disproportionate given all the circumstances of the case. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention."

I sagen *I.M. v. Switzerland (2019)* blev klageren udvist af opholdslandet efter at være blevet dømt for voldtægt ti år forinden. Han led af forskellige sygdomme og var vurderet 80 % invalid. Klagerens tidligere ægtefælle og deres fællesbørn, hvoraf tre var myndige, havde alle ophold i opholdslandet, og klageren var afhængig af hjælp fra de myndige børn i form af pleje og økonomisk bistand.

I præmis 69 gennemgik EMD de generelle kriterier, som Storkammeret havde sammenfattet i Üner-sommen, som skal vejlede de nationale domstole i sager om udvisning af kriminelle udlændinge ved vurderingen af,

om indgrebet er nødvendigt i et demokratisk samfund. EMD udtalte herefter i præmis 70 (uofficiel dansk oversættelse):

"Der skal ligeledes i givet fald tages højde for de særlige omstændigheder i forbindelse med den foreliggende sag, som f.eks. forhold af lægelig art eller indrejseforbuddets midlertidige eller definitive karakter (Shala mod Schweiz, nr. 52873/09, præmis 46, 15. november 2012, og de citerede referencer)."

I præmis 71-73 udtalte EMD om de nationale myndigheders skønsbeføjelser og begrundelsespligt (uofficiel dansk oversættelse):

"71. Domstolen henviser til, at de nationale myndigheder har visse skønsbeføjelser til at udtale sig om nødvendigheden af et indgreb i udøvelsen af en rettighed, der er beskyttet i medfør af artikel 8, og om den pågældende foranstaltnings proportionalitet med det legitime mål, der forfølges. Domstolens opgave består i at bestemme, om der i forbindelse med anfægtede foranstaltninger er respekteret en rimelig afvejning mellem de tilstedeværende interesser, dvs. på den ene side den pågældende persons interesser, der er beskyttet i medfør af Konventionen, og på den anden side samfundets interesser (Slivenko, nævnt ovenfor, præmis 113, og Boultif, nævnt ovenfor, præmis 47).

72. Domstolen henviser ligeledes til, at de nationale domstole skal begrunde deres afgørelser tilstrækkeligt udførligt, for navnlig at gøre det muligt for Domstolen at sikre det europæiske tilsyn, som Domstolen er betroet (jf., mutatis mutandis, X mod Letland [Storkammeret], nr. 27853/09, præmis 107, EMD 2013, og El Ghatet mod Schweiz, nr. 56971/10, præmis 47, 8. november 2016). Et utilstrækkeligt ræsonnement fra de nationale myndigheders side uden en reel afvejning af de tilstedeværende interesser strider mod kravene i Konventionens artikel 8. Det er tilfældet, når de nationale myndigheder ikke på en overbevisende måde formår at overbevise om, at indgrebet i en ret, der er beskyttet i medfør af Konventionen, står i forhold til de forfulgte mål, og at det herefter svarer til et "bydende nødvendigt socialt behov" i overensstemmelse med den ovennævnte retspraksis (El Ghatet, nævnt ovenfor, præmis 47, og mutatis mutandis, Schweizerische Radio- und Fernsehgesellschaft SRG mod Schweiz, nr. 34124/06, præmis 65, 21. juni 2012, Saber og Boughassal mod Spanien, nr. 76550/13 og 45938/14, præmis 51, 18. december 2018).

73. Hvis det til gengæld viser sig, at de nationale myndigheder har foretaget en tilstrækkelig og overbevisende undersøgelse af de faktiske forhold og relevante betragtninger, herunder en passende afvejning af klagers interesser og samfundets mere generelle interesser, tilkommer det ikke Domstolen at lade sin vurdering træde i stedet for den vurdering, der er foretaget af de nationale myndigheder, herunder i forhold til behandlingen af proportionaliteten i den omtvistede sag, medmindre der findes væsentlige årsager til at gøre dette (jf. i denne henseende Ndidi mod Det Forenede Kongerige, nr. 41215/14, præmis 76, 14. september 2017, Hamesevic mod Danmark (dec.), nr. 25748/15, præmis 43, 16. maj 2017 og Alam mod Danmark (dec.), nr. 33809/15, præmis 35, 6. juni 2017)."

EMD konstaterede om de nationale domstoles konkrete vurdering af indgrebets nødendighed i et demokratisk samfund i præmis 76-79 (uofficiel dansk oversættelse):

"76. Domstolen bemærker, at den administrative forbundsdomstol har udtalt sig om alvoren af den begåede lovovertrædelse, kortfattet behandlet spørgsmålet om risikoen for gentagelse af den strafbare handling og bemærket de problemer, som klager måtte blive konfronteret med ved sin tilbagevenden til Kosovo. Domstolen henviser imidlertid til, at forbundsdomstolen har begrænset sin analyse i forhold til Konventionens artikel 8 til alene disse dele. Da forbundsdomstolen traf afgørelse mere end tolv år efter lovovertrædelsen, tog den på ingen måde højde for udviklingen i klagers adfærd, siden lovovertrædelsen blev begået (K.M. mod Schweiz, nr. 6009/10, præmis 54, 2. juni 2015, og de nævnte referencer). Den vurderede heller ikke indvirkningen af den betydelige forværring af den pågældende persons helbredstilstand (invaliditetsgrad på 80 % siden 1. oktober 2012) i forhold til risikoen for gentagelse af de strafbare forhold og har ikke behandlet flere kriterier, der er fastlagt i Domstolens retspraksis ved vurdering af nødvendigheden af udvisningsforanstaltningen. Den administrative forbundsdomstol har navnlig ikke taget højde for fastheden af klagers sociale, kulturelle og familiemæssige tilknytning til værtslandet Schweiz og destinationslandet Kosovo samt de særlige omstændigheder i den foreliggende sag, som for eksempel de lægelige oplysninger (Üner, nævnt ovenfor, præmis 58, og Shala, nævnt ovenfor, præmis 46). For så vidt angår navnlig respekten for familielivet, selv om domstolene har anerkendt klagers afhængighed, i det mindste hans økonomiske afhængighed af de myndige børn, er der ikke foretaget en mere dybtgående analyse af indvirkningerne af denne afhængighed på klagers udøvelse af rettighederne i medfør af Konventionens artikel 8.

77. Domstolen vurderer henset til ovenstående, at der ved anvendelse af de kriterier, der er fastlagt i dens retspraksis (ovenstående præmis 68 og 69), ikke kan udledes nogen tydelig konklusion med hensyn til, hvorvidt klagers private og familiemæssige interesse i fortsat at kunne bo på den indklagede stats territorium går forud for sidstnævntes offentlige interesse i at udvise klager med henblik på at varetage missionen med opretholdelse af den offentlige orden (jf., mutatis mutandis, El Ghatet, nævnt ovenfor, præmis 52). Hvis de nationale myndigheder havde foretaget en grundig afvejning af de pågældende interesser og taget højde for de forskellige kriterier, der er fastlagt i Domstolens retspraksis, og hvis de havde anført relevante og tilstrækkelige grunde, der kunne berettige deres afgørelse, ville Domstolen i givet fald, i tråd med nærhedsprincippet, kunne have været foranlediget til at vurdere, at de nationale myndigheder hverken havde undladt at foretage en retfærdig afvejning af klagers og den indklagede stats interesser eller overskredet de skønsbeføjelser, som de har inden for immigrationsområdet (jf., El Ghatet, nævnte ovenfor, præmis 52).

78. Domstolen vurderer imidlertid, at den administrative forbundsdomstol i den foreliggende sag har foretaget en overfladisk behandling af udsendelsesforanstaltningens proportionalitet. Henset til fraværet af en reel afvejning af de interesser, der står på spil, vurderer Domstolen, at de nationale myndigheder ikke på en overbevisende måde har formået at bevise, at udsendelsesforanstaltningen skulle være proportionel med de forfulgte legitime mål og dermed nødvendig i et demokratisk samfund.

79. Der ville herefter foreligge en krænkelse af Konventionens artikel 8, hvis klager udvises."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig

indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

Vedrørende spørgsmålet om, hvorvidt klageren havde privatliv og familieliv i Nederlandene, udtalte EMD i præmis 47-50:

"47. The Court has further laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, for instance, Konstatinov v. the Netherlands, no. 16351/03, § 52, 26 April 2007, and Z. and T. v. the United Kingdom (dec.), no. 27034/05, ECHR 2006-III). However, it has not insisted on such further elements of dependency in a number of cases concerning young adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; Osman v. Denmark, no. 38058/09, §§ 55-56, 14 June 2011; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019).

48. Even if a person of 26 years of age could still be considered a "young adult", the Court notes that at least in 2011 the applicant was not living full-time with his foster parents anymore (see paragraph 21 above). Moreover, it has not been argued and there is no indication that there are any further elements of dependency between the applicant and his foster parents.

49. The above notwithstanding, the Court deems it not necessary to decide on the question whether or not the ties between the applicant and his foster parents constituted family life within the meaning of Article 8. It reiterates that, in practice, the factors to be examined in order to assess the compatibility with Article 8 of a denial of a right of residence – in so far as those factors are relevant in a particular case – are the same regardless of whether family or private life is engaged (see, mutatis mutandis, A.A. v. the United Kingdom, no. 8000/08, §§ 49 and 57, 20 September 2011).

50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already

been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the

Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Otite v. the United Kingdom (2022)* blev klageren idømt fire år og otte måneders fængsel for økonomisk kriminalitet og udvist for bestandig. Klageren var indrejst som 31-årig som familiesammenført til sin ægtefælle, der havde oprindelse i samme land som klageren, og som ligesom parrets tre børn i alderen 12, 17 og 19 år var statsborger i opholdslandet. Klageren havde på tidspunktet for dommen opholdt sig i opholdslandet i 19 år. Han havde været på fri fod i 11 år og havde i fire af de 11 år været involveret i kriminalitet. Familien havde efter det oplyste ikke besøgt klageren under afsoningen.

I præmis 49 gennemgik EMD kriminalitetens alvor og lagde vægt på, at klageren over en fireårig periode havde drevet en dokumentfabrik, hvilket havde involveret et stort antal ofre og betragtelige pengebeløb, og at han ikke havde erkendt overtrædelsernes påvirkning og konsekvenser for ofrene og samfundet, ligesom der var betragtelig risiko for, at han ville fortsætte med at opføre sig som før.

I præmis 52-54 gennemgik EMD indgrebets mulige betydning for klagerens familieliv, herunder børnenes alder og deres manglende kontakt med klageren under hans afsoning, ægtefællens tilknytning til opholdslandet i form af familiemedlemmer og sociale bånd, som ville kunne udgøre et støttende netværk i tilfælde af klagerens udsendelse, ligesom familien allerede havde klaret sig uden klageren under hans langvarige afsoning. Endvidere fandtes familien at kunne tage ophold i klagerens hjemland, hvor ægtefællen havde rødder og hvor børnene ville kunne få statsborgerskab. Endelig ville familien besøge klageren i hjemlandet og holde kontakt via telefon og internet.

Om klagerens egen tilknytning til hjemlandet udtalte EMD i præmis 54:

"*54. […] Furthermore, the applicant only left Nigeria when he was thirty-one years old (see paragraph 5 above), and there is no evidence to suggest that he no longer has family, social, cultural and linguistic ties there (see, for example, Külekci, cited above, § 50).*"

Herefter konkluderede EMD i præmis 56-57:

"56. The foregoing considerations are sufficient to enable the Court to conclude that the strength of the applicant's family and private life in the United Kingdom is not such as to outweigh the public interest in his deportation.

57. Accordingly, his deportation would not violate Article 8 of the Convention."

Der kan endvidere henvises til følgende sager:

- *Loukili v. the Netherlands (2023).*
- *Al-Masudi v. Denmark (2023).*
- *Noorzae v. Denmark (2023).*

- *Goma v. Denmark (2023)*.
- *Nguyen v. Denmark (2024)*.

4.2.12.2. Mindre alvorlig kriminalitet

I sagen *Jakupovic v. Austria (2003)* blev klageren to gange idømt fængselsstraf af henholdsvis fem måneders og ti ugers varighed, begge udsat i en prøveperiode på tre år, for mindre alvorlig kriminalitet, herunder indbrud og tyveri. Han blev endvidere udvist med indrejseforbud i ti år. Klageren var indrejst i opholdslandet som 11-årig og var på tidspunktet, hvor udvisningsafgørelsen blev endelig, 16 år. Han blev udsendt det samme år, som han fyldte 18 år.

I præmis 28-30 udtalte EMD:

"28. The Court observes that at the time of the expulsion the applicant had not been in Austria for a long time – just four years. Furthermore his situation was not comparable to that of a second generation immigrant, as he had arrived in Austria at the age of eleven, had previously attended school in his country of origin and must therefore have been well acquainted with its language and culture. However, the residence prohibition seriously upset his private and family life: he had arrived in Austria with his brother to join his mother and the new family she had founded there and has apparently no close relatives in Bosnia. The applicant's father remained in Bosnia, a fact which is emphasised by the Government, but the applicant points out that he last saw his father in 1988 and the father has been reported missing since the end of the armed conflict in that country.

29. Thus, the Court considers that very weighty reasons have to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which has recently experienced a period of armed conflict with all its adverse effects on living conditions and with no evidence of close relatives living there.

30. The Government rely in this respect on the applicant's criminal record. The Court finds that this record, which is the essential element of justification for the expulsion, must be examined very carefully. It consists of two convictions for burglary. The Court cannot find that these convictions – even taking into account a further set of criminal proceedings which were discontinued after the victim had been compensated by the applicant – for which the Austrian courts had only imposed conditional sentences of imprisonment can be considered particularly serious as these offences did not involve elements of violence. The only element which may indicate any tendency of the applicant towards violent behaviour was a prohibition to possess arms issued in May 1995. Although the seriousness of such a measure should not be underestimated, it cannot be compared to a conviction for an act of violence, and there is no indication that such charges have ever been brought against the applicant."

EMD udtalte i præmis 32:

"Taking all the above elements into account, the Court finds that by imposing the residence prohibition in the particular circumstances of the case, the Austrian authorities have overstepped their margin of appreciation under Article 8 as the reasons in support of the necessity of the residence prohibition are not sufficiently weighty. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued."

I sagen *Miah v. the United Kingdom (2010)* indrejste klageren i opholdslandet som 11-årig og tog ophold hos sin far, dennes nye ægtefælle samt sine to brødre. Da klageren var 14 år gammel, døde faren. Som 19-årig blev han idømt to års fængsel på en institution for ungdomskriminelle for indbrud og tyveri. Klageren blev efterfølgende flere gange idømt bøder for bl.a. tyveri. Da klageren var 26 år gammel, blev han idømt 12 måneders fængsel for tyveri, og samme år blev han udvist. Klageren havde indtil fængslingen boet hjemme hos stedmoren og havde til hensigt at flytte hjem igen efter løsladelsen. Klageren blev året efter udsendt til Bangladesh.

Efter at have gengivet Storkammerets vurderinger i *Maslov*-dommen, udtalte EMD i præmis 25:

"Turning to the present case, the Court accepts that the applicant has spent a significant period of time in the United Kingdom and that the majority of his social, cultural and family ties are there rather than in Bangladesh. However, despite the relatively young age at which he arrived in the United Kingdom, the Court is not persuaded that he has severed all links to Bangladesh. His mother still lives Bangladesh and, as the Tribunal found, he would be able to rely on her and any extended family for support. In contrast to Mr Maslov, the present applicant speaks the language of his country of origin. Although both Mr Maslov and the applicant were convicted of mostly non-violent offences, the applicant's offences are of a quite different character. With the exception of the first burglary offence, they were all committed when the applicant was an adult and there cannot be the same duty to facilitate the reintegration of an adult offender rather than deport him as there would be for a juvenile offender who is convicted of the same offences. The applicant's offences appear to have been committed in order to fund a drug addiction, a factor which must go some way to mitigating if not the seriousness of the offences then at least the sentences imposed. Indeed, the domestic courts have made efforts to rehabilitate the applicant by imposing a series of non-custodial sentences. Nonetheless, by the time of the final offence, they were entitled to take the view that further such efforts would be inappropriate. Therefore, while the applicant is correct to observe that his final sentence of twelve months' imprisonment was at the lower end of the scale to which a presumption in favour of deportation would apply, the domestic authorities were entitled to take into account that this was the last in a series of offences and that the applicant had failed to respond to other, less severe sentences. Finally, while the duration of the deportation imposed on the applicant is of the same duration as that imposed in Maslov, it does not exclude him from the United Kingdom for as much time as he spent there and does not do so for a decisive period in his life. The Court therefore finds that the domestic authorities have not exceeded the margin of appreciation afforded to them in such cases. A fair balance has been struck in this case and the Court therefore agrees with the Tribunal that the applicant's deportation was proportionate to the legitimate aim pursued. Accordingly, this part of the application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention."

EMD afviste derefter sagen som inadmissible.

I sagen *Emre v. Schweiz (2008)* var klageren indrejst i opholdslandet som femårig sammen med sine forældre. Klageren blev flere gange dømt for kriminalitet, herunder kriminalitet begået mens han var mindreårig, og blev som 22-årig udvist.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det kortfattede Press Release issued by the Registrar af 22. maj 2008, der er gengivet i sin helhed i afsnit 4.2.1.2. Den officielle franske

version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

EMD gentog i dommens præmis 69 det ovennævnte princip om betydningen af længden af opholdet, som blandt andet kom til udtryk i Üner-dommens præmis 58[23], og uddybede i forlængelse heraf i præmis 70 (uofficiel dansk oversættelse):

"Domstolen har understreget vigtigheden af dette sidste punkt med hensyn til immigranter, der har tilbragt størstedelen af deres liv i værtslandet. I et sådant tilfælde bør det reelt bemærkes, at de modtog deres uddannelse der, fik størstedelen af deres sociale tilknytninger der og derfor udviklede deres identitet der. Da de er født eller ankommet til værtslandet på grund af deres forældres emigration, har de normalt deres vigtigste familiemæssige tilknytning der. Nogle af disse immigranter har endog kun bevaret nationalitetstilknytningen til fødelandet (Benhebba mod Frankrig, nr. 53441/99, præmis 33, 10. juli 2003, Mehemi, nævnt ovenfor, præmis 36, og Boujlifa, nævnt ovenfor, s. 2264, præmis 44, og, a contrario, Bouchelkia mod Frankrig, dom af 29. januar 1997, Samlingen af domme og afgørelser 1997- I, og Baghli mod Frankrig, nr. 34374/97, EMD 1999-VIII, nævnt ovenfor, henholdsvis præmis 50 og præmis 48)."

I præmis 77 og 79 gennemgik EMD varigheden af klagerens ophold i opholdslandet og fastheden af klagerens sociale, kulturelle og familiemæssige tilknytning til værtslandet.

Herefter udtalte EMD i præmis 80 om fastheden af klagerens sociale, kulturelle og familiemæssige tilknytning til hjemlandet (uofficiel dansk oversættelse):

"Sammenlignet med disse forhold, der til trods for klagers kriminelle aktivitet viser en vis integration i Schweiz, forekommer de sociale, kulturelle og familiemæssige tilknytninger, som han opretholder til Tyrkiet, at være meget ubetydelige. Det fremgår af sagsakterne, at klager kun har opholdt sig 1½ måned i landet i juni og juli 2002, og at kun hans bedstemor stadig bor der. Domstolen er ikke overbevist om, at det korte ophold i Tyrkiet efter klagers første udsendelse, – en foranstaltning, der anfægtes i nærværende klage, kan tages i betragtning. Det er desuden ikke sikkert, at klager har et tilstrækkeligt kendskab til det tyrkiske sprog. Selv om forholdet mellem forældre og voksne børn ikke er omfattet af beskyttelsen i artikel 8 uden påvisning af "yderligere afhængighedsforhold mellem dem ud over almindelige følelsesmæssige bånd" (jf. mutatis mutandis, Kwakye-Nti og Dufie mod Nederlandene (dec.), nr. 311519/96, 7. november 2000), bemærker Domstolen ligeledes, at forbundsdomstolen selv erkendte, at klagers familiemæssige tilknytning til Tyrkiet var meget mindre betydningsfuld end hans tilknytning til værtslandet. Domstolen har i øvrigt på ingen måde rejst tvivl om, at klager ville "få betydelige vanskeligheder, hvis han vendte tilbage til Tyrkiet"."

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[23] *"Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there."*

I præmis 81-83 gennemgik EMD "Særlige forhold i sagen: sagens medicinske aspekt".

Endelig gennemgik EMD i præmis 84-85 opholdsforbuddet i opholdslandet.

EMD konkluderede i præmis 86-87 (uofficiel dansk oversættelse):

"86. I betragtning af ovenstående og navnlig den relative grovhed [alvorlighed, red.] af domfældelserne mod klager, hans svage tilknytning til hjemlandet og den endelige karakter af udsendelsesforanstaltningen finder Domstolen, at den indklagede stat ikke kan anses for at have foretaget en rimelig afvejning mellem klagers og hans families interesser på den ene side og statens egen interesse i at kontrollere indvandringen på den anden.

87. Der er følgelig sket en krænkelse af artikel 8."

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis 5 og 6 måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden.

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som f.eks. narkotikahandel.

I præmis 61 gennemgik EMD klagerens tilknytning til opholdslandet.

I præmis 62 udtalte EMD om klagerens tilknytning til hjemlandet:

"On the other hand, the Court is not persuaded that the applicant has become so estranged from the country where he spent the first ten years of his life that he would no longer be able to settle in Turkey, having regard to the fact that the applicant married his Turkish wife in Turkey, where their first son was born and that his wife and son did not follow him to Germany until 1989. It follows that the applicant must have entertained certain links to his country of origin at least until 1989. It can further be presumed that the applicant is familiar with the Turkish language, as he married a Turkish wife."

EMD gennemgik herefter i præmis 63-64 spørgsmålet om, hvorvidt klagerens ægtefælle og børn med rimelighed kunne forventes at følge med klageren til hjemlandet, og fandt, at børnene ville møde store vanskeligheder ved omplantning til det tyrkiske skolesystem. I præmis 65 gennemgik EMD spørgsmålet om den manglende tidsbegrænsning i klagerens indrejseforbud. Endelig udtalte EMD i præmis 66, at:

"The Court considers that the applicant's expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant's children could be expected to face if they followed him to Turkey, the Court considers that an

unlimited exclusion from the German territory violates the applicant's rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention."

I sagen *Yildiz v. Austria (2002)* var den første klager indrejst i opholdslandet som 14-årig for at bo sammen med sine forældre og sine søskende. Han indledte et forhold til den anden klager, som var statsborger i den første klagers hjemland, men født og opvokset i opholdslandet. Nogle måneder senere traf opholdslandet afgørelse om udvisning af den første klager med indrejseforbud i fem år på baggrund af flere bødestraffe for tyveri og færdselslovsovertrædelser. Da udvisningsafgørelsen blev endelig, havde klagerne sammen fået et barn, den tredje klager. Klageren udrejste til hjemlandet, da barnet var knap to år gammelt. På tidspunktet for EMD's behandling af sagen boede han fortsat i hjemlandet. Den anden og tredje klager besøgte ham jævnligt, indtil parret blev skilt.

EMD udtalte i præmis 43, at:

"The Court will first examine the applicants' family situation and the length of their stay in Austria. It observes that the first applicant is not a second generation immigrant, i.e. a person who was born or has lived the main part of his life in the country from which he is going to be removed. He only came to Austria in 1989 at the age of fourteen and must therefore have links with his country of origin and in particular be able to speak Turkish. On the other hand, he was still an adolescent when he came to Austria, where his close family was and is still living. In December 1996, when the Administrative Court confirmed the residence ban against him, he had been living in Austria for seven years, he had been working there and had been co-habiting for a little less than three years with the second applicant, who is also a Turkish national but was born in Austria and has lived there all her life. Their daughter, the third applicant, was one year and four months old at the material time. In fact, the Austrian authorities issuing the residence ban acknowledged that the first applicant had reached a high degree of integration in Austria. Nevertheless, the Court considers that, as regards the possible effects of the residence ban on his family life, the authorities failed to establish whether the second applicant could be expected to follow him to Turkey, in particular whether she spoke Turkish and maintained any links, other than her nationality, with that country."

I præmis 44 fastslog EMD, at vurderingen af, om indrejseforbuddet udgjorde en krænkelse af artikel 8, skulle foretages på baggrund af de forhold, der gjorde sig gældende, da indrejseforbuddet blev endeligt, uanset at klagerne efterfølgende var blevet skilt, og deres familiesituation således var anderledes på tidspunktet for EMD's behandling af sagen. I præmis 45- 46 udtalte EMD:

"45. Next, the Court will turn to the offences committed by the first applicant, as their gravity is an essential element for assessing the proportionality of the interference with the applicants' family life. The Court notes that in 1993 the first applicant, who was then still a minor, was convicted twice by the criminal courts, once for shop-lifting with a sentence of three days' imprisonment suspended on probation, and once for theft without a sentence being pronounced. Between 1992 and April 1994 he was convicted seven times of traffic offences, in particular driving without a license and once ignoring a red light and high speeding. The fines imposed on him amounted to a total sum of ATS 28,000 (equivalent to EUR 2,035). In sum, the Court finds that these offences were not negligible. However, as is shown by the modest penalties imposed, the domestic authorities considered them to be of a minor nature. Moreover, the first applicant did not commit any further offences between April 1994 and December 1996, when the residence ban proceedings were terminated. Thus, in the Court's view the authorities' fear that he constituted a danger to public order and security in that

would commit further offences is mitigated by the particular circumstances of the case (see Boultif v. Switzerland, cited above, § 51, with further references).

46. Having regard to all these elements, the Court considers that the authorities failed to strike a fair balance between the different interests involved and that the interference with the applicants' right to respect for their family life was not proportionate to the legitimate aim pursued.

Accordingly, there has been a breach of Article 8 of the Convention."

4.2.12.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende deres opholdstilladelse, da klagerne var blevet myndige.

EMD udtalte i præmis 76, at:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was

in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

[citat af præmis 68-70 i Nunez-dommen, red.]"

På den baggrund gennemgik EMD i præmis 79-85 de hensyn af immigrationspolitisk karakter, som kan tale for at identificere børn med deres forældres handlinger i svigssager, medmindre der foreligger ekstraordinære omstændigheder, og vurderingen heraf i den konkrete sag. De nævnte præmisser er indsat i afsnittene 4.2.1.3 og 4.2.1.4.

I præmis 86-87 udtalte EMD:

"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 udtalte EMD:

"88. In contrast, the applicants' links to Pakistan were not particularly strong, bearing in mind the timing and duration of their residence there. They had not seen their father since returning to Norway in 1996 and their mother had died. Neither the fact that the applicants should have inherited a part of a house from their mother, currently occupied by their father, nor that they might be familiar with another uncle living in the same area as their father, nor any other factors, point to any solid links to Pakistan as suggested by the Government. According to the applicants they were unable to write Urdu and were speaking a "childish" Urdu. They both mastered English well, which was an official language in Pakistan. Although the applicants still had certain links to Pakistan and there would not appear to be insurmountable obstacles to them returning to the country, they might, as found by the High Court, encounter social and professional difficulties if they were to do so (see paragraph 36 above)."

I præmis 89 gennemgik EMD betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

4.2.12.4. Ulovligt ophold

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende deres opholdstilladelse, da klagerne var blevet myndige.

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"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

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to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

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"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

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"88. In contrast, the applicants' links to Pakistan were not particularly strong, bearing in mind the timing and duration of their residence there. They had not seen their father since returning to Norway in 1996 and their mother had died. Neither the fact that the applicants should have inherited a part of a house from their mother, currently occupied by their father, nor that they might be familiar with another uncle living in the same area as their father, nor any other factors, point to any solid links to Pakistan as suggested by the Government. According to the applicants they were unable to write Urdu and were speaking a "childish" Urdu. They both mastered English well, which was an official language in Pakistan. Although the applicants still had certain links to Pakistan and there would not appear to be insurmountable obstacles to them returning to the country, they might, as found by the High Court, encounter social and professional difficulties if they were to do so (see paragraph 36 above)."

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"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

Sagen *Gezginci v. Switzerland (2010)* omhandlede såvel ulovligt ophold som nægtelse af forlængelse af opholdstilladelse. EMD har i et *legal summary* karakteriseret klagerens ophold i opholdslandet som *long term illegal immigration*, hvorfor sagen er placeret i dette afsnit. Dommen foreligger ikke på engelsk i en officiel oversættelse, hvorfor hele EMD´s *legal summary* er citeret herunder:

"Judgment 9.12.2010 [Section I]
Article 8
Expulsion
Deportation order against long-term illegal immigrant: deportation would not constitute a violation
Facts – The applicant is a Turkish national who has lived in Switzerland since 1978, on the basis of residence permits from 1980 to 1998 and unlawfully during the remaining periods. In 1997 the national authorities decided not to renew his residence permit. A few months later they set March 1999 as the deadline for his deportation from Switzerland. However, the applicant did not leave the country. In 2003, after a serious work-related accident, he applied for a residence permit on humanitarian grounds. The authorities refused the application. Shortly afterwards his wife disappeared without trace, leaving him to care for their eleven-year-old daughter. The applicant lodged several unsuccessful appeals against the deportation order, which is still in force.
Law – Article 8: In view of the applicant's very long-standing residence in Switzerland, the refusal to grant him a residence permit on humanitarian grounds amounted to interference with his right to respect for his private life. That interference had been in accordance with the law and had pursued the legitimate aims of ensuring the economic well-being of the country, preventing disorder or crime and protecting the rights and freedoms of others. In order to determine whether it had been necessary in a democratic society, a number of factors had to be taken into consideration. First of all, the applicant's convictions between 1982 and 1992 had not been very serious and since 1993 his conduct did not appear to have been open to criticism from a purely criminal-law standpoint. Next, the applicant had lived in Switzerland for approximately thirty years, not counting periods spent abroad, thanks to the considerable tolerance shown by the authorities since 1999. Furthermore, some members of the applicant's family still lived in Turkey and would be able to help him resettle there and find work; he also spoke Turkish fluently. Similar considerations would apply were he to opt for Romania, a country which he knew from visits, where his wife lived and his daughter had spent much of her life, and where he appeared to have been in gainful employment. Furthermore, it was clear from his attitude that he was unable and unwilling to find employment in Switzerland. As to his daughter, given that she had spent most of her life in Romania and Turkey, was a citizen of both countries and probably spoke both languages, she could reasonably be expected to be able to adjust if she returned there. Lastly, the applicant's health was not liable to significantly hinder his integration in Turkey, given that he would have access there to the necessary medicines and treatment and would undoubtedly receive an invalidity pension. Accordingly, regard being had in particular to the fact that the applicant had been residing unlawfully in Switzerland since 1997, his lack of willingness to integrate there, his failure to abide by the rules of the country and the fact that his ties with his country of origin did not appear to have been completely severed, the respondent State could be said to have struck a fair balance between the interests of the applicant and his daughter on the one hand and its own interest in controlling immigration on the other.
Conclusion: the applicant's deportation would not amount to a violation (five votes to two)." [Understreget her, red.]

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

Vedrørende spørgsmålet om, hvorvidt klageren havde privatliv og familieliv i Nederlandene, udtalte EMD i præmis 47-50:

"47. The Court has further laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, for instance, Konstatinov v. the Netherlands, no. 16351/03, § 52, 26 April 2007, and Z. and T. v. the United Kingdom (dec.), no. 27034/05, ECHR 2006-III). However, it has not insisted on such further elements of dependency in a number of cases concerning young adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; Osman v. Denmark, no. 38058/09, §§ 55-56, 14 June 2011; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019).

48. Even if a person of 26 years of age could still be considered a "young adult", the Court notes that at least in 2011 the applicant was not living full-time with his foster parents anymore (see paragraph 21 above). Moreover, it has not been argued and there is no indication that there are any further elements of dependency between the applicant and his foster parents.

49. The above notwithstanding, the Court deems it not necessary to decide on the question whether or not the ties between the applicant and his foster parents constituted family life within the meaning of Article 8. It reiterates that, in practice, the factors to be examined in order to assess the compatibility with Article 8 of a denial of a right of residence – in so far as those factors are relevant in a particular case – are the same regardless of whether family or private life is engaged (see, mutatis mutandis, A.A. v. the United Kingdom, no. 8000/08, §§ 49 and 57, 20 September 2011).

50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his

foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

4.2.12.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Slivenko v. Latvia (2003)* var klagerne, som var af russisk oprindelse, blevet udsendt fra Letland under henvisning til, at de var familiemedlemmer til en russisk militærperson og derfor forpligtede til at forlade Letland i forbindelse med tilbagetrækningen af de russiske tropper fra Letland som følge af landets opnåelse af uafhængighed fra USSR. Sagen vedrørte klagernes privatliv, idet de havde levet hele eller hovedparten af deres liv i Letland.

EMD udtalte vedrørende spørgsmålet om, hvorvidt der forelå et indgreb i klagernes privatliv, i præmis 96:

"As regards the facts of the present case, the first applicant arrived in Latvia in 1959, when she was only one month old. Until 1999, by which time she was 40 years of age, she continued to live in Latvia. She attended school there, found employment and married. Her daughter, the second applicant, was born in Latvia in 1981 and lived there until the age of 18, when she was compelled to leave the country together with her mother, having just completed her secondary education (see paragraphs 16 and 46 above). It is undisputed that the applicants left Latvia against their own will, as a result of the unsuccessful outcome of the proceedings concerning the legality of their stay in Latvia. They were thus removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being. Furthermore, as a result of the removal, the applicants lost the flat in which they had lived in Riga (see paragraphs 32 and 46 above). In these circumstances, the Court cannot but find that the applicants' removal from Latvia constituted an interference with their "private life" and their "home" within the meaning of Article 8 § 1 of the Convention."

EMD gennemgik i præmis 116-118 nogle overordnede betragtninger vedrørende tilbagetrækning af fremmede tropper fra en uafhængig stat i forhold til aktivt tjenestegørende og pensionerede militærpersoner og deres familier. I præmis 119 fastslog EMD, at klagernes ægtefælle/far var pensioneret på tidspunktet for sagen om lovligheden af klagernes fortsatte ophold i Letland. I præmis 120-121 konstaterede EMD, at der i visse situationer var mulighed for dispensation fra kravet om at forlade Letland, og i præmis 122 udtalte EMD, at spørgsmålet om, hvorvidt en udsendelse i lyset af klagernes personlige situation var proportional med det

legitime formål: statens sikkerhed, måtte afgøres på baggrund af sagens konkrete omstændigheder. EMD udtalte herom i præmis 123-125:

"123. The respondent Government argued that the applicants had not been sufficiently integrated into Latvian society (see paragraph 88 above). In this connection the Court observes that the applicants have spent virtually all their lives in Latvia (see paragraph 96 above). It is true that the applicants are not of Latvian origin, and that they arrived and lived in Latvia – then part of the USSR – in connection with the service of members of their family (the first applicant's father and her husband) in the Soviet armed forces. However, the applicants also developed personal, social and economic ties in Latvia unrelated to their status as relatives of Soviet (and later Russian) military officers. This is shown by the fact that the applicants did not live in army barracks or any other restricted area, but in a block of flats in which there were also civilians. Nor did they study or work in a military institution. The first applicant was able to find employment in Latvian companies after Latvia regained its independence in 1991.

124. As regards the respondent Government's argument about the level of the applicants' proficiency in Latvian, the Court observes that, in so far as this is a relevant consideration, it has not been shown that the degree of the applicants' fluency in the language – although the precise level is in dispute – was insufficient for them to lead a normal everyday life in Latvia. In particular, there is no evidence that the level of the applicants' knowledge of Latvian was in any way different from that of other native Russian speakers living in Latvia, including those who were able to obtain the status of "ex-USSR citizens" in order to remain in Latvia on a permanent basis.

125. Although in 1999 the applicants moved to Russia to join Nikolay Slivenko and eventually obtained Russian citizenship, by that time they had apparently not developed personal, social or economic ties in Russia similar to those they had established in Latvia. In short, the Court finds that at the relevant time the applicants were sufficiently integrated into Latvian society."

I præmis 126-127 gennemgik EMD det af regeringen påberåbte argument for forskelsbehandlingen af klagerne, at det havde betydning for den nationale sikkerhed, at den første klager var kommet til Letland som medlem af en familie til en sovjetisk militærofficer (den første klagers far/den anden klagers bedstefar).

EMD udtalte i præmis 128-129:

"128. Having regard to all the circumstances, the Court considers that the Latvian authorities overstepped the margin of appreciation enjoyed by the Contracting Parties in such a matter, and that they failed to strike a fair balance between the legitimate aim of the protection of national security and the interest of the protection of the applicants' rights under Article 8. Therefore, the applicants' removal from the territory of Latvia cannot be regarded as having been 'necessary in a democratic society'.

129. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Osman v. Denmark (2011)* ansås klagerens opholdstilladelse i medlemsstaten som bortfaldet som følge af hendes langvarige ophold i familiens tidligere opholdsland Kenya. Klageren, der var somalisk statsborger, havde boet i Kenya fra hun var tre-fire år, indtil hun som syvårig indrejste i opholdslandet som familiesammenført. Hun havde herefter opholdt sig i opholdslandet, indtil hun som 15-årig af forældrene blev sendt tilbage til Kenya. Kort tid før hun fyldte 18 år, kontaktede klageren den danske ambassade i Kenya med henblik på at kunne vende tilbage til sin familie i opholdslandet, hvilket blev afslået af de danske myndigheder. Hun indrejse herefter som 19-årig i medlemsstaten, hvor hun ikke længere havde lovligt ophold.

EMD konstaterede i præmis 60-61:

"60. The Court observes that the applicant spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old. She speaks Danish and received schooling in Denmark until August 2002. Her divorced parents and older siblings live in Denmark. The applicant therefore had social, cultural and family ties in Denmark.

61. The applicant also had social, cultural and family ties in Kenya and Somalia. She was born in Somalia and lived there from 1987 to 1991. She resided in Kenya from 1991 to 1995. The applicant spoke Somali. It was unclear whether the applicant had family in Somalia but certain that she had family in Kenya. The applicant returned to Kenya in 2003 and took care of her parental grandmother. Her application in August 2005 to re-enter Denmark was refused but she re-entered the country illegally, apparently in June 2007. The applicant's father was a recognised refugee from Somalia. He visited Kenya at least twice, namely in 2003 and 2005. The second time he remarried there. There was no indication that the applicant's mother could not enter Somalia and Kenya."

EMD forholdt sig ikke udtrykkeligt til betydningen af klagerens sociale og kulturelle tilknytning til hjemlandet. Om betydningen af klagerens tidligere lovlige ophold i opholdslandet udtalte EMD imidlertid i præmis 65:

"It also reiterates that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in a host country, very serious reasons are required to justify expulsion (see, Maslov v. Austria [GC], quoted above, § 75). In the present case the applicant was refused restoration of her lapsed residence permit, as opposed to being expelled due to having committed a crime. Nevertheless, it is undisputed that she spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old, that she spoke Danish, that she had received schooling in Denmark until August 2002, and that all her close family remained in Denmark. In these circumstances, the Court also considers that very serious reasons were required to justify the authorities' refusal to restore the applicant's residence permit, when she applied from Kenya in August 2005."

EMD fandt blandt andet under henvisning til klagerens tilknytning til opholdslandet og hensynet til barnets tarv ("interest"), herunder barnets selvstændige ret til respekt for sit privat- og familieliv:

"76. Having regard to all the above circumstances, it cannot be said that the applicant's interests have sufficiently been taken into account in the authorities' refusal to reinstate her residence permit in Denmark or that a fair balance was struck between the applicants' interests on the one hand and the State's interest in controlling immigration on the other.

77. There has accordingly been a violation of Article 8 of the Convention."

Sagen *Hasanbasic v. Switzerland (2013)* omhandlede en klager, hvis opholdstilladelse blev annulleret af de nationale myndigheder i opholdslandet, idet klageren over for disse myndigheder havde tilkendegivet, at han ville rejse tilbage til sit hjemland med henblik på permanent at bosætte sig der. Klageren genindrejste dog fire måneder senere i opholdslandet, hvorefter hans ægtefælle, som stadig opholdt sig i opholdslandet, indgav en ansøgning om ny opholdstilladelse på baggrund af familiesammenføring. EMD har kategoriseret sagen *som refusal to renew residence visa*, hvorfor den er medtaget under dette punkt.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det komplette *legal summary* under afsnit 4.2.1.5. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

Efter i præmis 51 og 52 at have fastslået, at indgrebet var i overensstemmelse med loven og forfulgte et eller flere af de legitime hensyn, gennemgik EMD i præmis 53-56 de generelle principper, som var relevante i den konkrete sag for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund.

I præmis 57-63 anvendte EMD disse principper på forholdene den konkrete sag. EMD udtalte i præmis 57 (uofficiel dansk oversættelse):

"57. Domstolen bemærker indledningsvist, at de to klagere længe har boet lovligt i Schweiz. Den mandlige klager ankom til Schweiz i 1986, den kvindelige klager ankom allerede i 1969. Varigheden af deres ophold udgør således på det tidspunkt, hvor Forbundsdomstolen afsagde sin dom i 2009, henholdsvis 23 og 40 år. Den kvindelige klager har endvidere haft en etableringstilladelse i Schweiz siden 1979, og dermed en tilladelse af en mere stabil karakter end en almindelig opholdstilladelse. Det er i øvrigt ikke bestridt, at Schweiz i en lang periode har været centrum for klagernes privat- og familieliv.

Domstolen konstaterer ligeledes, at klagerne har opholdt sig uafbrudt i Schweiz, bortset fra i en periode på fire måneder fra mellem august og december 2004, efter at de nationale myndigheder havde afvist den kvindelige klagers anmodning om familiesammenføring (ovenstående præmis 14). Den foreliggende sag adskiller sig på dette punkt væsentligt fra sagen Gezginci (nævnt ovenfor, præmis 69 og 70), hvori klager gentagne gange tog til udlandet i længerevarende perioder.

Domstolen vurderer under disse omstændigheder, at det tilkommer de nationale myndigheder på en overbevisende måde og ved hjælp af relevante og tilstrækkelige årsager at bevise, at der eksisterer et samfundsmæssigt bydende nødvendigt behov for at udvise den pågældende person, og navnlig, at denne foranstaltning står i forhold til det forfulgte legitime mål."

I præmis 58 gennemgik EMD den mandlige klagers lovstridige adfærd og fandt, at de pågældende forseelser ikke vejede tungt, og at klageren ikke kunne anses for at udgøre en fare eller trussel for sikkerheden eller den offentlige orden. I præmis 59 gennemgik EMD betydningen af klagerens store gæld til myndighederne i opholdslandet og de betydelige beløb, som klagerne havde modtaget i offentlig støtte, og fandt, at opholdslandets myndigheder kunne tage højde for klagernes gæld og afhængighed af offentlig bistand, såfremt denne afhængighed måtte have indflydelse på landets økonomiske velvære, men at disse forhold kun udgjorde et aspekt blandt flere, som EMD skulle tage højde for. I præmis 60-61 gennemgik EMD klagernes familieliv,

herunder med deres voksne børn, som var bosat i opholdslandet, og betydningen af, at den mandlige klager ville have mulighed for at besøge familien i opholdslandet.

I præmis 62-63 gennemgik EMD fastheden af de sociale, kulturelle og familiemæssige bånd til opholdslandet og hjemlandet og klagernes tilknytning til hjemlandet (uofficiel dansk oversættelse):

"62. Et andet kriterium, der skal tages højde for i afvejningen af interesserne, er fastheden af de sociale, kulturelle og familiemæssige bånd med Schweiz og med Bosnien-Hercegovina. Forbundsdomstolen har selv i den foreliggende sag erkendt, at klagerne har et betydeligt socialt netværk i Schweiz, og at deres tilbagevenden til oprindelseslandet på grund af den betydelige varighed af deres ophold i Schweiz uden tvivl ville stille dem over for visse vanskeligheder (ovenstående præmis 20).

63. De schweiziske myndigheder har ganske vist ligeledes henvist til, at klagerne havde ladet et hus opføre i deres oprindelsesland, og at ét af børnene fra den mandlige klagers første ægteskab samt hans søster bor i oprindelseslandet. Domstolen tager ligeledes til efterretning, at den mandlige klager den 24. august 2003 havde meddelt de schweiziske myndigheder, at han definitivt ville vende tilbage til Bosnien-Hercegovina, hvilket er ét af de nationale myndigheders hovedargumenter for afvisning af en fornyelse af opholdstilladelsen. Domstolen vurderer, at dette argument skal bedømmes i lyset af de efterfølgende indtrufne forhold, dvs. efter Forbundsdomstolens dom af 6. marts 2009."

Herefter gennemgik EMD i præmis 64-65 betydningen af klagerens helbredsmæssige forhold og den risiko for en forværring heraf, en flytning til hjemlandet ville indebære.

EMD udtalte i præmis 66-67 (uofficiel dansk oversættelse):

"66. Domstolen vedgår henset til ovenstående, at landets økonomiske velfærd ganske vist kan tjene som et legitimt mål i forbindelse med en afvisning af at forny en opholdstilladelse. Denne årsag skal ikke desto mindre vurderes ud fra en retfærdig afvejning og i lyset af samtlige omstændigheder i sagen. Domstolen vurderer imidlertid ud fra den betydelige varighed af klagernes ophold i Schweiz og deres ubestridte sociale integration i landet, at den anfægtede foranstaltning ikke var berettiget ud fra et bydende nødvendigt samfundsmæssigt behov og ikke stod i forhold til de påberåbte legitime formål. Den indklagede stat har følgelig overskredet sin skønsmargen i den foreliggende sag.

67. Der er følgelig sket en krænkelse af Konventionens artikel 8."

4.2.13. Klagerens familieforhold i hjemlandet

EMD har i flere afgørelser ved vurderingen af, om indgrebet i klagerens privat- og/eller familieliv var proportionalt, lagt vægt på, om klageren havde familiemedlemmer i hjemlandet.

Som anført i afsnit 3.3.3.2 afhænger vægtningen af de enkelte elementer i proportionalitetsafvejningen af de konkrete omstændigheder i hver enkelt sag, se f.eks. Maslov v. Austria (2008), hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[24] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

4.2.13.1. Alvorlig kriminalitet

I sagen *El Boujaïdi v. France (1997)* var klageren indrejst i opholdslandet som syvårig. Han blev idømt seks års fængsel og udvist med indrejseforbud for bestandig for narkotikakriminalitet begået da han var 19 år. Efter at være blevet løsladt da han var 24 år, blev klageren på ny anholdt og idømt et års fængsel for forsøg på røveri og for ikke at være udrejst i overensstemmelse med udvisningen. Klageren blev udsendt, da han var 26 år gammel. På dette tidspunkt boede han sammen med en statsborger i opholdslandet, med hvem han havde fået et barn nogle måneder forud for udsendelsen.

EMD udtalte i præmis 40 og 41, at:

"40. The Court's task therefore consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other. The Court notes that Mr El Boujaïdi arrived in France at the age of 7 and lived there lawfully from 1974 until 19 June 1991 (the date of his release – see paragraph 13 above). He received most of his education there, he worked there and his parents, his three sisters and his brother live there (see paragraph 7 above). However, while he asserted that he had no close family in Morocco, he did not claim that he knew no Arabic or that he had never returned to Morocco before the exclusion order was enforced. It also seems that he has never shown any desire to acquire French nationality. Accordingly, even though most of his family and social ties are in France, it has not been established that he has lost all links with his country of origin other than his nationality. In addition, the applicant had a

[24] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

previous conviction – a sentence of thirty months' imprisonment having been imposed on him by the Annecy Criminal Court for heroin dealing in 1987 – when the Lyons Court of Appeal sentenced him to six years' imprisonment and ordered his permanent exclusion from French territory for drug use and drug trafficking (see paragraphs 10 and 11 above). Once he was released, and at a time when he was unlawfully present in France, he continued to lead a life of crime and committed an attempted robbery (see paragraph 13 above). The seriousness of the offence on account of which the measure in issue was imposed on the applicant and his subsequent conduct count heavily against him.

41. Having regard to the foregoing, the Court does not find that enforcement of the order for the applicant's permanent exclusion from French territory was disproportionate to the legitimate aims pursued. There has accordingly been no breach of Article 8."

I sagen *Dalia v. France (1998)* var klageren indrejst i opholdslandet i 1976 eller 1977 i en alder af 17-18 år for at slutte sig til sine forældre og søskende. I 1985 blev hun idømt et års fængsel for narkokriminalitet og udvist fra opholdslandet for bestandig. Hun udrejste til hjemlandet i 1987 og tog ophold hos en tante. I 1989 genindrejste hun i opholdslandet på et gyldigt visum og tog ophold hos sin mor. I 1990 fødte hun et barn med statsborgerskab i både opholdslandet og hjemlandet. EMD udtalte i præmis 53:

"53. The Court notes, as the Commission did, that the applicant arrived in France at the age of 17 or 18 to join the rest of her family and lived there until 1987. She returned in July 1989 with a visa valid for thirty days, on expiry of which she remained in France. Her mother and her seven brothers and sisters live in France. In 1986 she married a French national, by whom she did not have any children; the marriage was dissolved in 1989. In 1990, when the exclusion order was still in force, she gave birth to a child of French nationality. Mrs Dalia's family ties are therefore essentially in France.

Nevertheless, having lived in Algeria until the age of 17 or 18, for two years without her parents (see paragraph 7 above), she has maintained certain family relations, spoken the local language and established social and school relationships. In those circumstances, her Algerian nationality is not merely a legal fact but reflects certain social and emotional links. In short, the interference in issue was not so drastic as that which may result from the expulsion of applicants who were born in the host country or first went there as young children (see the C. v. Belgium judgment of 7 August 1996, Reports 1996-III, p. 924, § 34)."

EMD lagde endvidere vægt på, at hun havde født sit barn, mens hun opholdt sig ulovligt i opholdslandet, og at indrejseforbuddet var blevet pålagt som straf for farlig heroinhandel (præmis 54). EMD udtalte videre i præmis 54-55:

"54. […] In view of the devastating effects of drugs on people's lives, the Court understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge. Irrespective of the sentence passed on her, the fact that Mrs Dalia took part in such trafficking still weighs as heavily in the balance.

55. Having regard to the foregoing, the Court considers that the refusal to lift the exclusion order made against the applicant cannot be regarded as disproportionate to the legitimate aim pursued. There has therefore been no violation of Article 8."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

I præmis 46-50 gennemgik EMD klagerens opførsel og domstolsbehandlingen af hans sag efter begåelsen af lovovertrædelsen samt klagerens families forhold, herunder muligheden for klagerens ægtefælle og børn for at tage ophold i klagerens hjemland.

I præmis 51 og 52 gennemgik EMD klagerens tilknytning til henholdsvis opholdslandet og hjemlandet :

"51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'."

EMD udtalte herefter i præmis 53-55:

"53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

I sagen *A.W. Khan v. the United Kingdom (2010)* var klageren indrejst i opholdslandet som treårig og var meddelt tidsubegrænset opholdstilladelse. Han blev som 28-årig idømt syv års fængsel for narkotikakriminalitet, men blev løsladt efter tre år på grund af god opførsel. Myndighederne traf efterfølgende afgørelse om udvisning på baggrund af den begåede kriminalitet. Klageren havde dels sin mor, og sine søskende i opholdslandet, dels en kæreste, som han havde fået et barn med. På tidspunktet for sagens behandling for EMD var klageren 34 år gammel.

I præmis 31-32 gennemgik EMD klagerens forhold til sin mor og sine søskende, som fandtes at udgøre privatliv. I præmis 33-35 gennemgik EMD klagerens forhold til sin kæreste og deres fælles barn, som fandtes at udgøre familieliv. Herefter konkluderede EMD i præmis 36, at der var tale om et ingreb både i klagerens privatliv og hans familieliv.

Herefter gennemgik EMD i præmis 37-42 om indgrebet var i overensstemmelse med loven, om det skete til varetagelse af et af de legitime hensyn og om det var nødvendigt i et demokratisk samfund. EMD henviste i denne forbindelse til de relevante kriterier som sammenfattet i Üner-dommen og udtalte i præmis 40-43:

"40. The Court reiterates that in view of the devastating effects of drugs on people's lives, it understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge (Dalia v France, cited above, § 54; Bhagli v France, cited above, § 48). The applicant's offence was particularly serious as it involved the importation of a significant quantity of heroin. The severity of the offence is reflected in the fact that the applicant was sentenced to seven years' imprisonment, taking account of his decision to plead guilty at a very early stage. The severity of this offence must therefore weigh heavily in the balance.

41. Nevertheless, the Court must also take into account the fact that the applicant had not previously committed any serious criminal offences in the United Kingdom, and has committed no further offences following his release in June 2006. Under the approach taken in the Boultif judgment (cited above, §51), the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has a certain impact on the assessment of the risk which the applicant poses to society.

42. As regards the applicant's private life, the Court accepts that the applicant has lived most of his life in the United Kingdom, having arrived there at the age of three, and no longer has any real social, cultural or family

ties to Pakistan. The applicant has not returned to Pakistan, even for a short visit, and he has no immediate family in Pakistan.

43. In the United Kingdom the applicant has established close ties with his mother and two brothers, with whom he has lived for most of his life. The relationship clearly entails an additional degree of dependence which results from the relative ill-health of all of the parties. Although there is no evidence to suggest that the family would not be able to cope without the applicant, his removal would likely cause greater difficulties than would otherwise be the case."

I præmis 44-47 gennemgik EMD, hvorvidt klagerens familieliv med sin kæreste og deres fælles barn kunne tillægges vægt i proportionalitetsafvejningen, hvilket ikke fandtes at være tilfældet henset til omstændighederne på tidspunktet for etableringen af familielivet. I præmis 48 udtalte EMD, at der også måtte tages hensyn til varigheden af indrejseforbuddet, som var højst ti år.

Herefter udtalte EMD i præmis 50-51:

"50. In light of the above, having particular regard to the length of time that the applicant has been in the United Kingdom and his very young age at the time of his entry, the lack of any continuing ties to Pakistan, the strength of his ties with the United Kingdom, and the fact that the applicant has not reoffended following his release from prison in 2006, the Court finds that the applicant's deportation from the United Kingdom would not be proportionate to the legitimate aim pursued and would therefore not be necessary in a democratic society.

51. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Pakistan."

I sagen vedrørende A.W. Khans bror, *A.H. Khan v. the United Kingdom (2011)*, var klageren indrejst i opholdslandet som syvårig og var tidligere blevet dømt for samleje med en mindreårig, to forsøg på røveri samt overfald. Som 30-årig blev klageren ydermere idømt fem års fængsel for røveri samt udvist. Han blev udsendt ni år efter sin sidste dom. På tidspunktet for EMD´s afgørelse af sagen var klageren far til seks børn i alderen fra 12 til 17 år. Klageren var på daværende tidspunkt ikke i et forhold med mødrene til sine børn.

EMD udtalte i præmis 37:

"[…] the Court finds that, on balance, the applicant lived in the United Kingdom from 1978, when he was aged seven, returning to Pakistan only for visits. It is therefore accepted that he has lived in the United Kingdom since an early age, a factor which means that serious reasons would be required before his deportation could be found to be proportionate (see Maslov v. Austria [GC], no. 1638/03, § 75, 23 June 2008)."

EMD fandt den af klageren begåede kriminalitet alvorlig og fremhævede, at det forhold, at han havde begået kriminalitet igen kort tid efter løsladelsen, viste, at han ikke var rehabiliteret og derfor fortsat udgjorde en fare for offentligheden, hvorfor der var gode grunde til at udsende ham (præmis 38). Herefter gennemgik EMD klagerens familieforhold og udtalte endelig i præmis 41:

"Finally, the Court turns to the question of the respective solidity of the applicant's ties to the United Kingdom and to Pakistan. The Court notes that, unlike his younger brother, the applicant returned to Pakistan for visits following his arrival in the United Kingdom and also married there. In the absence of any evidence to the

contrary, the Court assumes that this marriage is still, legally at least, subsisting. The applicant therefore maintained some level of connection to his country of origin and was not deported as a stranger to the country. As regards his ties to the United Kingdom, the Court has addressed the question of his family life, both with his parents and siblings and with his various partners and children, above, and found it to be limited in its extent. Furthermore, the applicant's private life in the United Kingdom, as observed by the Tribunal, has been constrained by his convictions and spells in prison. Whilst he was mainly educated in the United Kingdom and has worked, he does not appear to have established a lengthy or consistent employment history. In short, and despite the length of his stay, the applicant did not achieve a significant level of integration into British society. The Court is aware that, as a settled migrant who spent much of his childhood in the United Kingdom, serious reasons would be required to render the applicant's deportation proportionate (see Maslov, cited above, § 75). However, having regard to his substantial offending history, including offences of violence and recidivism following the commencement of deportation proceedings against him, the Court is of the view that such serious reasons are present in the applicant's case. His private and family life in the United Kingdom were not such as to outweigh the risk he presented of future offending and harm to the public and his deportation was therefore proportionate to the legitimate aim of preventing crime. As such, the applicant's deportation to Pakistan did not amount to a violation of Article 8."

I sagen *A.A. v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som 13-årig sammen med sine to søstre som familiesammenført til deres mor. To år senere blev han som 15-årig idømt fire års tilbageholdelse på en ungdomsinstitution for voldtægt begået mod en mindreårig, men blev løsladt tidligere på grund af god opførsel. Fem år efter den begåede kriminalitet blev klagerens udvisningsafgørelse endelig. Da EMD behandlede sagen, havde klageren opholdt sig i opholdslandet i 11 år. Han boede hos sin mor og besøgte sine to søstre regelmæssigt.

I præmis 46-50 gennemgik EMD sin hidtidige praksis vedrørende spørgsmålet om, hvorvidt forholdet mellem myndige børn og forældre udgør privatliv og/eller familieliv. EMD udtalte i præmis 49:

"49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life". However, it is not necessary to decide the question given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Thus, regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on "family life" rather than "private life", it observes that in practice the factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged (Üner, cited above, §§ 57-60)."

EMD konstaterede i præmis 51-55, at indgrebet var i overensstemmelse med loven og forfulgte et af de legitime hensyn.

Ved vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund, gennemgik EMD i præmis 56 kriterierne som sammenfattet i Üner-dommen og udtalte på den baggrund i præmis 57-58, at de nationale domstole i hver enkelt sag må vurdere, hvilken vægt der skal tillægges de enkelte elementer i foretagelsen af den konkrete afvejning, indenfor staternes margin of appreciation. Om de relevante elementer i den foreliggende sag udtalte EMD i præmis 59-64:

"59. In the present case, the Court considers the relevant factors to be the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in United Kingdom; the time which has elapsed since the offence was committed and the applicant's conduct during that period; and the solidity of social, cultural and family ties with the host country and with the country of destination.

60. The Court has made it clear that very serious violent offences can justify expulsion even if they were committed by a minor (see Maslov, cited above, § 85). There can be no doubt that the applicant's offence was a serious one and the Court considers the comments of the sentencing judge as to the applicant's conduct and the effect of the attack on the victim to be relevant factors to be taken into account (see paragraph 8 above). The sentence imposed – four years in a Young Offenders' Institution – demonstrates the gravity of the offence. However, the fact that the applicant was a minor at the time the offence was committed is a relevant consideration in assessing the proportionality of a deportation (see Maslov, cited above, § 72). In this regard, the Court recalls that where offences committed by a minor underlie an exclusion order, regard must be had to the best interests of the child. In particular, the obligation to take the best interests of the child into account includes an obligation to facilitate his reintegration, an aim that the Court has previously held will not be achieved by severing family or social ties through expulsion (see Maslov, cited above, §§ 82-83).

61. The Court observes that the total length of the applicant's stay in the United Kingdom to date is eleven years. He arrived in the country at the age of 13 and has therefore now spent almost half his life in the United Kingdom. The Court notes that the applicant committed the offence which rendered him liable to deportation less than two years after his arrival in the United Kingdom. Further, following his conviction, he spent some two years in detention, during which time he was served with a deportation order. While the applicant was granted Indefinite Leave to Remain during this period, the Court is persuaded by the Government's submissions that leave was granted in ignorance of the applicant's conviction and, as a result, considers that no significance can be attached to the fact that Indefinite Leave to Remain was granted following the conviction (compare and contrast Omojudi, cited above, § 42). It is also true that the applicant has been aware since July 2003 of the fact that he was liable to be deported on account of his conviction. However, the Court nonetheless observes that he has now spent seven years at liberty in the United Kingdom following his release and despite having exhausted appeal rights in January 2008, no steps appear to have been taken in respect of his deportation until September 2010 (see paragraphs 23-25 above).

62. As to the lapse of time and the applicant's conduct since commission of the offence in 2002, the Court observes at the outset that the applicant has committed no further offences. While in detention, the applicant took advantage of the educational opportunities available to him and obtained a number of high school qualifications (see paragraph 11 above). At the time of his release from detention in August 2004, his risk of reoffending was assessed to be low (see paragraph 11 above), an assessment subsequently reiterated by his probation officer in 2005 and accepted by the AIT in 2007 (see paragraphs 15 and 20 above). Since his release,

the applicant's conduct appears to have been exemplary. He enrolled in college in September 2004 in order to sit his A-level examinations, which he obtained in summer 2005 (see paragraph 14 above). He was subsequently offered a place at university to study towards an undergraduate degree, which he obtained in 2008, followed by a postgraduate degree, which he completed in 2009 (see paragraphs 18 and 24 above). He commenced stable employment with a local authority in 2010 (see paragraph 24 above).

63. The Government have not pointed to any concern regarding the applicant's conduct in the seven years since his release from prison and rely solely on the seriousness of the offence to justify concerns as to his continued presence in the United Kingdom and his risk to the public (see paragraphs 41-42 and 44 above). The Court reiterates that the factors to be taken into consideration in cases involving deportation following a criminal offence are partially designed to evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities (see paragraph 57 above). In particular, the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has an impact on the assessment of the risk which the applicant poses to society (see Boultif, cited above, § 51; Maslov, cited above, § 90; and A.W. Khan, cited above, § 41). Accordingly, the Court considers the present factor to be of particular importance when assessing whether the seriousness of the offence in itself is sufficient to justify the applicant's deportation for the prevention of disorder or crime.

64. Finally, as regards the applicant's ties with the United Kingdom and with Nigeria, the Court observes that the applicant continues to reside with his mother and has close relationships with his two sisters and an uncle, all of whom reside in England. He has completed the majority of his high school and further education in the United Kingdom and has now commenced a career with a local authority in London. He is also a member of a church community. While he spent a significant period of his childhood in Nigeria, he has now not visited the country for eleven years. He has had no contact with his father since 1991".

I præmis 65-68 gennemgik EMD betydningen af opholdslandets passivitet i forhold til at udsende klageren i overensstemmelse med den trufne udvisningsafgørelse og redegjorde for baggrunden for at inddrage forhold indtruffet og klagerens opførsel i perioden efter denne afgørelse i sin afvejning, herunder vigtigheden af at facilitere reintegration af unge lovovertrædere i samfundet.

Herefter konkluderede EMD i præmis 69-70:

"69. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's deportation from the United Kingdom would be disproportionate to the legitimate aim of the "prevention of disorder and crime" and would therefore not be necessary in a democratic society.

70. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Nigeria."

I sagen *Bajsultanov v. Austria (2012)* var klageren meddelt asyl i opholdslandet. Han blev idømt i alt 20 måneders fængsel for bl.a. flere tilfælde af vold samt udvist. EMD fastsatte længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen. Klagerens ægtefælle var meddelt asyl afledt af klagerens forhold og de havde to børn, der på tidspunktet for EMD's behandling af sagen var otte og fem år.

Efter i præmis 79-82 at have konstateret, at udvisningen af klageren udgjorde et indgreb i hans ret til respekt for familieliv, og at dette indgreb var i overensstemmelse med loven og forfulgte et af de legitime hensyn, gennemgik EMD i præmis 83 de generelle principper, som indgår i afvejningen af, om indgrebet var nødvendigt i et demokratisk samfund, jf. kriterierne som sammenfattet i Boultif- og Üner-dommene.

Om karakteren og alvorligheden af den begåede kriminalitet udtalte EMD i præmis 84:

"Turning to the first set of criteria relating to the criminal offences committed by the applicant, the Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks' imprisonment, suspended with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions."

EMD udtalte i præmis 85 til 87:

"85. As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there.

86. On the other hand, the applicant lived in Chechnya for almost twenty-three years, went to school there and subsequently worked occasionally in different jobs. The applicant's parents and siblings still live in Chechnya, and the applicant has maintained regular contact with his father.

87. The Court therefore considers, in line with the Austrian authorities, that the applicant still has stronger social and cultural ties to his country of origin than to his host country."

I præmis 88-90 gennemgik EMD klagerens familieliv og ægtefællens mulighed for at følge med klageren tilbage til hjemlandet i relation til artikel 3 og i forhold til, om der ville være uoverstigelige hindringer forbundet hermed.

EMD udtalte i præmis 91-92:

"Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian

authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention."

I sagen *Alam v. Denmark (2017)* var klageren indrejst fra Pakistan som halvandetårig som familiesammenført til sin far. Som 30-årig blev hun idømt 16 års fængsel for manddrab og brandstiftelse og udvist for bestandig. Hun talte udover dansk også engelsk, tysk, pashto, urdu og punjabi. Hendes far var død, men hendes mor og fem søskende boede i Danmark og var danske statsborgere. Klageren havde tidligere været i Pakistan, hvor hun havde to halvsøskende, og hendes mor rejste ofte til Pakistan, hvor hun ejede et hus. Klagerens børn var på tidspunktet for EMD's behandling af sagen 16 og 13 år gamle. De talte dansk og den ældste også lidt pashto.

EMD udtalte i præmis 33, at:

"The Court recognises that the City Court made a thorough assessment of the applicant's personal circumstances, carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law (see paragraph 18 above). It specifically noted the children's age, which had significant importance when compared with the sentence imposed (see paragraphs 25 above and 34 below), and found that considerations for the applicant's children could not lead to another decision. [(…])"

Om de nationale domstoles vurdering af klagerens tilknytning til opholdslandet, bl.a. på baggrund af skolegang og uddannelse, samt til hjemlandet udtalte EMD videre i præmis 33, at:

"[…] It made an overall assessment, taking into account especially that the applicant had had all her upbringing, schooling and education in Denmark, that she had maintained a real attachment to Pakistan and Pakistani culture, that she had two children in Denmark, and that she had been convicted of very serious crimes. That balancing and proportionality test was approved by the High Court in its judgment of 4 September 2014 (see paragraph 20 above)."

Efter at have gennemgået spørgsmålet om klagerens børns mulige fortabelse af opholdstilladelse i præmis 34, udtalte EMD i præmis 35, at:

"Having regard to the above, the Court has no reason to call into question the conclusions reached by the domestic courts on the basis of the balancing exercise which they carried out. Those conclusions were neither arbitrary nor manifestly unreasonable. The Court is thus satisfied that the interference with the applicant's private and family life was supported by relevant and sufficient reasons and that her expulsion would not be disproportionate given all the circumstances of the case. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention."

I sagen *I.M. v. Switzerland (2019)* blev klageren udvist af opholdslandet efter at være blevet dømt for voldtægt ti år forinden. Han led af forskellige sygdomme og var vurderet 80 % invalid. Klagerens tidligere ægtefælle og deres fællesbørn, hvoraf tre var myndige, havde alle ophold i opholdslandet, og klageren var afhængig af hjælp fra de myndige børn i form af pleje og økonomiske bistand.

I præmis 69 gennemgik EMD de generelle kriterier, som Storkammeret havde sammenfattet i Üner-dommen, som skal vejlede de nationale domstole i sager om udvisning af kriminelle udlændinge ved vurderingen af, om indgrebet er nødvendigt i et demokratisk samfund. EMD udtalte herefter i præmis 70 (uofficiel dansk oversættelse):

"Der skal ligeledes i givet fald tages højde for de særlige omstændigheder i forbindelse med den foreliggende sag, som f.eks. forhold af lægelig art eller indrejseforbuddets midlertidige eller definitive karakter (Shala mod Schweiz, nr. 52873/09, præmis 46, 15. november 2012, og de citerede referencer)."

I præmis 71-73 udtalte EMD om de nationale myndigheders skønsbeføjelser og begrundelsespligt (uofficiel dansk oversættelse):

"71. Domstolen henviser til, at de nationale myndigheder har visse skønsbeføjelser til at udtale sig om nødvendigheden af et indgreb i udøvelsen af en rettighed, der er beskyttet i medfør af artikel 8, og om den pågældende foranstaltnings proportionalitet med det legitime mål, der forfølges. Domstolens opgave består i at bestemme, om der i forbindelse med anfægtede foranstaltninger er respekteret en rimelig afvejning mellem de tilstedeværende interesser, dvs. på den ene side den pågældende persons interesser, der er beskyttet i medfør af Konventionen, og på den anden side samfundets interesser (Slivenko, nævnt ovenfor, præmis 113, og Boultif, nævnt ovenfor, præmis 47).

72. Domstolen henviser ligeledes til, at de nationale domstole skal begrunde deres afgørelser tilstrækkeligt udførligt, for navnlig at gøre det muligt for Domstolen at sikre det europæiske tilsyn, som Domstolen er betroet (jf., mutatis mutandis, X mod Letland [Storkammeret], nr. 27853/09, præmis 107, EMD 2013, og El Ghatet mod Schweiz, nr. 56971/10, præmis 47, 8. november 2016). Et utilstrækkeligt ræsonnement fra de nationale myndigheders side uden en reel afvejning af de tilstedeværende interesser strider mod kravene i Konventionens artikel 8. Det er tilfældet, når de nationale myndigheder ikke på en overbevisende måde formår at overbevise om, at indgrebet i en ret, der er beskyttet i medfør af Konventionen, står i forhold til de forfulgte mål, og at det herefter svarer til et "bydende nødvendigt socialt behov" i overensstemmelse med den ovennævnte retspraksis (El Ghatet, nævnt ovenfor, præmis 47, og mutatis mutandis, Schweizerische Radio- und Fernsehgesellschaft SRG mod Schweiz, nr. 34124/06, præmis 65, 21. juni 2012, Saber og Boughassal mod Spanien, nr. 76550/13 og 45938/14, præmis 51, 18. december 2018).

73. Hvis det til gengæld viser sig, at de nationale myndigheder har foretaget en tilstrækkelig og overbevisende undersøgelse af de faktiske forhold og relevante betragtninger, herunder en passende afvejning af klagers interesser og samfundets mere generelle interesser, tilkommer det ikke Domstolen at lade sin vurdering træde i stedet for den vurdering, der er foretaget af de nationale myndigheder, herunder i forhold til behandlingen af proportionaliteten i den omtvistede sag, medmindre der findes væsentlige årsager til at gøre dette (jf. i denne henseende Ndidi mod Det Forenede Kongerige, nr. 41215/14, præmis 76, 14. september 2017, Hamesevic mod Danmark (dec.), nr. 25748/15, præmis 43, 16. maj 2017 og Alam mod Danmark (dec.), nr. 33809/15, præmis 35, 6. juni 2017)."

EMD konstaterede om de nationale domstoles konkrete vurdering af indgrebets nødendighed i et demokratisk samfund i præmis 76-79 (uofficiel dansk oversættelse):

"76. Domstolen bemærker, at den administrative forbundsdomstol har udtalt sig om alvoren af den begåede lovovertrædelse, kortfattet behandlet spørgsmålet om risikoen for gentagelse af den strafbare handling og bemærket de problemer, som klager måtte blive konfronteret med ved sin tilbagevenden til Kosovo. Domstolen henviser imidlertid til, at forbundsdomstolen har begrænset sin analyse i forhold til Konventionens artikel 8 til alene disse dele. Da forbundsdomstolen traf afgørelse mere end tolv år efter lovovertrædelsen, tog den på ingen måde højde for udviklingen i klagers adfærd, siden lovovertrædelsen blev begået (K.M. mod Schweiz, nr. 6009/10, præmis 54, 2. juni 2015, og de nævnte referencer). Den vurderede heller ikke indvirkningen af den betydelige forværring af den pågældende persons helbredstilstand (invaliditetsgrad på 80 % siden 1. oktober 2012) i forhold til risikoen for gentagelse af de strafbare forhold og har ikke behandlet flere kriterier, der er fastlagt i Domstolens retspraksis ved vurdering af nødvendigheden af udvisningsforanstaltningen. Den administrative forbundsdomstol har navnlig ikke taget højde for fastheden af klagers sociale, kulturelle og familiemæssige tilknytning til værtslandet Schweiz og destinationslandet Kosovo samt de særlige omstændigheder i den foreliggende sag, som for eksempel de lægelige oplysninger (Üner, nævnt ovenfor, præmis 58, og Shala, nævnt ovenfor, præmis 46). For så vidt angår navnlig respekten for familielivet, selv om domstolene har anerkendt klagers afhængighed, i det mindste hans økonomiske afhængighed af de myndige børn, er der ikke foretaget en mere dybtgående analyse af indvirkningerne af denne afhængighed på klagers udøvelse af rettighederne i medfør af Konventionens artikel 8.

77. Domstolen vurderer henset til ovenstående, at der ved anvendelse af de kriterier, der er fastlagt i dens retspraksis (ovenstående præmis 68 og 69), ikke kan udledes nogen tydelig konklusion med hensyn til, hvorvidt klagers private og familiemæssige interesse i fortsat at kunne bo på den indklagede stats territorium går forud for sidstnævntes offentlige interesse i at udvise klager med henblik på at varetage missionen med opretholdelse af den offentlige orden (jf., mutatis mutandis, El Ghatet, nævnt ovenfor, præmis 52). Hvis de nationale myndigheder havde foretaget en grundig afvejning af de pågældende interesser og taget højde for de forskellige kriterier, der er fastlagt i Domstolens retspraksis, og hvis de havde anført relevante og tilstrækkelige grunde, der kunne berettige deres afgørelse, ville Domstolen i givet fald, i tråd med nærhedsprincippet, kunne have været foranlediget til at vurdere, at de nationale myndigheder hverken havde undladt at foretage en retfærdig afvejning af klagers og den indklagede stats interesser eller overskredet de skønsbeføjelser, som de har inden for immigrationsområdet (jf., El Ghatet, nævnte ovenfor, præmis 52).

78. Domstolen vurderer imidlertid, at den administrative forbundsdomstol i den foreliggende sag har foretaget en overfladisk behandling af udsendelsesforanstaltningens proportionalitet. Henset til fraværet af en reel afvejning af de interesser, der står på spil, vurderer Domstolen, at de nationale myndigheder ikke på en overbevisende måde har formået at bevise, at udsendelsesforanstaltningen skulle være proportionel med de forfulgte legitime mål og dermed nødvendig i et demokratisk samfund.

79. Der ville herefter foreligge en krænkelse af Konventionens artikel 8, hvis klager udvises."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og

klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

Vedrørende spørgsmålet om, hvorvidt klageren havde privatliv og familieliv i Nederlandene, udtalte EMD i præmis 47-50:

"47. The Court has further laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, for instance, Konstatinov v. the Netherlands, no. 16351/03, § 52, 26 April 2007, and Z. and T. v. the United Kingdom (dec.), no. 27034/05, ECHR 2006-III). However, it has not insisted on such further elements of dependency in a number of cases concerning young adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; Osman v. Denmark, no. 38058/09, §§ 55-56, 14 June 2011; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019).

48. Even if a person of 26 years of age could still be considered a "young adult", the Court notes that at least in 2011 the applicant was not living full-time with his foster parents anymore (see paragraph 21 above). Moreover, it has not been argued and there is no indication that there are any further elements of dependency between the applicant and his foster parents.

49. The above notwithstanding, the Court deems it not necessary to decide on the question whether or not the ties between the applicant and his foster parents constituted family life within the meaning of Article 8. It reiterates that, in practice, the factors to be examined in order to assess the compatibility with Article 8 of a denial of a right of residence – in so far as those factors are relevant in a particular case – are the same regardless of whether family or private life is engaged (see, mutatis mutandis, A.A. v. the United Kingdom, no. 8000/08, §§ 49 and 57, 20 September 2011).

50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said

that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Abdi v. Denmark (2021)* var klageren som fireårig indrejst i opholdslandet, hvor også hans forældre og søskende opholdt sig. Han var tidligere idømt tre måneders betinget fængsel for et røveri begået som 15-årig og fire måneders fængsel, heraf tre måneder betinget, for indbrud begået som 17-årig. Efter det fyldte 18. år var han syv gange idømt bødestraf for overtrædelse af lov om euforiserende stoffer. Senest var klageren idømt to et halvt års fængsel og udvist for bestandig for besiddelse af et ladt skydevåben på offentligt sted begået i det år, hvor han fyldte 24 år. Klageren havde ingen familie i oprindelseslandet, talte kun grundlæggende somali og havde ikke besøgt oprindelseslandet siden udrejsen.

I præmis 39-41 udtalte EMD, at den ikke betvivlede, at klageren på tidspunktet for den kriminalitet, der havde ført til udvisningen, udgjorde en alvorlig trussel for den offentlige orden, men at bortset herfra indikerede den pådømte kriminalitet begået efter at klageren var fyldt 18 år ikke, at han generelt udgjorde en trussel for den offentlige orden, og at klageren ikke tidligere var blevet advaret om udvisning eller idømt betinget udvisning. EMD bemærkede videre i præmis 42, at ikke desto mindre – trods fraværet af relevante tidligere domfældelser og advarsler om udvisning og uanset at klageren var blevet idømt en relativt mild straf i den foreliggende sag – havde de danske domstole besluttet at kombinere udvisningen med et permanent indrejseforbud. Herefter udtalte EMD i præmis 43-45:

"43. This observation should also be seen in the light that the applicant arrived in Denmark at a very young age and had lawfully resided there for approximately twenty years. He thus had very strong ties with Denmark, whereas his ties with Somalia were virtually non-existing.

44. The Court is therefore of the view, given all the circumstances of the case, that the expulsion of the applicant combined with a life-long ban on returning was disproportionate (see, notably, Ezzouhdi v. France, cited above, §§ 34-35; Keles v. Germany, cited above, § 66, and Bousarra v. France, cited above, §§ 53-54).

45. There has accordingly been a violation of Article 8 of the Convention."

I sagen *Otite v. the United Kingdom (2022)* blev klageren idømt fire år og otte måneders fængsel for økonomisk kriminalitet og udvist for bestandig. Klageren var indrejst som 31-årig som familiesammenført til sin ægtefælle, der havde oprindelse i samme land som klageren, og som ligesom parrets tre børn i alderen 12, 17 og 19 år var statsborger i opholdslandet. Klageren havde på tidspunktet for dommen opholdt sig i opholdslandet i 19 år. Han havde været på fri fod i 11 år og havde i fire af de 11 år været involveret i kriminalitet. Familien havde efter det oplyste ikke besøgt klageren under afsoningen.

I præmis 49 gennemgik EMD kriminalitetens alvor og lagde vægt på, at klageren over en fireårig periode havde drevet en dokumentfabrik, hvilket havde involveret et stort antal ofre og betragtelige pengebeløb, og at han ikke havde erkendt overtrædelsernes påvirkning og konsekvenser for ofrene og samfundet, ligesom der var betragtelig risiko for, at han ville fortsætte med at opføre sig som før.

I præmis 52-54 gennemgik EMD indgrebets mulige betydning for klagerens familieliv, herunder børnenes alder og deres manglende kontakt med klageren under hans afsoning, ægtefællens tilknytning til opholdslandet i form af familiemedlemmer og sociale bånd, som ville kunne udgøre et støttende netværk i tilfælde af klagerens udsendelse, ligesom familien allerede havde klaret sig uden klageren under hans langvarige afsoning. Endvidere fandtes familien at kunne tage ophold i klagerens hjemland, hvor ægtefællen havde rødder og hvor børnene ville kunne få statsborgerskab. Endelig ville familien besøge klageren i hjemlandet og holde kontakt via telefon og internet.

Om klagerens egen tilknytning til hjemlandet udtalte EMD i præmis 54:

"*54. […] Furthermore, the applicant only left Nigeria when he was thirty-one years old (see paragraph 5 above), and there is no evidence to suggest that he no longer has family, social, cultural and linguistic ties there (see, for example, Külekci, cited above, § 50).*"

Herefter konkluderede EMD i præmis 56-57:

"56. The foregoing considerations are sufficient to enable the Court to conclude that the strength of the applicant's family and private life in the United Kingdom is not such as to outweigh the public interest in his deportation.

57. Accordingly, his deportation would not violate Article 8 of the Convention."

Der kan endvidere henvises til følgende sager:

- *Azzaqui v. the Netherlands (2023)*.
- *Sharifi v. Denmark (2023)*.
- *Al-Masudi v. Denmark (2023)*.
- *Noorzae v. Denmark (2023)*.
- *Goma v. Denmark (2023)*.

4.2.13.2. Mindre alvorlig kriminalitet

I sagen *Jakupovic v. Austria (2003)* blev klageren to gange idømt fængselsstraf af henholdsvis fem måneders og ti ugers varighed, begge udsat i en prøveperiode på tre år, for mindre alvorlig kriminalitet, herunder indbrud og tyveri. Han blev endvidere udvist med indrejseforbud i ti år. Klageren var indrejst i opholdslandet som 11-årig og var på tidspunktet, hvor udvisningsafgørelsen blev endelig, 16 år. Han blev udsendt det samme år, som han fyldte 18 år.

I præmis 28-30 udtalte EMD:

"28. The Court observes that at the time of the expulsion the applicant had not been in Austria for a long time – just four years. Furthermore his situation was not comparable to that of a second generation immigrant, as he had arrived in Austria at the age of eleven, had previously attended school in his country of origin and must

therefore have been well acquainted with its language and culture. However, the residence prohibition seriously upset his private and family life: he had arrived in Austria with his brother to join his mother and the new family she had founded there and has apparently no close relatives in Bosnia. The applicant's father remained in Bosnia, a fact which is emphasised by the Government, but the applicant points out that he last saw his father in 1988 and the father has been reported missing since the end of the armed conflict in that country.

29. Thus, the Court considers that very weighty reasons have to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which has recently experienced a period of armed conflict with all its adverse effects on living conditions and with no evidence of close relatives living there.

30. The Government rely in this respect on the applicant's criminal record. The Court finds that this record, which is the essential element of justification for the expulsion, must be examined very carefully. It consists of two convictions for burglary. The Court cannot find that these convictions – even taking into account a further set of criminal proceedings which were discontinued after the victim had been compensated by the applicant – for which the Austrian courts had only imposed conditional sentences of imprisonment can be considered particularly serious as these offences did not involve elements of violence. The only element which may indicate any tendency of the applicant towards violent behaviour was a prohibition to possess arms issued in May 1995. Although the seriousness of such a measure should not be underestimated, it cannot be compared to a conviction for an act of violence, and there is no indication that such charges have ever been brought against the applicant."

EMD udtalte i præmis 32:

"Taking all the above elements into account, the Court finds that by imposing the residence prohibition in the particular circumstances of the case, the Austrian authorities have overstepped their margin of appreciation under Article 8 as the reasons in support of the necessity of the residence prohibition are not sufficiently weighty. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued."

I sagen *Miah v. the United Kingdom (2010)* indrejste klageren i opholdslandet som 11-årig og tog ophold hos sin far, dennes nye ægtefælle samt sine to brødre. Da klageren var 14 år gammel, døde faren. Som 19-årig blev han idømt to års fængsel på en institution for ungdomskriminelle for indbrud og tyveri. Klageren blev efterfølgende flere gange idømt bøder for bl.a. tyveri. Da klageren var 26 år gammel, blev han idømt 12 måneders fængsel for tyveri, og samme år blev han udvist. Klageren havde indtil fængslingen boet hjemme hos stedmoren og havde til hensigt at flytte hjem igen efter løsladelsen. Klageren blev året efter udsendt til Bangladesh.

Efter at have gengivet Storkammerets vurderinger i *Maslov*-dommen, udtalte EMD i præmis 25:

"Turning to the present case, the Court accepts that the applicant has spent a significant period of time in the United Kingdom and that the majority of his social, cultural and family ties are there rather than in Bangladesh. However, despite the relatively young age at which he arrived in the United Kingdom, the Court is not persuaded that he has severed all links to Bangladesh. His mother still lives Bangladesh and, as the Tribunal found, he would be able to rely on her and any extended family for support. In contrast to Mr Maslov, the present applicant speaks the language of his country of origin. Although both Mr Maslov and the applicant

were convicted of mostly non-violent offences, the applicant's offences are of a quite different character. With the exception of the first burglary offence, they were all committed when the applicant was an adult and there cannot be the same duty to facilitate the reintegration of an adult offender rather than deport him as there would be for a juvenile offender who is convicted of the same offences. The applicant's offences appear to have been committed in order to fund a drug addiction, a factor which must go some way to mitigating if not the seriousness of the offences then at least the sentences imposed. Indeed, the domestic courts have made efforts to rehabilitate the applicant by imposing a series of non-custodial sentences. Nonetheless, by the time of the final offence, they were entitled to take the view that further such efforts would be inappropriate. Therefore, while the applicant is correct to observe that his final sentence of twelve months' imprisonment was at the lower end of the scale to which a presumption in favour of deportation would apply, the domestic authorities were entitled to take into account that this was the last in a series of offences and that the applicant had failed to respond to other, less severe sentences. Finally, while the duration of the deportation imposed on the applicant is of the same duration as that imposed in Maslov, it does not exclude him from the United Kingdom for as much time as he spent there and does not do so for a decisive period in his life. The Court therefore finds that the domestic authorities have not exceeded the margin of appreciation afforded to them in such cases. A fair balance has been struck in this case and the Court therefore agrees with the Tribunal that the applicant's deportation was proportionate to the legitimate aim pursued. Accordingly, this part of the application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention."

EMD afviste derefter sagen som *inadmissible*.

I sagen *Radovanovic v. Austria (2004)* var klageren kort efter fødslen i opholdslandet flyttet til hjemlandet, hvor han boede hos sine bedsteforældre og gik i skole. Som tiårig vendte han tilbage til sine forældre og sin søster i opholdslandet, hvor han færdiggjorde skolen og blev udlært som slagter. Som mindreårig begik han kriminalitet i form af blandt andet groft røveri og indbrud og blev idømt 30 måneders fængsel, heraf 24 betinget, og udvist for bestandig. Efter at have afsonet fængselsstraffen blev klageren i det år, han fyldte 19 år, udsendt til hjemlandet.

EMD bemærkede i præmis 33:

"The Court notes that the applicant, a single young adult at the time of his expulsion, is not a second generation immigrant as, despite his birth in Austria, he did not permanently live there until the age of ten. Given the young age at which he arrived, the Court will nevertheless assess the necessity of the interference by applying the same criteria it usually applies in cases of second generation immigrants who have not yet founded a family of their own in the host country. These criteria, so far as material, are the nature and gravity of the offence committed by the applicant and the length of his stay in the host country. In addition the applicant's family ties and the social ties he established in the host country by receiving his schooling and by spending the decisive years of his youth there are to be taken into account (see Benhebba v. France, no. 53441/99, §§ 32-33, 15 June 2003)."

EMD sammenholdt i præmis 34 sagen med en række sager, hvor der ikke var sket krænkelse af artikel 8, om udvisning af second generation immigrants, som var ankommet til opholdslandet i en ung alder og var idømt langvarige ubetingede fængselsstraffe for alvorlig kriminalitet i form af narkotikakriminalitet, som EMD ser med alvor på. Trods den kortere varighed af klagerens ophold i opholdslandet tillagde EMD det stor vægt, at

selvom der var tale om groft røveri, var klageren kun idømt seks måneders ubetinget fængsel. Uden at underkende kriminalitetens grovhed noterede EMD sig, at klageren havde været mindreårig, at han ikke var tidligere straffet og at hovedparten af den relativt lange straf var gjort betinget. Derfor kunne EMD ikke tilslutte sig de nationale myndigheders vurdering af, at klageren udgjorde en sådan fare for public order, at det nødvendiggjorde indgrebet, jf. præmis 35.

Herefter udtalte EMD i præmis 36-38:

"36. Given the applicant's birth in Austria, where he later also completed his secondary education and vocational training while living with his family, and also taking into account that his family had already lawfully stayed in Austria for a long time and that the applicant himself had an unlimited residence permit when he committed the offence, and considering that, after the death of his grandparents in Serbia and Montenegro, he no longer has any relatives there, the Court finds that his family and social ties with Austria were much stronger than with Serbia and Montenegro.

37. The Court therefore considers that, in the circumstances of the present case, the imposition of a residence prohibition of unlimited duration was an overly rigorous measure. A less intrusive measure, such as a residence prohibition of a limited duration would have sufficed. The Court thus concludes that the Austrian authorities, by imposing a residence prohibtion of unlimited duration against the applicant, have not struck a fair balance between the interests involved and that the means employed were disproportionate to the aim pursued in the circumstances of the case (see mutatis mutandis, Ezzouhdi, cited above, § 35; and Yilmaz, cited above, §§ 48-49).

38. Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Yildiz v. Austria (2002)* var den første klager indrejst i opholdslandet som 14-årig for at bo sammen med sine forældre og sine søskende. Han indledte et forhold til den anden klager, som var statsborger i den første klagers hjemland, men født og opvokset i opholdslandet. Nogle måneder senere traf opholdslandet afgørelse om udvisning af den første klager med indrejseforbud i fem år på baggrund af flere bødestraffe for tyveri og færdselslovsovertrædelser. Da udvisningsafgørelsen blev endelig, havde klagerne sammen fået et barn, den tredje klager. Klageren udrejste til hjemlandet, da barnet var knap to år gammelt. På tidspunktet for EMD's behandling af sagen boede han fortsat i hjemlandet. Den anden og tredje klager besøgte ham jævnligt, indtil parret blev skilt.

EMD udtalte i præmis 43, at:

"The Court will first examine the applicants' family situation and the length of their stay in Austria. It observes that the first applicant is not a second generation immigrant, i.e. a person who was born or has lived the main part of his life in the country from which he is going to be removed. He only came to Austria in 1989 at the age of fourteen and must therefore have links with his country of origin and in particular be able to speak Turkish. On the other hand, he was still an adolescent when he came to Austria, where his close family was and is still living. In December 1996, when the Administrative Court confirmed the residence ban against him, he had been living in Austria for seven years, he had been working there and had been co-habiting for a little less than three years with the second applicant, who is also a Turkish national but was born in Austria and

has lived there all her life. Their daughter, the third applicant, was one year and four months old at the material time. In fact, the Austrian authorities issuing the residence ban acknowledged that the first applicant had reached a high degree of integration in Austria. Nevertheless, the Court considers that, as regards the possible effects of the residence ban on his family life, the authorities failed to establish whether the second applicant could be expected to follow him to Turkey, in particular whether she spoke Turkish and maintained any links, other than her nationality, with that country."

I præmis 44 fastslog EMD, at vurderingen af, om indrejseforbuddet udgjorde en krænkelse af artikel 8, skulle foretages på baggrund af de forhold, der gjorde sig gældende, da indrejseforbuddet blev endeligt, uanset at klagerne efterfølgende var blevet skilt, og deres familiesituation således var anderledes på tidspunktet for EMD's behandling af sagen. I præmis 45- 46 udtalte EMD:

"45. Next, the Court will turn to the offences committed by the first applicant, as their gravity is an essential element for assessing the proportionality of the interference with the applicants' family life. The Court notes that in 1993 the first applicant, who was then still a minor, was convicted twice by the criminal courts, once for shop-lifting with a sentence of three days' imprisonment suspended on probation, and once for theft without a sentence being pronounced. Between 1992 and April 1994 he was convicted seven times of traffic offences, in particular driving without a license and once ignoring a red light and high speeding. The fines imposed on him amounted to a total sum of ATS 28,000 (equivalent to EUR 2,035). In sum, the Court finds that these offences were not negligible. However, as is shown by the modest penalties imposed, the domestic authorities considered them to be of a minor nature. Moreover, the first applicant did not commit any further offences between April 1994 and December 1996, when the residence ban proceedings were terminated. Thus, in the Court's view the authorities' fear that he constituted a danger to public order and security in that would commit further offences is mitigated by the particular circumstances of the case (see Boultif v. Switzerland, cited above, § 51, with further references).

46. Having regard to all these elements, the Court considers that the authorities failed to strike a fair balance between the different interests involved and that the interference with the applicants' right to respect for their family life was not proportionate to the legitimate aim pursued.

Accordingly, there has been a breach of Article 8 of the Convention."

I sagen *Emre v. Schweiz (2008)* var klageren indrejst i opholdslandet som femårig sammen med sine forældre. Klageren blev flere gange dømt for kriminalitet, herunder kriminalitet begået mens han var mindreårig, og blev som 22-årig udvist.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det kortfattede Press Release issued by the Registrar af 22. maj 2008, der er gengivet i sin helhed i afsnit 4.2.1.2. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

EMD gentog i dommens præmis 69 det ovennævnte princip om betydningen af længden af opholdet, som blandt andet kom til udtryk i Üner-dommens præmis 58[25], og uddybede i forlængelse heraf i præmis 70 (uofficiel dansk oversættelse):

"Domstolen har understreget vigtigheden af dette sidste punkt med hensyn til immigranter, der har tilbragt størstedelen af deres liv i værtslandet. I et sådant tilfælde bør det reelt bemærkes, at de modtog deres uddannelse der, fik størstedelen af deres sociale tilknytninger der og derfor udviklede deres identitet der. Da de er født eller ankommet til værtslandet på grund af deres forældres emigration, har de normalt deres vigtigste familiemæssige tilknytning der. Nogle af disse immigranter har endog kun bevaret nationalitetstilknytningen til fødelandet (Benhebba mod Frankrig, nr. 53441/99, præmis 33, 10. juli 2003, Mehemi, nævnt ovenfor, præmis 36, og Boujlifa, nævnt ovenfor, s. 2264, præmis 44, og, a contrario, Bouchelkia mod Frankrig, dom af 29. januar 1997, Samlingen af domme og afgørelser 1997- I, og Baghli mod Frankrig, nr. 34374/97, EMD 1999-VIII, nævnt ovenfor, henholdsvis præmis 50 og præmis 48)."

I præmis 77 og 79 gennemgik EMD varigheden af klagerens ophold i opholdslandet og fastheden af klagerens sociale, kulturelle og familiemæssige tilknytning til værtslandet.

Herefter udtalte EMD i præmis 80 om fastheden af klagerens sociale, kulturelle og familiemæssige tilknytning til hjemlandet (uofficiel dansk oversættelse):

"Sammenlignet med disse forhold, der til trods for klagers kriminelle aktivitet viser en vis integration i Schweiz, forekommer de sociale, kulturelle og familiemæssige tilknytninger, som han opretholder til Tyrkiet, at være meget ubetydelige. Det fremgår af sagsakterne, at klager kun har opholdt sig 1½ måned i landet i juni og juli 2002, og at kun hans bedstemor stadig bor der. Domstolen er ikke overbevist om, at det korte ophold i Tyrkiet efter klagers første udsendelse, – en foranstaltning, der anfægtes i nærværende klage, kan tages i betragtning. Det er desuden ikke sikkert, at klager har et tilstrækkeligt kendskab til det tyrkiske sprog. Selv om forholdet mellem forældre og voksne børn ikke er omfattet af beskyttelsen i artikel 8 uden påvisning af "yderligere afhængighedsforhold mellem dem ud over almindelige følelsesmæssige bånd" (jf. mutatis mutandis, Kwakye-Nti og Dufie mod Nederlandene (dec.), nr. 311519/96, 7. november 2000), bemærker Domstolen ligeledes, at forbundsdomstolen selv erkendte, at klagers familiemæssige tilknytning til Tyrkiet var meget mindre betydningsfuld end hans tilknytning til værtslandet. Domstolen har i øvrigt på ingen måde rejst tvivl om, at klager ville "få betydelige vanskeligheder, hvis han vendte tilbage til Tyrkiet"."

I præmis 81-83 gennemgik EMD "Særlige forhold i sagen: sagens medicinske aspekt".

Endelig gennemgik EMD i præmis 84-85 opholdsforbuddet i opholdslandet.

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[25] *"Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there."*

EMD konkluderede i præmis 86-87 (uofficiel dansk oversættelse):

"86. I betragtning af ovenstående og navnlig den relative grovhed [alvorlighed, red.] af domfældelserne mod klager, hans svage tilknytning til hjemlandet og den endelige karakter af udsendelsesforanstaltningen finder Domstolen, at den indklagede stat ikke kan anses for at have foretaget en rimelig afvejning mellem klagers og hans families interesser på den ene side og statens egen interesse i at kontrollere indvandringen på den anden.

87. Der er følgelig sket en krænkelse af artikel 8."

4.2.13.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Antwi and others v. Norway (2012)* havde klageren ligeledes opnået sin opholdstilladelse på baggrund af svig. Klageren var i opholdslandet blevet gift og havde fået et barn. Syv år efter indrejsen fik opholdslandet kendskab til hans reelle identitet og året efter blev han udvist fra opholdslandet.

EMD udtalte i præmis 90:

"In applying the above principles [fra Nunez-dommen, red.] to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Nunez, cited above, § 71, and Darren Omoregie and Others v. Norway, no. 265/07, § 67, 31 July 2008; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Nunez and Darren Omoregie and Others, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Nunez, cited above, § 73)."

Om tilknytningen til henholdsvis opholdslandet og hjemlandet udtalte EMD i præmis 91-92, at:

"91. Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country.

92. Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any

event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country."

Efter at have gennemgået ægtefællens og datterens forhold, udtalte EMD i præmis 103-105:

"103. There being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion.

104. The above considerations are not altered by the duration of the prohibition on re-entry – five years. In this connection, the Court reiterates that in a comparable case, Darren Omoregie (cited above, §§ 63-68), it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case.

105. In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand.

Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban would not entail a violation of Article 8 of the Convention."

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende klagernes opholdstilladelse, da de var blevet myndige.

EMD udtalte i præmis 76:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the

applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

[citat af præmis 68-70 i Nunez-dommen, red.]"

På den baggrund gennemgik EMD i præmis 79-85 de hensyn af immigrationspolitisk karakter, som kan tale for at identificere børn med deres forældres handlinger i svigssager, medmindre der foreligger ekstraordinære omstændigheder, og vurderingen heraf i den konkrete sag. De nævnte præmisser er indsat i afsnittene 4.2.1.3 og 4.2.1.4.

I præmis 86-87 udtalte EMD:

"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 udtalte EMD:

"88. In contrast, the applicants' links to Pakistan were not particularly strong, bearing in mind the timing and duration of their residence there. They had not seen their father since returning to Norway in 1996 and their mother had died. Neither the fact that the applicants should have inherited a part of a house from their mother, currently occupied by their father, nor that they might be familiar with another uncle living in the same area as their father, nor any other factors, point to any solid links to Pakistan as suggested by the Government. According to the applicants they were unable to write Urdu and were speaking a "childish" Urdu. They both mastered English well, which was an official language in Pakistan. Although the applicants still had certain links to Pakistan and there would not appear to be insurmountable obstacles to them returning to the country, they might, as found by the High Court, encounter social and professional difficulties if they were to do so (see paragraph 36 above)."

I præmis 89 gennemgik EMD betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

4.2.13.4. Ulovligt ophold

I sagen *Darren Omoregie a.o. v. Norway (2008)* var klageren indrejst som 22-årig og havde fået afslag på asyl, men undlod at efterkomme udrejsebeslutningen og arbejdede endvidere ulovligt i opholdslandet. Nogle måneder senere giftede han sig med en statsborger fra opholdslandet og søgte om familiesammenføring, hvilket blev afslået, og klageren blev på ny pålagt at udrejse, hvilket han ikke efterkom. Der blev endvidere truffet afgørelse om at udvise klageren med indrejseforbud i fem år med mulighed for genindrejse efter ansøgning allerede efter to år. Under domstolsbehandlingen af udvisningsafgørelsen blev klagerens ægtefælle gravid med deres fælles barn, som blev født fem år efter klagerens indrejse. Klageren fik på ny afslag på familiesammenføring og efter fem et halvt års ophold blev han udsendt.

I præmis 59-63 gennemgik EMD klagerens opholdsretlige status på tidspunktet for og efter etableringen af familieliv i opholdslandet og hvorvidt denne kunne give klageren og ægtefællen anledning til at have berettigede forventninger med hensyn til mulighederne for klagerens fortsatte ophold i opholdslandet. I præmis 64 udtalte EMD:

"Against this background the Court does not consider that the first and second applicants, by confronting the Norwegian authorities with the first applicant's presence in the country as a fait accompli, were entitled to expect that any right of residence would be conferred upon him (see Roslina Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003; Yash Priya v. Denmark (dec.) 13594/03; 6 July 2006; cf. Rodrigues da Silva and Hoogkamer, cited above, § 43)."

Om tilknytningen til henholdsvis klagerens hjemland og opholdsland samt om indrejseforbuddets varighed udtalte EMD i præmis 66-68, at:

"66. It should further be noted that the first applicant had lived in Nigeria since he was six months old until he left the country at the age of 22, had studied at university for four years and had three brothers with whom he was still in contact. Whereas his links to Nigeria were particularly strong, his links to Norway were comparatively weak, apart from the family bounds he had formed there with the second and third applicants pending the proceedings. […]

67. Finally, the Court notes that the decision prohibiting the first applicant re-entry for five years was imposed as an administrative sanction, the purpose of which was to ensure that resilient immigrants do not undermine the effective implementation of rules on immigration control. Moreover, it was open to the first applicant to apply for re-entry already after two years.

68. Against this background, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed their margin of appreciation when deciding to expel the first applicant and to prohibit his re-entry for five years. The Court is not only satisfied that the impugned interference was supported by relevant and sufficient reasons but also that in reaching the disputed decision the domestic authorities struck a fair balance between the personal interests of the applicants on the one hand and the public interest in ensuring an effective implementation of immigration control on the other hand. In view of the first applicant's immigration status, the present case disclosed no exceptional circumstances requiring the respondent State to grant him a right of residence in Norway so as to enable the applicants to maintain and develop family life in that country. In sum, the Court finds that the national authorities could reasonably consider that the interference was 'necessary' within the meaning of Article 8 § 2 of the Convention.
Accordingly, there has been no violation of Article 8 of the Convention."

Sagen *Gezginci v. Switzerland (2010)* omhandlede både ulovligt ophold og nægtelse af forlængelse af opholdstilladelse. EMD har i et *legal summary* karakteriseret klagerens ophold i opholdslandet som *long term illegal immigration*, hvorfor sagen er placeret i dette afsnit. Dommen foreligger ikke på engelsk i en officiel oversættelse, hvorfor hele EMD´s *legal summary* er citeret herunder:

"Judgment 9.12.2010 [Section I]
Article 8
Expulsion
Deportation order against long-term illegal immigrant: deportation would not constitute a violation
Facts – The applicant is a Turkish national who has lived in Switzerland since 1978, on the basis of residence permits from 1980 to 1998 and unlawfully during the remaining periods. In 1997 the national authorities decided not to renew his residence permit. A few months later they set March 1999 as the deadline for his deportation from Switzerland. However, the applicant did not leave the country. In 2003, after a serious work-related accident, he applied for a residence permit on humanitarian grounds. The authorities refused the application. Shortly afterwards his wife disappeared without trace, leaving him to care for their eleven-year-old daughter. The applicant lodged several unsuccessful appeals against the deportation order, which is still in force.

Law – Article 8: In view of the applicant's very long-standing residence in Switzerland, the refusal to grant him a residence permit on humanitarian grounds amounted to interference with his right to respect for his private life. That interference had been in accordance with the law and had pursued the legitimate aims of ensuring the economic well-being of the country, preventing disorder or crime and protecting the rights and freedoms of others. In order to determine whether it had been necessary in a democratic society, a number of factors had to be taken into consideration. First of all, the applicant's convictions between 1982 and 1992 had not been very serious and since 1993 his conduct did not appear to have been open to criticism from a purely criminal-law standpoint. Next, the applicant had lived in Switzerland for approximately thirty years, not counting periods spent abroad, thanks to the considerable tolerance shown by the authorities since 1999. Furthermore, some members of the applicant's family still lived in Turkey and would be able to help him resettle there and find work; he also spoke Turkish fluently. Similar considerations would apply were he to opt for Romania, a country which he knew from visits, where his wife lived and his daughter had spent much of her life, and where he appeared to have been in gainful employment. Furthermore, it was clear from his attitude that he was unable and unwilling to find employment in Switzerland. As to his daughter, given that she had spent most of her life in Romania and Turkey, was a citizen of both countries and probably spoke both languages, she could reasonably be expected to be able to adjust if she returned there. Lastly, the applicant's health was not liable to significantly hinder his integration in Turkey, given that he would have access there to the necessary medicines and treatment and would undoubtedly receive an invalidity pension. Accordingly, regard being had in particular to the fact that the applicant had been residing unlawfully in Switzerland since 1997, his lack of willingness to integrate there, his failure to abide by the rules of the country and the fact that his ties with his country of origin did not appear to have been completely severed, the respondent State could be said to have struck a fair balance between the interests of the applicant and his daughter on the one hand and its own interest in controlling immigration on the other.
Conclusion: the applicant's deportation would not amount to a violation (five votes to two)." [Understreget her, red.]

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende klagernes opholdstilladelse, da de var blevet myndige.

EMD udtalte i præmis 76:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the

applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012):

[citat af præmis 68-70 i Nunez-dommen, red.]"

På den baggrund gennemgik EMD i præmis 79-85 de hensyn af immigrationspolitisk karakter, som kan tale for at identificere børn med deres forældres handlinger i svigssager, medmindre der foreligger ekstraordinære omstændigheder, og vurderingen heraf i den konkrete sag. De nævnte præmisser er indsat i afsnittene 4.2.1.3 og 4.2.1.4.

I præmis 86-87 udtalte EMD:

"86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 udtalte EMD:

"88. In contrast, the applicants' links to Pakistan were not particularly strong, bearing in mind the timing and duration of their residence there. They had not seen their father since returning to Norway in 1996 and their mother had died. Neither the fact that the applicants should have inherited a part of a house from their mother, currently occupied by their father, nor that they might be familiar with another uncle living in the same area as their father, nor any other factors, point to any solid links to Pakistan as suggested by the Government. According to the applicants they were unable to write Urdu and were speaking a "childish" Urdu. They both mastered English well, which was an official language in Pakistan. Although the applicants still had certain links to Pakistan and there would not appear to be insurmountable obstacles to them returning to the country, they might, as found by the High Court, encounter social and professional difficulties if they were to do so (see paragraph 36 above)."

I præmis 89 gennemgik EMD betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

Vedrørende spørgsmålet om, hvorvidt klageren havde privatliv og familieliv i Nederlandene, udtalte EMD i præmis 47-50:

"47. The Court has further laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, for instance, Konstatinov v. the Netherlands, no. 16351/03, § 52, 26 April 2007,

and Z. and T. v. the United Kingdom (dec.), no. 27034/05, ECHR 2006-III). However, it has not insisted on such further elements of dependency in a number of cases concerning young adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; Osman v. Denmark, no. 38058/09, §§ 55-56, 14 June 2011; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019).

48. Even if a person of 26 years of age could still be considered a "young adult", the Court notes that at least in 2011 the applicant was not living full-time with his foster parents anymore (see paragraph 21 above). Moreover, it has not been argued and there is no indication that there are any further elements of dependency between the applicant and his foster parents.

49. The above notwithstanding, the Court deems it not necessary to decide on the question whether or not the ties between the applicant and his foster parents constituted family life within the meaning of Article 8. It reiterates that, in practice, the factors to be examined in order to assess the compatibility with Article 8 of a denial of a right of residence – in so far as those factors are relevant in a particular case – are the same regardless of whether family or private life is engaged (see, mutatis mutandis, A.A. v. the United Kingdom, no. 8000/08, §§ 49 and 57, 20 September 2011).

50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

Herefter gennemgik EMD i præmis 52-54 forskellen på "settled migrants" og udlændinge, der søger om opholdstilladelse i landet:

"52. In its case-law the Court has established a number of principles relating to the expulsion of settled migrants. The notion of "settled migrants" has been used in the Court's case-law for persons who have already been granted formally a right of residence in a host country. As regards settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country, the Court has found that very serious reasons are required to justify expulsion (see, inter alia, Maslov, cited above, § 75, and Osman, cited above, § 65). Furthermore, in cases of settled migrants the Court regards the withdrawal of their residence permit and their expulsion as an interference with their right to private and/or family life (see, amongst many authorities, Boultif v. Switzerland, no. 54273/00, § 40, ECHR 2001-IX, and Mokrani v. France, no. 52206/99, § 23, 15 July 2003).

53. As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – even after many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 (see in respect of this case-law, Üner, cited above, §§ 57-60, and Maslov, cited above, §§ 68-76) cannot be transposed automatically to the situation of an alien who has not been granted formally a right of residence (see Jeunesse, cited above, §§ 104-05). In the latter situation the issue that falls to be determined is whether Article 8 of the Convention imposes a positive obligation on the respondent State to allow the applicant to exercise private and/or family life on its territory (ibid., § 105).

54. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation."

I præmis 55-58 gennemgik EMD principperne for staternes positive forpligtelser efter EMRK artikel 8 og spørgsmålet om berettiget forventning.

I præmis 59 konstaterede EMD, at til trods for, at klageren var ankommet til opholdslandet som knap fireårig og således havde tilbragt det meste af sin barndom og ungdom i landet, var hans ophold ikke lovligt, og han var således ikke en "settled migrant", hvorfor et afslag på opholdstilladelse ikke forudsatte sådanne "meget alvorlige grunde", som ville være nødvendige for at retfærdiggøre en udsendelse af en settled migrant indrejst i samme alder. På den anden side udtalte EMD i præmis 60, at princippet om, at det "kun under meget ekstraordinære omstændigheder" vil være i strid med artikel 8 at nægte ophold til en person, som har haft ulovligt ophold, finder anvendelse i sager, hvor det allerede fra det tidspunkt, hvor privatliv i opholdslandet indledes, er udlændingen bekendt, at vedkommendes opholdsretlige status kan være til hinder for fortsat privatliv. Dette var ikke tilfældet for klagerens vedkommende, og henset til hans unge alder ved indrejsen i opholdslandet og sagens øvrige omstændigheder fandtes dette princip ikke at kunne gøres gældende over for ham. Endvidere kunne klageren ikke identificeres med plejeforældrenes undladelse af at sikre ham lovligt ophold, idet deres ophold ikke var afhængigt af meddelelse af opholdstilladelse til klageren. På den baggrund udtalte EMD i præmis 61:

"61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country

of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above).”

EMD udtalte herefter i præmis 64:

“64. Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State.”

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

“The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant’s relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands.”

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

“69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention.”

4.2.13.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Osman v. Denmark (2011)* ansås klagerens opholdstilladelse i medlemsstaten som bortfaldet som følge af hendes langvarige ophold i familiens tidligere opholdsland Kenya. Klageren, der var somalisk statsborger, havde boet i Kenya fra hun var tre-fire år, indtil hun som syvårig indrejste i opholdslandet som familiesammenført. Hun havde herefter opholdt sig i opholdslandet, indtil hun som 15-årig af forældrene blev sendt tilbage til Kenya. Kort tid før hun fyldte 18 år, kontaktede klageren den danske ambassade i Kenya med

henblik på at kunne vende tilbage til sin familie i opholdslandet, hvilket blev afslået af de danske myndigheder. Hun indrejse herefter som 19-årig i medlemsstaten, hvor hun ikke længere havde lovligt ophold.

EMD konstaterede i præmis 60-61, at:

"60. The Court observes that the applicant spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old. She speaks Danish and received schooling in Denmark until August 2002. Her divorced parents and older siblings live in Denmark. The applicant therefore had social, cultural and family ties in Denmark.

61. The applicant also had social, cultural and family ties in Kenya and Somalia. She was born in Somalia and lived there from 1987 to 1991. She resided in Kenya from 1991 to 1995. The applicant spoke Somali. It was unclear whether the applicant had family in Somalia but certain that she had family in Kenya. The applicant returned to Kenya in 2003 and took care of her parental grandmother. Her application in August 2005 to re-enter Denmark was refused but she re-entered the country illegally, apparently in June 2007. The applicant's father was a recognised refugee from Somalia. He visited Kenya at least twice, namely in 2003 and 2005. The second time he remarried there. There was no indication that the applicant's mother could not enter Somalia and Kenya."

EMD forholdt sig ikke udtrykkeligt til betydningen af klagerens familieforhold i hjemlandet. Om betydningen af klagerens tidligere lovlige ophold i opholdslandet udtalte EMD imidlertid i præmis 65:

"It also reiterates that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in a host country, very serious reasons are required to justify expulsion (see, Maslov v. Austria [GC], quoted above, § 75). In the present case the applicant was refused restoration of her lapsed residence permit, as opposed to being expelled due to having committed a crime. Nevertheless, it is undisputed that she spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old, that she spoke Danish, that she had received schooling in Denmark until August 2002, and that all her close family remained in Denmark. In these circumstances, the Court also considers that very serious reasons were required to justify the authorities' refusal to restore the applicant's residence permit, when she applied from Kenya in August 2005."

EMD fandt blandt andet under henvisning til klagerens tilknytning til opholdslandet og hensynet til barnets tarv ("interest"), herunder barnets selvstændige ret til respekt for sit privat- og familieliv:

"76. Having regard to all the above circumstances, it cannot be said that the applicant's interests have sufficiently been taken into account in the authorities' refusal to reinstate her residence permit in Denmark or that a fair balance was struck between the applicants' interests on the one hand and the State's interest in controlling immigration on the other.

77. There has accordingly been a violation of Article 8 of the Convention."

Sagen *Hasanbasic v. Switzerland (2013)* omhandlede en klager, hvis opholdstilladelse blev annulleret af de nationale myndigheder i opholdslandet, idet klageren over for disse myndigheder havde tilkendegivet, at han

ville rejse tilbage til sit hjemland med henblik på permanent at bosætte sig der. Klageren genindrejste dog fire måneder senere i opholdslandet, hvorefter hans ægtefælle, som stadig opholdt sig i opholdslandet, indgav en ansøgning om ny opholdstilladelse på baggrund af familiesammenføring. EMD har kategoriseret sagen *som refusal to renew residence visa*, hvorfor den er medtaget under dette punkt.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det komplette *legal summary* under afsnit 4.2.1.5. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

Efter i præmis 51 og 52 at have fastslået, at indgrebet var i overensstemmelse med loven og forfulgte et eller flere af de legitime hensyn, gennemgik EMD i præmis 53-56 de generelle principper, som var relevante i den konkrete sag for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund.

I præmis 57-63 anvendte EMD disse principper på forholdene den konkrete sag. EMD udtalte i præmis 57 (uofficiel dansk oversættelse):

"57. Domstolen bemærker indledningsvist, at de to klagere længe har boet lovligt i Schweiz. Den mandlige klager ankom til Schweiz i 1986, den kvindelige klager ankom allerede i 1969. Varigheden af deres ophold udgør således på det tidspunkt, hvor Forbundsdomstolen afsagde sin dom i 2009, henholdsvis 23 og 40 år. Den kvindelige klager har endvidere haft en etableringstilladelse i Schweiz siden 1979, og dermed en tilladelse af en mere stabil karakter end en almindelig opholdstilladelse. Det er i øvrigt ikke bestridt, at Schweiz i en lang periode har været centrum for klagernes privat- og familieliv.

Domstolen konstaterer ligeledes, at klagerne har opholdt sig uafbrudt i Schweiz, bortset fra i en periode på fire måneder fra mellem august og december 2004, efter at de nationale myndigheder havde afvist den kvindelige klagers anmodning om familiesammenføring (ovenstående præmis 14). Den foreliggende sag adskiller sig på dette punkt væsentligt fra sagen Gezginci (nævnt ovenfor, præmis 69 og 70), hvori klager gentagne gange tog til udlandet i længerevarende perioder.

Domstolen vurderer under disse omstændigheder, at det tilkommer de nationale myndigheder på en overbevisende måde og ved hjælp af relevante og tilstrækkelige årsager at bevise, at der eksisterer et samfundsmæssigt bydende nødvendigt behov for at udvise den pågældende person, og navnlig, at denne foranstaltning står i forhold til det forfulgte legitime mål."

I præmis 58 gennemgik EMD den mandlige klagers lovstridige adfærd og fandt, at de pågældende forseelser ikke vejede tungt, og at klageren ikke kunne anses for at udgøre en fare eller trussel for sikkerheden eller den offentlige orden. I præmis 59 gennemgik EMD betydningen af klagerens store gæld til myndighederne i opholdslandet og de betydelige beløb, som klagerne havde modtaget i offentlig støtte og fandt, at opholdslandets myndigheder kunne tage højde for klagernes gæld og afhængighed af offentlig bistand, såfremt denne afhængighed måtte have indflydelse på landets økonomiske velvære, men at disse forhold kun udgjorde et aspekt blandt flere, som EMD skulle tage højde for. I præmis 60-61 gennemgik EMD klagernes familieliv, herunder med deres voksne børn, som var bosat i opholdslandet, og betydningen af, at den mandlige klager ville have mulighed for at besøge familien i opholdslandet.

I præmis 62-63 gennemgik EMD fastheden af de sociale, kulturelle og familiemæssige bånd til opholdslandet og hjemlandet og klagernes tilknytning til hjemlandet (uofficiel dansk oversættelse):

"62. Et andet kriterium, der skal tages højde for i afvejningen af interesserne, er fastheden af de sociale, kulturelle og familiemæssige bånd med Schweiz og med Bosnien-Hercegovina. Forbundsdomstolen har selv i den foreliggende sag erkendt, at klagerne har et betydeligt socialt netværk i Schweiz, og at deres tilbagevenden til oprindelseslandet på grund af den betydelige varighed af deres ophold i Schweiz uden tvivl ville stille dem over for visse vanskeligheder (ovenstående præmis 20).

63. De schweiziske myndigheder har ganske vist ligeledes henvist til, at klagerne havde ladet et hus opføre i deres oprindelsesland, og at ét af børnene fra den mandlige klagers første ægteskab samt hans søster bor i oprindelseslandet. Domstolen tager ligeledes til efterretning, at den mandlige klager den 24. august 2003 havde meddelt de schweiziske myndigheder, at han definitivt ville vende tilbage til Bosnien-Hercegovina, hvilket er ét af de nationale myndigheders hovedargumenter for afvisning af en fornyelse af opholdstilladelsen. Domstolen vurderer, at dette argument skal bedømmes i lyset af de efterfølgende indtrufne forhold, dvs. efter Forbundsdomstolens dom af 6. marts 2009."

Herefter gennemgik EMD i præmis 64-65 betydningen af klagerens helbredsmæssige forhold og den risiko for en forværring heraf, en flytning til hjemlandet ville indebære.

EMD udtalte i præmis 66-67 (uofficiel dansk oversættelse):

"66. Domstolen vedgår henset til ovenstående, at landets økonomiske velfærd ganske vist kan tjene som et legitimt mål i forbindelse med en afvisning af at forny en opholdstilladelse. Denne årsag skal ikke desto mindre vurderes ud fra en retfærdig afvejning og i lyset af samtlige omstændigheder i sagen. Domstolen vurderer imidlertid ud fra den betydelige varighed af klagernes ophold i Schweiz og deres ubestridte sociale integration i landet, at den anfægtede foranstaltning ikke var berettiget ud fra et bydende nødvendigt samfundsmæssigt behov og ikke stod i forhold til de påberåbte legitime formål. Den indklagede stat har følgelig overskredet sin skønsmargen i den foreliggende sag.

67. Der er følgelig sket en krænkelse af Konventionens artikel 8."

4.2.14. Klagerens helbredsmæssige forhold

EMD har i nogle sager inddraget klagerens helbredsmæssige forhold i vurderingen efter EMRK artikel 8.

I sagen *Bensaid v. the United Kingdom (2001)* var klageren diagnosticeret med skizofreni i opholdslandet. Da han tog ophold i sit hjemland i en periode, bortfaldt hans opholdstilladelse i opholdslandet. EMD udtalte, at klagerens helbredsmæssige tilstand ikke indebar, at en udsendelse af ham til hjemlandet ville udgøre en krænkelse af EMRK artikel 3. Om vurderingen af klagerens helbredsmæssige forhold efter EMRK artikel 8 udtalte EMD:

"46. Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity (see Costello-Roberts v. the United Kingdom, judgment of 25 March 1993, Series A no. 247-C, pp. 60-61, § 36)." [Understreget her, red.]

EMD har gentaget den understregede passus i sin dom i sagen *Nnyanzi v. the UK (2008), præmis 74.*

Sagen *Costello-Roberts v. the United Kingdom (1993)* vedrørte ikke udsendelse af udlændinge, men en kostskoles disciplinærstraf over for en elev i form af tre slag på bagdelen udenpå tøjet med en gymnastiksko. Klagerne gjorde gældende, at forholdet udgjorde en krænkelse både af EMRK artikel 3 og EMRK artikel 8.

EMD udtalte i den i ovenstående domme nævnte præmis 36:

"36. The Court agrees with the Government that the notion of "private life" is a broad one, which, as it held in its recent judgment in the case of Niemietz v. Germany (16 December 1992, Series A no. 251-B, p. 11, para. 29), is not susceptible to exhaustive definition. Measures taken in the field of education may, in certain circumstances, affect the right to respect for private life (see, mutatis mutandis, the judgment of 23 July 1968 on the merits of the "Belgian Linguistics" case, Series A no. 6, p. 33, para. 7), but not every act or measure which may be said to affect adversely the physical or moral integrity of a person necessarily gives rise to such an interference.

The particular disciplinary measure taken against Jeremy Costello-Roberts for a series of minor breaches of school rules did not attain, in the opinion of the Court, a level of severity which was sufficient to bring it within the ambit of Article 3 (art. 3) (see paragraph 32 above), the Convention Article which expressly deals with punishment and therefore provides a first point of reference for examining a case concerning disciplinary measures in a school.

The Court does not exclude the possibility that there might be circumstances in which Article 8 (art. 8) could be regarded as affording in relation to disciplinary measures a protection which goes beyond that given by Article 3 (art. 3). Having regard, however, to the purpose and aim of the Convention taken as a whole, and bearing in mind that the sending of a child to school necessarily involves some degree of interference with his or her private life, the Court considers that the treatment complained of by the applicant did not entail adverse effects for his physical or moral integrity sufficient to bring it within the scope of the prohibition contained in Article 8 (art. 8). While not wishing to be taken to approve in any way the retention of corporal punishment

as part of the disciplinary regime of a school, the Court therefore concludes that in the circumstances of this case there has also been no violation of that Article (art. 8).”

I sagen *Z and others v. the United Kingdom (2001)*, som ligeledes ikke vedrørte udsendelse af udlændinge, men de sociale myndigheders manglende indgriben i forhold til forældrenes vold og omsorgssvigt over for deres børn, fandt EMD, at forholdet udgjorde en krænkelse af EMRK artikel 3, hvorefter EMD for så vidt angik den påberåbte EMRK artikel 8-krænkelse udtalte:

“76. The applicants alleged, in the alternative to their complaints under Article 3 of the Convention, that the circumstances in which they suffered ill-treatment, causing them physical and psychological injury, disclosed a breach of Article 8 of the Convention, which under the principle of respect for private life, protected physical and moral integrity.

77. Having regard to its finding of a violation of Article 3, the Court considers that no separate issue arises under Article 8 of the Convention.”

I sagen *Emre v. Schweiz (2008)* var klageren indrejst i opholdslandet som femårig sammen med sine forældre. Klageren blev flere gange dømt for kriminalitet, herunder kriminalitet begået mens han var mindreårig, og blev som 22-årig udvist. I præmis 65-71 gennemgik EMD de generelle principper, som var relevante i den konkrete sag for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund. EMD henviste i den forbindelse i præmis 68-69 til kriterierne som sammenfattet i blandt andet Üner-dommen og udtalte i præmis 71 (uofficiel dansk oversættelse):

”Der skal endelig ligeledes tages højde for de særlige omstændigheder ved den foreliggende sag (Boultif, nævnt ovenfor, præmis 51), såsom f.eks. forholdene af medicinsk karakter i den foreliggende sag samt proportionaliteten af den anfægtede foranstaltning og indrejseforbuddets midlertidige eller endelige karakter.”

Vedrørende betydningen af klagerens helbredsmæssige problemer i den konkrete sag udtalte EMD i præmis 83 (uofficiel dansk oversættelse):

”Domstolen udelukker ikke, at klagers helbredsproblemer kan behandles på passende vis i Tyrkiet. Den er ligeledes opmærksom på, at klager i det mindste i starten ignorerede den ordinerede behandling. Samtidig finder Domstolen, at klagers forstyrrelser, som Regeringen i øvrigt på ingen måde har rejst tvivl om, selv om de ikke i sig selv er tilstrækkelige til at retfærdiggøre et særskilt klagepunkt i henhold til artikel 8, ikke desto mindre udgør et yderligere aspekt, der sandsynligvis vil gøre det endnu sværere for klager at vende tilbage til sit hjemland, hvor han næppe har noget socialt netværk.”

I sagen *Hasanbasic v. Switzerland (2013)*, der omhandlede en situation, som EMD i sit engelske legal summary har kategoriseret som ”*refusal to renew residence visa”,* udtalte EMD tilsvarende om de generelle principper i præmis 54 (uofficiel dansk oversættelse):

”Der skal ligeledes i givet fald tages højde for særlige omstændigheder i forbindelse med nærværende sag, som for eksempel lægelige informationer (Emre, nævnt ovenfor, præmis 71, 81-83).”

I sagen *I.M. v. Switzerland (2019)* blev klageren udvist af opholdslandet efter at være blevet dømt for voldtægt ti år forinden. Han led af forskellige sygdomme og var vurderet 80 % invalid. I præmis 69 gennemgik EMD de generelle kriterier, som Storkammeret havde sammenfattet i Üner-dommen, som skal vejlede de nationale domstole i sager om udvisning af kriminelle udlændinge ved vurderingen af, om indgrebet er nødvendigt i et demokratisk samfund. EMD udtalte herefter i præmis 70 (uofficiel dansk oversættelse):

"Der skal ligeledes i givet fald tages højde for de særlige omstændigheder i forbindelse med den foreliggende sag, som f.eks. forhold af lægelig art eller indrejseforbuddets midlertidige eller definitive karakter (Shala mod Schweiz, nr. 52873/09, præmis 46, 15. november 2012, og de citerede referencer)."

Efter at have konstateret, at de nationale domstole i deres vurdering af indgrebets nødvendighed havde undladt at inddrage flere af de kriterier, der er fastlagt i EMD's retspraksis, herunder de særlige omstændigheder i sagen som f.eks. de lægelige oplysninger, udtalte EMD i præmis 78-79 (uofficiel dansk oversættelse):

"78. Domstolen vurderer imidlertid, at den administrative forbundsdomstol i den foreliggende sag har foretaget en overfladisk behandling af udsendelsesforanstaltningens proportionalitet. Henset til fraværet af en reel afvejning af de interesser, der står på spil, vurderer Domstolen, at de nationale myndigheder ikke på en overbevisende måde har formået at bevise, at udsendelsesforanstaltningen skulle være proportionel med de forfulgte legitime mål og dermed nødvendig i et demokratisk samfund.

79. Der ville herefter foreligge en krænkelse af Konventionens artikel 8, hvis klager udvises."

I sagen *Savran v. Denmark (2021)* var klageren fundet skyldig i vold med døden til følge, men fundet straffri som følge af psykisk sygdom. Han blev idømt retspsykiatrisk behandling samt udvist for bestandig. Storkammeret gennemgik i præmis 191-196 betydningen af klagerens helbredstilstand og udtalte i den forbindelse blandt andet:

"191. The Court observes at the outset that, on account of his mental condition, the applicant was more vulnerable than an average "settled migrant" facing expulsion. The state of his health was required to be taken into account as one of the balancing factors (see paragraph 184 above). […]

…

193. […] In accordance with the Maslov criteria (see paragraph 182 above), it needs to be considered whether "very serious reasons" justified the applicant's expulsion and hence, for the purposes of the present case, the refusal to revoke the order in 2015 at the time its execution became feasible. A relevant issue for the purposes of the Article 8 analysis is whether the fact that the applicant, on account of his mental illness, was, in the national courts' view, exempt from punishment under Article 16 § 2 and Article 68 of the Danish Penal Code when convicted in 2009 had the impact of limiting the extent to which the respondent State could legitimately rely on the applicant's criminal acts as the basis for his expulsion and permanent ban on re-entry.

194. In its recent case-law dealing with the expulsion of settled migrants under Article 8 of the Convention (see, for example, paragraph 189 above), the Court has held that serious criminal offences can, assuming that the other Maslov criteria are adequately taken into account by the national courts in an overall balancing of

interests, constitute a "very serious reason" such as to justify expulsion. However, the first Maslov criterion, with its reference to the "nature and seriousness" of the offence perpetrated by the applicant, presupposes that the competent criminal court has determined whether the settled migrant suffering from a mental illness has demonstrated by his or her actions the required level of criminal culpability. The fact that his or her criminal culpability was officially recognised at the relevant time as being excluded on account of mental illness at the point in time when the criminal act was perpetrated may have the effect of limiting the weight that can be attached to the first Maslov criterion in the overall balancing of interests required under Article 8 § 2 of the Convention.

195. The Court makes clear that in the present case it is not called upon to make general findings in this regard, but only to determine whether the manner in which the national courts assessed the "nature and seriousness" of the applicant's offence in the 2015 proceedings adequately took into account the fact that he was, according to the national authorities, suffering from a serious mental illness, namely paranoid schizophrenia, at the moment when he perpetrated the act in question.

196. In this connection, the Court observes that, in its decision of 13 January 2015 regarding the lifting of the expulsion order, the High Court only briefly referred to the serious nature and gravity of his criminal offence (the first Maslov criterion, see paragraphs 66 and 182 above). No account was taken of the fact that the applicant was, due to his mental illness, ultimately exempt from any punishment but instead sentenced to committal to forensic psychiatric care (see paragraphs 22, 26 and 30 above). The High Court also made only a limited attempt to consider whether there had been a change in the applicant's personal circumstances with a view to assessing the requirements of public order in the light of the information regarding his conduct during the intervening 7-year period (see paragraphs 34-36, 38-40, 43, 51, 54 and 62 above). Against this background, and given the immediate and long-term consequences for the applicant of the expulsion order being executed (see paragraph 200 below in relation to the permanent nature of the ban on re-entry), the Court considers that the national authorities did not give a sufficiently thorough and careful consideration to the Article 8 rights of the applicant, a settled migrant who had resided in Denmark since the age of six, and did not carry out an appropriate balancing exercise with a view to establishing whether those applicant's rights outweighed the public interest in his expulsion for the purpose of preventing disorder and crime (compare Ndidi, cited above, §§ 76 and 81)."

Se også sagen *Azzaqui mod Nederlandene (2023).* I sagen var klageren indrejst i opholdslandet som tiårig. Da han var mellem 15 og 24 år, blev han idømt fængselsstraf for en række lovovertrædelser. Som 24-årig blev han i 1996 idømt to års fængsel for voldtægt, og den nationale domstol fandt, at det skulle tillægges betydning i vurdering af skyldsspørgsmålet, at klageren på gerningstidspunktet led af en personlighedsforstyrrelse med skizotypiske og antisociale karaktertræk og episodiske psykotiske oplevelser. På baggrund af ekspertudtalelser, hvorefter der var en betydelig risiko for ny kriminalitet, blev han af hensyn til "the general safety of persons" i tillæg til sin fængselsstraf idømt retspsykiatrisk behandling. Hans behandlingsdom blev de følgende 20 år løbende fornyet. Klageren udviste god opførsel og blev 20 år efter dommen vurderet egnet til løsladelse fra tilbageholdelsen på betingelse af blandt andet fortsat god opførsel, tilsyn og indkvartering på et bosted, indtil han 22 år efter dommen for voldtægt fik sin opholdstilladelse inddraget under henvisning til, at han på baggrund af den tidligere begåede kriminalitet fandtes at udgøre en trussel for den offentlige orden, ligesom han blev meddelt indrejseforbud i ti år.

EMD udtalte i præmis 48-50 og 54-57:

"48. Where appropriate, other elements relevant to the case, such as, for instance, its medical aspects, should also be taken into account (see Savran, cited above, § 184, with further references), including the availability and accessibility of medical treatment in the country of destination (ibid., §§ 191-92).

49. The Court reiterates that the criterion of the "nature and seriousness of the offence committed by the applicant" is to be considered by reference to the totality of a person's criminal history and the circumstances under which the crime or crimes giving rise to expulsion were committed. Accordingly, under this criterion account must be taken of the nature and the effects of the crime on society as a whole (see Akbulut v. the United Kingdom (dec.), no. 53586/08, § 18, 10 April 2012; Unuane v. the United Kingdom, no. 80343/17, § 87, 24 November 2020, with further references; and Üner, cited above, § 63), the severity of the criminal penalty (see Unuane, § 86, and Azerkane, § 73, both cited above), the risk of reoffending (see Ndidi v. the United Kingdom, no. 41215/14, §§ 29, 78 and 81, 14 September 2017; Levakovic v. Denmark, no. 7841/14, §§ 19 and 44, 23 October 2018; and Azerkane, cited above, §§ 22, 78 and 84), whether the offences were committed as a juvenile or as an adult (see, for example, Maslov, cited above, § 81).

50. In Savran (cited above, §§ 193-96), the Court added that this criterion presupposes that the competent criminal courts have determined whether the settled immigrant suffering from a mental illness had demonstrated by his or her actions the required level of criminal culpability and, taking note of the fact that the applicant in that case was, in the national courts' view, exempt from punishment under domestic criminal law when convicted, held that this may have an impact of limiting the weight that can be attached to this criterion in the overall balancing of interests required under Article 8 § 2 of the Convention. The Court observed that it was not called upon to make general findings in this regard in the case at hand, but only to determine whether the manner in which the national authorities, including the domestic courts, assessed the "nature and seriousness" of the applicant's offence adequately took into account the fact that he was, according to the national authorities, suffering from a serious mental illness at the moment when he perpetrated the act in question.

[…]

54. In determining whether those revocation proceedings were in compliance with Article 8 of the Convention, the Court will assess whether the national authorities, including the domestic courts, applied the relevant criteria established in the Court's case-law, and adequately balanced the interests of the applicant against those of the general public (see paragraph 52 above). In this connection the Court notes at the outset that, on account of his mental condition, the applicant was more vulnerable than an average "settled migrant" facing expulsion (compare Savran, cited above, § 191). The state of his health was required to be taken into account as one of the balancing factors (see paragraph 48 above).

55. As regards the criterion "nature and seriousness of the offence committed by the applicant", the Court notes that the applicant was convicted between 1987 and 1996 of multiple crimes and of rape in 1996 (see paragraphs 6 and 7 above). Those convictions included crimes of a violent and of a sexual nature which can, assuming that the other relevant criteria are adequately taken into account by the national authorities in an overall balancing of interests, constitute a "very serious reason" such as to justify expulsion (see Savran, cited above, § 194).

56. In determining whether the other relevant criteria were adequately taken into account in the present case, the Court cannot overlook the fact that in the criminal proceedings that led to the applicant's last conviction, reports were drawn up by a psychiatrist and a psychologist which revealed that at the time when he had committed that offence, the applicant was suffering from a personality disorder with schizotypal and antisocial traits and episodic psychotic experiences to such an extent that the offence could only be attributed to him to a reduced extent. The Arnhem Regional Court made that conclusion of reduced criminal culpability its own when it convicted the applicant of rape and imposed the TBS order (see paragraph 7 above).

57. The Court observes that the Deputy Minister in the decision revoking the applicant's residence permit, only referred to the seriousness of the multiple crimes that the applicant had committed and the extensions of his TBS order, and noted further that there remained a risk of reoffending and thus a threat to public order (see paragraph 16 above). Upholding those findings, the Regional Court held in its judgment of 6 November 2018 that the Deputy Minister had rightly given "decisive weight" to the serious crimes that had repeatedly been committed by the applicant (see paragraph 24 above). It follows from the foregoing that neither the Deputy Minister nor the administrative court, when assessing the "nature and seriousness of the applicant's offence", took into account the fact that he was, in the view of the criminal court, suffering from a serious mental illness, which had reduced his criminal culpability, at the moment when he perpetrated the act in question (see Savran, cited above, § 195)."

Herefter udtalte EMD i præmis 60:

"[…]In reaching their conclusion about the existence of a threat to public order in the revocation proceedings, the authorities thus failed to sufficiently consider the applicant's personal circumstances, and particularly the relevant conclusions of the criminal courts, supported as they were by medical evidence (compare Savran, cited above, § 197)."

Som anført i afsnit 3.3.3.2 afhænger vægtningen af de enkelte elementer i proportionalitetsafvejningen af de konkrete omstændigheder i hver enkelt sag, se f.eks. Maslov v. Austria (2008), hvor EMD i præmis 70 udtalte:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[26] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

[26] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

4.2.14.1. Alvorlig kriminalitet

I sagen *Nasri v. France (1995)* var klageren indrejst i opholdslandet som femårig. Klageren var født *"deaf and dumb"*. Klageren havde fra han var 17 år gammel begået adskillige kriminelle forhold. Da klageren var 26 år gammel, blev han idømt fem års fængsel for deltagelse i en gruppevoldtægt. Klageren modtog efterfølgende også flere domme for mindre alvorlig kriminalitet. I en periode på 12 år var klageren blevet idømt 103 måneders fængsel. Klageren blev dømt til udvisning, da han var 32 år, men denne var ikke blevet effektueret, da EMD behandlede sagen.

EMD udtalte i præmis 43, at:

"Above all it is necessary to take account of Mr Nasri's handicap. He has been deaf and dumb since birth and this condition has been aggravated by an illiteracy which was the result in particular of largely inadequate schooling, even though this was to a certain extent attributable to the applicant since on account of his bad behaviour he was expelled from the establishments that he attended. Like the Delegate of the Commission, who relied on the expert reports concerning the applicant, the Court is inclined to the view that, for a person confronted with such obstacles, the family is especially important, not only in terms of providing a home, but also because it can help to prevent him from lapsing into a life of crime, all the more so in this instance inasmuch as Mr Nasri has received no therapy adapted to his condition."

EMD fandt, at der, hvis udvisningen blev effektueret, ville være en krænkelse af artikel 8, og udtalte i præmis 46, at:

"In view of this accumulation of special circumstances, notably his situation as a deaf and dumb person, capable of achieving a minimum psychological and social equilibrium only within his family, the majority of whose members are French nationals with no close ties with Algeria, the decision to deport the applicant, if executed, would not be proportionate to the legitimate aim pursued. It would infringe the right to respect for family life and therefore constitute a breach of Article 8 (art. 8)."

I sagen *I.M. v. Switzerland (2019)* blev klageren udvist af opholdslandet efter at være blevet dømt for voldtægt ti år forinden. Han led af forskellige sygdomme og var vurderet 80 % invalid. Klagerens tidligere ægtefælle og deres fællesbørn, hvoraf tre var myndige, havde alle ophold i opholdslandet, og klageren var afhængig af hjælp fra de myndige børn i form af pleje og økonomisk bistand.

I præmis 69 gennemgik EMD de generelle kriterier, som Storkammeret havde sammenfattet i Üner-dommen, som skal vejlede de nationale domstole i sager om udvisning af kriminelle udlændinge ved vurderingen af, om indgrebet er nødvendigt i et demokratisk samfund. EMD udtalte herefter i præmis 70 (uofficiel dansk oversættelse):

"Der skal ligeledes i givet fald tages højde for de særlige omstændigheder i forbindelse med den foreliggende sag, som f.eks. forhold af lægelig art eller indrejseforbuddets midlertidige eller definitive karakter (Shala mod Schweiz, nr. 52873/09, præmis 46, 15. november 2012, og de citerede referencer)."

I præmis 71-73 udtalte EMD om de nationale myndigheders skønsbeføjelser og begrundelsespligt (uofficiel dansk oversættelse):

"71. Domstolen henviser til, at de nationale myndigheder har visse skønsbeføjelser til at udtale sig om nødvendigheden af et indgreb i udøvelsen af en rettighed, der er beskyttet i medfør af artikel 8, og om den pågældende foranstaltnings proportionalitet med det legitime mål, der forfølges. Domstolens opgave består i at bestemme, om der i forbindelse med anfægtede foranstaltninger er respekteret en rimelig afvejning mellem de tilstedeværende interesser, dvs. på den ene side den pågældende persons interesser, der er beskyttet i medfør af Konventionen, og på den anden side samfundets interesser (Slivenko, nævnt ovenfor, præmis 113, og Boultif, nævnt ovenfor, præmis 47).

72. Domstolen henviser ligeledes til, at de nationale domstole skal begrunde deres afgørelser tilstrækkeligt udførligt, for navnlig at gøre det muligt for Domstolen at sikre det europæiske tilsyn, som Domstolen er betroet (jf., mutatis mutandis, X mod Letland [Storkammeret], nr. 27853/09, præmis 107, EMD 2013, og El Ghatet mod Schweiz, nr. 56971/10, præmis 47, 8. november 2016). Et utilstrækkeligt ræsonnement fra de nationale myndigheders side uden en reel afvejning af de tilstedeværende interesser strider mod kravene i Konventionens artikel 8. Det er tilfældet, når de nationale myndigheder ikke på en overbevisende måde formår at overbevise om, at indgrebet i en ret, der er beskyttet i medfør af Konventionen, står i forhold til de forfulgte mål, og at det herefter svarer til et "bydende nødvendigt socialt behov" i overensstemmelse med den ovennævnte retspraksis (El Ghatet, nævnt ovenfor, præmis 47, og mutatis mutandis, Schweizerische Radio- und Fernsehgesellschaft SRG mod Schweiz, nr. 34124/06, præmis 65, 21. juni 2012, Saber og Boughassal mod Spanien, nr. 76550/13 og 45938/14, præmis 51, 18. december 2018).

73. Hvis det til gengæld viser sig, at de nationale myndigheder har foretaget en tilstrækkelig og overbevisende undersøgelse af de faktiske forhold og relevante betragtninger, herunder en passende afvejning af klagers interesser og samfundets mere generelle interesser, tilkommer det ikke Domstolen at lade sin vurdering træde i stedet for den vurdering, der er foretaget af de nationale myndigheder, herunder i forhold til behandlingen af proportionaliteten i den omtvistede sag, medmindre der findes væsentlige årsager til at gøre dette (jf. i denne henseende Ndidi mod Det Forenede Kongerige, nr. 41215/14, præmis 76, 14. september 2017, Hamesevic mod Danmark (dec.), nr. 25748/15, præmis 43, 16. maj 2017 og Alam mod Danmark (dec.), nr. 33809/15, præmis 35, 6. juni 2017)."

EMD konstaterede om de nationale domstoles konkrete vurdering af indgrebets nødendighed i et demokratisk samfund i præmis 76-79 (uofficiel dansk oversættelse):

"76. Domstolen bemærker, at den administrative forbundsdomstol har udtalt sig om alvoren af den begåede lovovertrædelse, kortfattet behandlet spørgsmålet om risikoen for gentagelse af den strafbare handling og bemærket de problemer, som klager måtte blive konfronteret med ved sin tilbagevenden til Kosovo. Domstolen henviser imidlertid til, at forbundsdomstolen har begrænset sin analyse i forhold til Konventionens artikel 8 til alene disse dele. Da forbundsdomstolen traf afgørelse mere end tolv år efter lovovertrædelsen, tog den på ingen måde højde for udviklingen i klagers adfærd, siden lovovertrædelsen blev begået (K.M. mod Schweiz, nr. 6009/10, præmis 54, 2. juni 2015, og de nævnte referencer). Den vurderede heller ikke indvirkningen af

den betydelige forværring af den pågældende persons helbredstilstand (invaliditetsgrad på 80 % siden 1. oktober 2012) i forhold til risikoen for gentagelse af de strafbare forhold og har ikke behandlet flere kriterier, der er fastlagt i Domstolens retspraksis ved vurdering af nødvendigheden af udvisningsforanstaltningen. Den administrative forbundsdomstol har navnlig ikke taget højde for fastheden af klagers sociale, kulturelle og familiemæssige tilknytning til værtslandet Schweiz og destinationslandet Kosovo samt de særlige omstændigheder i den foreliggende sag, som for eksempel de lægelige oplysninger (Üner, nævnt ovenfor, præmis 58, og Shala, nævnt ovenfor, præmis 46). For så vidt angår navnlig respekten for familielivet, selv om domstolene har anerkendt klagers afhængighed, i det mindste hans økonomiske afhængighed af de myndige børn, er der ikke foretaget en mere dybtgående analyse af indvirkningerne af denne afhængighed på klagers udøvelse af rettighederne i medfør af Konventionens artikel 8.

77. Domstolen vurderer henset til ovenstående, at der ved anvendelse af de kriterier, der er fastlagt i dens retspraksis (ovenstående præmis 68 og 69), ikke kan udledes nogen tydelig konklusion med hensyn til, hvorvidt klagers private og familiemæssige interesse i fortsat at kunne bo på den indklagede stats territorium går forud for sidstnævntes offentlige interesse i at udvise klager med henblik på at varetage missionen med opretholdelse af den offentlige orden (jf., mutatis mutandis, El Ghatet, nævnt ovenfor, præmis 52). Hvis de nationale myndigheder havde foretaget en grundig afvejning af de pågældende interesser og taget højde for de forskellige kriterier, der er fastlagt i Domstolens retspraksis, og hvis de havde anført relevante og tilstrækkelige grunde, der kunne berettige deres afgørelse, ville Domstolen i givet fald, i tråd med nærhedsprincippet, kunne have været foranlediget til at vurdere, at de nationale myndigheder hverken havde undladt at foretage en retfærdig afvejning af klagers og den indklagede stats interesser eller overskredet de skønsbeføjelser, som de har inden for immigrationsområdet (jf., El Ghatet, nævnte ovenfor, præmis 52).

78. Domstolen vurderer imidlertid, at den administrative forbundsdomstol i den foreliggende sag har foretaget en overfladisk behandling af udsendelsesforanstaltningens proportionalitet. Henset til fraværet af en reel afvejning af de interesser, der står på spil, vurderer Domstolen, at de nationale myndigheder ikke på en overbevisende måde har formået at bevise, at udsendelsesforanstaltningen skulle være proportionel med de forfulgte legitime mål og dermed nødvendig i et demokratisk samfund.

79. Der ville herefter foreligge en krænkelse af Konventionens artikel 8, hvis klager udvises."

I sagen *Savran v. Denmark (2021)* var klageren indrejst i opholdslandet som seksårig sammen med sin mor og sine søskende som familiesammenført til sin far. Klageren var som 16-årig blevet idømt et år og tre måneders fængsel, heraf ni måneder betinget, for røveri. Som 24-årig blev han fundet skyldig i vold med døden til følge begået tre år forinden, men fundet straffri som følge af psykisk sygdom. Han blev idømt retspsykiatrisk behandling samt udvist for bestandig. Fem år senere blev udvisningen prøvet og opretholdt, og klageren blev udsendt til sit hjemland.

Storkammeret udtalte i præmis 175:

"In the present case, the applicant arrived in Denmark at the age of six; he was educated and spent his formative years there; he was issued with a residence permit and remained lawfully resident in the country for

fourteen years and eight months (see paragraphs 27 and 30 above). The Court thus accepts that he was a "settled migrant" and therefore Article 8 under its "private life" aspect is engaged."

I præmis 176-178 gennemgik EMD, om klagerens forhold til sin mor og sine søskende udgjorde familie- eller privatliv, og konkluderede, at der var tale om privatliv.

I præmis 179-180 udtalte Storkammeret, at afvisningen af at ophæve udvisningsbeslutningen udgjorde et indgreb i klagerens privatliv, og at indgrebet var hjemlet i lov og forfulgte et af de legitime hensyn, forebyggelse af uro og forbrydelse.

I præmis 181-189 gennemgik EMD de generelle principper vedrørende nødvendighedsvurderingen.

EMD bemærkede i præmis 190, at der var forløbet en betragtelig tid fra det tidspunkt, hvor udvisningsbeslutningen blev endelig, til tidspunktet for afgørelsen om eventuel ophævelse af udvisningsbeslutningen, og at det var op til de nationale domstole at lade alle relevante ændringer i klagerens forhold i denne periode indgå i vurderingen af, om det på tidspunktet for afgørelsen om eventuel ophævelse af udvisningsbeslutningen var proportionalt at udvise klageren, herunder særligt ændringer vedrørende hans opførsel og helbred.

Vedrørende betydningen af klagerens helbredstilstand udtalte EMD herefter i præmis 191-196:

"191. The Court observes at the outset that, on account of his mental condition, the applicant was more vulnerable than an average "settled migrant" facing expulsion. The state of his health was required to be taken into account as one of the balancing factors (see paragraph 184 above). In this connection, the Court observes that, by virtue of section 50a of the Aliens Act (see paragraph 76 above), the national courts in the revocation proceedings proceeded to determine whether the applicant's state of health made it conclusively inappropriate to enforce the expulsion order. At two levels of jurisdiction, the domestic courts had regard to statements from various experts and relevant information from the country concerned. [Detaljerne herom er udeladt, red.]

192. The Court sees no reason to question that very thorough consideration was given to the medical aspects of the applicant's case at the domestic level. Indeed, the High Court carried out a careful examination of the applicant's state of health and the impact thereon, including the availability and accessibility of the necessary medical treatment, should the removal be implemented. It took into account the cost of medication and care, the distance to be travelled in order to have access to care and the availability of medical assistance in a language spoken by the applicant. However, medical aspects are only one among several factors to be taken into account where appropriate (see paragraph 184 above), as is the case here, in addition to the Maslov criteria outlined in paragraph 182 above.

193. As regards the nature and seriousness of the criminal offence, the Court observes that, while still a minor, the applicant committed a robbery of which he was convicted in 2001 (see paragraph 12 above). In 2006, acting with a group of other people, he participated in an attack on a man which resulted in the latter's death (see paragraph 13 above). The Court notes that those were crimes of a violent nature, which cannot be regarded as mere acts of juvenile delinquency (compare and contrast Maslov, cited above, § 81). At the same time, the Court does not overlook the fact that, in the later criminal proceedings in which the applicant was found guilty of aggravated assault, the medical reports revealed that at the time when he had committed

that offence, it was very likely that he had been suffering from a mental disorder, namely paranoid schizophrenia, threatening and physically aggressive behaviour being symptoms of that disorder in his case (see paragraph 25 above). In accordance with the Maslov criteria (see paragraph 182 above), it needs to be considered whether "very serious reasons" justified the applicant's expulsion and hence, for the purposes of the present case, the refusal to revoke the order in 2015 at the time its execution became feasible. A relevant issue for the purposes of the Article 8 analysis is whether the fact that the applicant, on account of his mental illness, was, in the national courts' view, exempt from punishment under Article 16 § 2 and Article 68 of the Danish Penal Code when convicted in 2009 had the impact of limiting the extent to which the respondent State could legitimately rely on the applicant's criminal acts as the basis for his expulsion and permanent ban on re-entry.

194. In its recent case-law dealing with the expulsion of settled migrants under Article 8 of the Convention (see, for example, paragraph 189 above), the Court has held that serious criminal offences can, assuming that the other Maslov criteria are adequately taken into account by the national courts in an overall balancing of interests, constitute a "very serious reason" such as to justify expulsion. However, the first Maslov criterion, with its reference to the "nature and seriousness" of the offence perpetrated by the applicant, presupposes that the competent criminal court has determined whether the settled migrant suffering from a mental illness has demonstrated by his or her actions the required level of criminal culpability. The fact that his or her criminal culpability was officially recognised at the relevant time as being excluded on account of mental illness at the point in time when the criminal act was perpetrated may have the effect of limiting the weight that can be attached to the first Maslov criterion in the overall balancing of interests required under Article 8 § 2 of the Convention.

195. The Court makes clear that in the present case it is not called upon to make general findings in this regard, but only to determine whether the manner in which the national courts assessed the "nature and seriousness" of the applicant's offence in the 2015 proceedings adequately took into account the fact that he was, according to the national authorities, suffering from a serious mental illness, namely paranoid schizophrenia, at the moment when he perpetrated the act in question.

196. In this connection, the Court observes that, in its decision of 13 January 2015 regarding the lifting of the expulsion order, the High Court only briefly referred to the serious nature and gravity of his criminal offence (the first Maslov criterion, see paragraphs 66 and 182 above). No account was taken of the fact that the applicant was, due to his mental illness, ultimately exempt from any punishment but instead sentenced to committal to forensic psychiatric care (see paragraphs 22, 26 and 30 above). The High Court also made only a limited attempt to consider whether there had been a change in the applicant's personal circumstances with a view to assessing the requirements of public order in the light of the information regarding his conduct during the intervening 7-year period (see paragraphs 34-36, 38-40, 43, 51, 54 and 62 above). Against this background, and given the immediate and long-term consequences for the applicant of the expulsion order being executed (see paragraph 200 below in relation to the permanent nature of the ban on re-entry), the Court considers that the national authorities did not give a sufficiently thorough and careful consideration to the Article 8 rights of the applicant, a settled migrant who had resided in Denmark since the age of six, and did not carry out an appropriate balancing exercise with a view to establishing whether those applicant's rights outweighed the public interest in his expulsion for the purpose of preventing disorder and crime (compare Ndidi, cited above, §§ 76 and 81)."

I præmis 197 gennemgik EMD betydningen af de fremskridt, der var sket i klagerens opførsel i perioden mellem gerningstidspunktet og den endelige afgørelse vedrørende evt. ophævelse af udvisningen, jf. det tredje Maslov-kriterium, hvilket imidlertid ikke blev taget i betragtning ved de nationale domstoles vurdering af risikoen for gentagelseskriminalitet.

I præmis 198 udtalte EMD om fastheden af klagerens sociale, kulturelle og familiemæssige bånd til opholdslandet og til hjemlandet:

"A further issue to be considered is the solidity of the applicant's social, cultural and family ties with the host country and the country of destination (the fourth Maslov criterion). Whilst the applicant's ties with Turkey seem to have been limited, it cannot be said that he was completely unfamiliar with that country (see paragraphs 30, 59 and 65 above). However, it appears that the High Court gave little consideration to the length of the applicant's stay in and his ties to his host country Denmark (the second and fourth Maslov criteria respectively; see paragraph 182 above), stressing as it did the fact that he had not founded his own family and had no children in Denmark (see paragraph 66 above). As to the latter aspect, the Court reiterates its finding in paragraph 178 above that, even if he had no "family life", the applicant could still claim protection of his right to respect for his "private life" within the meaning of Article 8 (see Maslov, cited above, § 93). In this regard, the Court attaches particular weight to the fact, also noted by the domestic courts in the criminal proceedings and by the City Court in the revocation proceedings, that the applicant was a settled migrant who had been living in Denmark since the age of six (see paragraph 59 above). Although the applicant's child and young adulthood were clearly difficult, suggesting integration difficulties, he had received most of his education in Denmark and his close family members (mother and siblings) all live there. He had also been attached to the Danish labour market for about five years (see paragraphs 27 and 30 above). "

Afslutningsvis gennemgik EMD I præmis 199-200 betydningen af varigheden af indrejseforbuddet for den samlede proportionalitetsvurdering.

Herefter konkluderede EMD i præmis 201-202:

"201. In the light of the above, it appears that in the revocation proceedings, despite the significant period of time during which the applicant underwent medical treatment for his mental disorder, the High Court, apart from briefly referring to his lack of family ties in Denmark and to the serious nature and gravity of his criminal offence, did not consider the changes in the applicant's personal circumstances with a view to assessing the risk of his reoffending against the background of his mental state at the time of the commission of the offence and the apparent beneficial effects of his treatment. Nor did it have due regard to the strength of the applicant's ties to Denmark as compared to those to Turkey. The Court further notes that under the domestic law, the administrative and judicial authorities had no possibility of making an individual assessment of the duration of the applicant's exclusion from Danish territory, which was both irreducible and permanent. Therefore, and notwithstanding the respondent State's margin of appreciation, the Court considers that, in the particular circumstances of the present case, the domestic authorities failed to duly take into account and to properly balance the interests at stake (see paragraphs 182 and 183 above).

202. Accordingly, there has been a violation of Article 8 of the Convention."

Se også sagen *Azzaqui mod Nederlandene (2023).* I sagen var klageren indrejst i opholdslandet som tiårig. Da han var mellem 15 og 24 år, blev han idømt fængselsstraf for en række lovovertrædelser. Som 24-årig blev

han i 1996 idømt to års fængsel for voldtægt, og den nationale domstol fandt, at det skulle tillægges betydning i vurdering af skyldsspørgsmålet, at klageren på gerningstidspunktet led af en personlighedsforstyrrelse med skizotypiske og antisociale karaktertræk og episodiske psykotiske oplevelser. På baggrund af ekspertudtalelser, hvorefter der var en betydelig risiko for ny kriminalitet, blev han af hensyn til "the general safety of persons" i tillæg til sin fængselsstraf idømt retspsykiatrisk behandling. Hans behandlingsdom blev de følgende 20 år løbende fornyet. Klageren udviste god opførsel og blev 20 år efter dommen vurderet egnet til løsladelse fra tilbageholdelsen på betingelse af blandt andet fortsat god opførsel, tilsyn og indkvartering på et bosted, indtil han 22 år efter dommen for voldtægt fik sin opholdstilladelse inddraget under henvisning til, at han på baggrund af den tidligere begåede kriminalitet fandtes at udgøre en trussel for den offentlige orden, ligesom han blev meddelt indrejseforbud i ti år.

EMD udtalte i præmis 48-50 og 54-57:

"48. Where appropriate, other elements relevant to the case, such as, for instance, its medical aspects, should also be taken into account (see Savran, cited above, § 184, with further references), including the availability and accessibility of medical treatment in the country of destination (ibid., §§ 191-92).

49. The Court reiterates that the criterion of the "nature and seriousness of the offence committed by the applicant" is to be considered by reference to the totality of a person's criminal history and the circumstances under which the crime or crimes giving rise to expulsion were committed. Accordingly, under this criterion account must be taken of the nature and the effects of the crime on society as a whole (see Akbulut v. the United Kingdom (dec.), no. 53586/08, § 18, 10 April 2012; Unuane v. the United Kingdom, no. 80343/17, § 87, 24 November 2020, with further references; and Üner, cited above, § 63), the severity of the criminal penalty (see Unuane, § 86, and Azerkane, § 73, both cited above), the risk of reoffending (see Ndidi v. the United Kingdom, no. 41215/14, §§ 29, 78 and 81, 14 September 2017; Levakovic v. Denmark, no. 7841/14, §§ 19 and 44, 23 October 2018; and Azerkane, cited above, §§ 22, 78 and 84), whether the offences were committed as a juvenile or as an adult (see, for example, Maslov, cited above, § 81).

50. In Savran (cited above, §§ 193-96), the Court added that this criterion presupposes that the competent criminal courts have determined whether the settled immigrant suffering from a mental illness had demonstrated by his or her actions the required level of criminal culpability and, taking note of the fact that the applicant in that case was, in the national courts' view, exempt from punishment under domestic criminal law when convicted, held that this may have an impact of limiting the weight that can be attached to this criterion in the overall balancing of interests required under Article 8 § 2 of the Convention. The Court observed that it was not called upon to make general findings in this regard in the case at hand, but only to determine whether the manner in which the national authorities, including the domestic courts, assessed the "nature and seriousness" of the applicant's offence adequately took into account the fact that he was, according to the national authorities, suffering from a serious mental illness at the moment when he perpetrated the act in question.

[…]

54. In determining whether those revocation proceedings were in compliance with Article 8 of the Convention, the Court will assess whether the national authorities, including the domestic courts, applied the relevant criteria established in the Court's case-law, and adequately balanced the interests of the applicant against

those of the general public (see paragraph 52 above). In this connection the Court notes at the outset that, on account of his mental condition, the applicant was more vulnerable than an average "settled migrant" facing expulsion (compare Savran, cited above, § 191). The state of his health was required to be taken into account as one of the balancing factors (see paragraph 48 above).

55. As regards the criterion "nature and seriousness of the offence committed by the applicant", the Court notes that the applicant was convicted between 1987 and 1996 of multiple crimes and of rape in 1996 (see paragraphs 6 and 7 above). Those convictions included crimes of a violent and of a sexual nature which can, assuming that the other relevant criteria are adequately taken into account by the national authorities in an overall balancing of interests, constitute a "very serious reason" such as to justify expulsion (see Savran, cited above, § 194).

56. In determining whether the other relevant criteria were adequately taken into account in the present case, the Court cannot overlook the fact that in the criminal proceedings that led to the applicant's last conviction, reports were drawn up by a psychiatrist and a psychologist which revealed that at the time when he had committed that offence, the applicant was suffering from a personality disorder with schizotypal and antisocial traits and episodic psychotic experiences to such an extent that the offence could only be attributed to him to a reduced extent. The Arnhem Regional Court made that conclusion of reduced criminal culpability its own when it convicted the applicant of rape and imposed the TBS order (see paragraph 7 above).

57. The Court observes that the Deputy Minister in the decision revoking the applicant's residence permit, only referred to the seriousness of the multiple crimes that the applicant had committed and the extensions of his TBS order, and noted further that there remained a risk of reoffending and thus a threat to public order (see paragraph 16 above). Upholding those findings, the Regional Court held in its judgment of 6 November 2018 that the Deputy Minister had rightly given "decisive weight" to the serious crimes that had repeatedly been committed by the applicant (see paragraph 24 above). It follows from the foregoing that neither the Deputy Minister nor the administrative court, when assessing the "nature and seriousness of the applicant's offence", took into account the fact that he was, in the view of the criminal court, suffering from a serious mental illness, which had reduced his criminal culpability, at the moment when he perpetrated the act in question (see Savran, cited above, § 195)."

Herefter udtalte EMD i præmis 60:

"[…]In reaching their conclusion about the existence of a threat to public order in the revocation proceedings, the authorities thus failed to sufficiently consider the applicant's personal circumstances, and particularly the relevant conclusions of the criminal courts, supported as they were by medical evidence (compare Savran, cited above, § 197)."

4.2.14.2. Mindre alvorlig kriminalitet

I sagen *Emre v. Schweiz (2008)* var klageren indrejst i opholdslandet som femårig sammen med sine forældre. Klageren blev flere gange dømt for kriminalitet, herunder kriminalitet begået mens han var mindreårig, og blev som 22-årig udvist.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det kortfattede Press Release issued by the Registrar af 22. maj 2008, der er gengivet i sin helhed i afsnit 4.2.1.2. Den officielle franske

version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

Som anført ovenfor gennemgik EMD i præmis 65-71 de generelle principper, som var relevante i den konkrete sag for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund. EMD henviste i den forbindelse i præmis 68-69 til kriterierne som sammenfattet i blandt andet Üner-dommen og udtalte i præmis 71 (uofficiel dansk oversættelse):

"Der skal endelig ligeledes tages højde for de særlige omstændigheder ved den foreliggende sag (Boultif, nævnt ovenfor, præmis 51), såsom f.eks. forholdene af medicinsk karakter i den foreliggende sag samt proportionaliteten af den anfægtede foranstaltning og indrejseforbuddets midlertidige eller endelige karakter."

EMD udtalte sig i præmis 73-76 om kriminalitetens alvor, herunder blandt andet at den samlede længde af frihedsstraffen på 18½ måned ikke var ubetydelig og at kriminaliteten strakte sig over en betydelig periode på 10 år, men at nogle af lovovertrædelserne faldt ind under ungdomskriminalitet, som ifølge FN's retningslinjer hos de fleste forsvinder ved overgangen til voksenlivet. Med hensyn til "arten" af kriminalitet kunne det ikke bestrides, at dommen for legemsbeskadigelse var til skade for ham. Det så derimod med hensyn til overtrædelse af våbenloven ud til, at den udelukkende bestod i besiddelse af en tåregasspray, ligesom det ikke var fastslået, at det var klager, der stak en sikkerhedsvagt ned under et felttog mod en natklub. Overtrædelserne af færdselsloven udgjorde utvivlsomt en potentiel fare, men skulle ikke desto mindre vurderes i lyset af de relativt milde sanktioner, der normalt ifaldes. I lyset af sammenlignelige sager skulle domfældelserne vurderes korrekt både mht deres alvor og de i sidste ende pålagte sanktioner.

EMD udtalte i præmis 78:

"78. Med hensyn til den tid, der er forløbet fra lovovertrædelserne blev begået, til det tidspunkt, hvor den anfægtede foranstaltning blev endelig, såvel som den pågældende persons adfærd i denne periode, bemærker Domstolen, at klagers kriminelle handlinger strakte sig over en betydelig periode. De nationale instanser har ligeledes gentagne gange konstateret, at han ikke udviste bevidsthed om sine kriminelle handlinger, og at han havde nægtet at følge psykoterapien (jf. i denne henseende Keles, citeret ovenfor, præmis 60)."

I præmis 77 og 79-80 gennemgik EMD varigheden af klagerens ophold i opholdslandet og fastheden af hans sociale, kulturelle og familiemæssige tilknytning til værtslandet og modtagerlandet.

Herefter udtalte EMD i præmis 81-83 om "Særlige forhold i sagen: sagens medicinske aspekt:"

"81. Domstolen bemærker, at der i en rapport fra det psykosociale center i Neuchâtel af 14. januar 2003 rapporteres om "en følelsesmæssigt labil personlighedsforstyrrelse med impulsive elementer og borderline såvel som fobisk angstlidelse" hos klager ved truslen om tilbagesendelse (dom afsagt af forbundsdomstolen, betragtning 3.4.2; ovenfor, præmis 18). Det er i øvrigt i et brev fra familiens læge af 21. januar 2003 bekræftet, at klager er opvokset i et voldeligt og ikke særligt stimulerende miljø, og det understreges, at en udvisning ville fjerne ham fra de beroligende og strukturerende forhold, der er etableret de senere år (ibidem.).

82. Parterne i den foreliggende sag har forskellige meninger om dette punkt. Klager hævder, at hans sygdom, der har udmundet i selvmordsforsøg, ikke ville kunne behandles tilstrækkeligt i Tyrkiet (jf. ovenstående præmis 42). Regeringen hævder til gengæld det modsatte og mener, at hans familie lige såvel kunne støtte ham økonomisk fra Schweiz. Den understreger i øvrigt, at klager i vidt omfang har afvist den psykiatriske behandling, der er ordineret til ham (jf. ovenstående præmis 57).

83. Domstolen udelukker ikke, at klagers helbredsproblemer kan behandles på passende vis i Tyrkiet. Den er ligeledes opmærksom på, at klager i det mindste i starten ignorerede den ordinerede behandling. Samtidig finder Domstolen, at klagers forstyrrelser, som Regeringen i øvrigt på ingen måde har rejst tvivl om, selv om de ikke i sig selv er tilstrækkelige til at retfærdiggøre et særskilt klagepunkt i henhold til artikel 8, ikke desto mindre udgør et yderligere aspekt, der sandsynligvis vil gøre det endnu sværere for klager at vende tilbage til sit hjemland, hvor han næppe har noget socialt netværk."

Endelig gennemgik EMD i præmis 84-85 opholdsforbuddet i opholdslandet.

EMD konkluderede i præmis 86-87 (uofficiel dansk oversættelse):

"86. I betragtning af ovenstående og navnlig den relative grovhed [alvorlighed, red.] af domfældelserne mod klager, hans svage tilknytning til hjemlandet og den endelige karakter af udsendelsesforanstaltningen finder Domstolen, at den indklagede stat ikke kan anses for at have foretaget en rimelig afvejning mellem klagers og hans families interesser på den ene side og statens egen interesse i at kontrollere indvandringen på den anden.

87. Der er følgelig sket en krænkelse af artikel 8."

4.2.14.3. Opholdstilladelse opnået på baggrund af svig

Det ses ikke, at EMD har taget stilling til helbredsmæssige forhold i sager, hvor opholdstilladelse er opnået på baggrund af svig.

4.2.14.4. Ulovligt ophold

Sagen *Gezginci v. Switzerland (2010)* omhandlede såvel ulovligt ophold som nægtelse af forlængelse af opholdstilladelse. EMD har i et *legal summary* karakteriseret klagerens ophold i opholdslandet som *long term illegal immigration*, hvorfor sagen er placeret i dette afsnit. Dommen foreligger ikke på engelsk i en officiel oversættelse, hvorfor hele EMD´s *legal summary* er citeret herunder:

"Judgment 9.12.2010 [Section I]
Article 8
Expulsion
Deportation order against long-term illegal immigrant: deportation would not constitute a violation
Facts – The applicant is a Turkish national who has lived in Switzerland since 1978, on the basis of residence permits from 1980 to 1998 and unlawfully during the remaining periods. In 1997 the national authorities decided not to renew his residence permit. A few months later they set March 1999 as the deadline for his deportation from Switzerland. However, the applicant did not leave the country. In 2003, after a serious work-

related accident, he applied for a residence permit on humanitarian grounds. The authorities refused the application. Shortly afterwards his wife disappeared without trace, leaving him to care for their eleven-year-old daughter. The applicant lodged several unsuccessful appeals against the deportation order, which is still in force.

Law – Article 8: In view of the applicant's very long-standing residence in Switzerland, the refusal to grant him a residence permit on humanitarian grounds amounted to interference with his right to respect for his private life. That interference had been in accordance with the law and had pursued the legitimate aims of ensuring the economic well-being of the country, preventing disorder or crime and protecting the rights and freedoms of others. In order to determine whether it had been necessary in a democratic society, a number of factors had to be taken into consideration. First of all, the applicant's convictions between 1982 and 1992 had not been very serious and since 1993 his conduct did not appear to have been open to criticism from a purely criminal-law standpoint. Next, the applicant had lived in Switzerland for approximately thirty years, not counting periods spent abroad, thanks to the considerable tolerance shown by the authorities since 1999. Furthermore, some members of the applicant's family still lived in Turkey and would be able to help him resettle there and find work; he also spoke Turkish fluently. Similar considerations would apply were he to opt for Romania, a country which he knew from visits, where his wife lived and his daughter had spent much of her life, and where he appeared to have been in gainful employment. Furthermore, it was clear from his attitude that he was unable and unwilling to find employment in Switzerland. As to his daughter, given that she had spent most of her life in Romania and Turkey, was a citizen of both countries and probably spoke both languages, she could reasonably be expected to be able to adjust if she returned there. Lastly, the applicant's health was not liable to significantly hinder his integration in Turkey, given that he would have access there to the necessary medicines and treatment and would undoubtedly receive an invalidity pension. Accordingly, regard being had in particular to the fact that the applicant had been residing unlawfully in Switzerland since 1997, his lack of willingness to integrate there, his failure to abide by the rules of the country and the fact that his ties with his country of origin did not appear to have been completely severed, the respondent State could be said to have struck a fair balance between the interests of the applicant and his daughter on the one hand and its own interest in controlling immigration on the other.

Conclusion: the applicant's deportation would not amount to a violation (five votes to two)." [Understreget her, red.]

I sagen *Nnyanzi v. the United Kingdom (2008)* var klagerens ansøgning om asyl blevet afvist, hvorefter opholdslandet gjorde tiltag med henblik på, at klageren skulle forlade landet. EMD udtalte i præmis 76-78:

"76. The Court does not consider it necessary to determine whether the applicant's accountancy studies, involvement with her church and friendship of unspecified duration with a man during her stay of almost ten years in the United Kingdom constitute private life within the meaning of Article 8 § 1 of the Convention. Even assuming this to be the case, it finds that her proposed removal to Uganda is "in accordance with the law" and is motivated by a legitimate aim, namely the maintenance and enforcement of immigration control. As to the necessity of the interference, the Court finds that any private life that the applicant has established during her stay in the United Kingdom when balanced against the legitimate public interest in effective immigration control would not render her removal a disproportionate interference. In this regard, the Court notes that, unlike the applicant in the case of Üner (cited above), the present applicant is not a settled migrant and has never been granted a right to remain in the respondent State. Her stay in the United Kingdom, pending

the determination of her several asylum and human rights claims, has at all times been precarious and her removal, on rejection of those claims, is not rendered disproportionate by any alleged delay on the part of the authorities in assessing them.

77. Nor does the Court find there to be sufficient evidence that the applicant's removal with her asthma condition, which she asserts is exacerbated by stress, would have such adverse effects on her physical and moral integrity as to breach her rights under Article 8 of the Convention.

78. Accordingly, the applicant's removal to Uganda would not give rise to a violation of Article 8 of the Convention."

4.2.14.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Bensaid v. the United Kingdom (2001)* var klageren indrejst i opholdslandet på et seks-måneders visum. Efter udløbet af visummet giftede han sig med en statsborger i opholdslandet og fik derefter opholdstilladelse på baggrund af dette ægteskab. Syv år efter indrejsen rejste klageren tilbage til sit hjemland, hvorefter hans opholdstilladelse bortfaldt. Da klageren vendte tilbage til opholdslandet, blev han nægtet opholdstilladelse, idet de nationale myndigheder sådede tvivl om, hvorvidt der forelå et reelt ægteskab. Klageren var i tiden forinden sin udrejse fra opholdslandet blevet diagnosticeret med skizofreni. Klageren søgte ligeledes om opholdstilladelse på baggrund af sin sygdom, hvilket blev afvist af de nationale myndigheder. Ved EMD's behandling af sagen blev der først vurderet, om en udsendelse af klageren ville være en krænkelse af EMRK artikel 3. EMD fandt, at dette ikke var tilfældet. Dernæst foretog EMD en artikel 8-vurdering.

Ved artikel 8-vurderingen udtalte EMD i præmis 46 og 47 vedrørende klagerens helbredsmæssige forhold, at:

"46. Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity (see Costello-Roberts v. the United Kingdom, judgment of 25 March 1993, Series A no. 247-C, pp. 60-61, § 36).

47. 'Private life' is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8 (see, for example, Dudgeon v. the United Kingdom, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41; B. v. France, judgment of 25 March 1992, Series A no. 232-C, pp. 53-54, § 63; Burghartz v. Switzerland, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24; and Laskey, Jaggard and Brown v. the United Kingdom, judgment of 19 February 1997, Reports 1997-I, p. 131, § 36). Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, Burghartz, cited above, opinion of the Commission, p. 37, § 47, and Friedl v. Austria, judgment of 31 January 1995, Series A no. 305-B, p. 20, § 45). The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life."

I præmis 48 udtalte EMD:

"Turning to the present case, the Court recalls that it has found above that the risk of damage to the applicant's health from return to his country of origin was based on largely hypothetical factors and that it was not substantiated that he would suffer inhuman and degrading treatment. Nor in the circumstances has it been established that his moral integrity would be substantially affected to a degree falling within the scope of Article 8 of the Convention. Even assuming that the dislocation caused to the applicant by removal from the United Kingdom where he has lived for the last eleven years was to be considered by itself as affecting his private life, in the context of the relationships and support framework which he enjoyed there, the Court considers that such interference may be regarded as complying with the requirements of the second paragraph of Article 8, namely as a measure 'in accordance with the law', pursuing the aims of the protection of the economic well-being of the country and the prevention of disorder and crime, as well as being 'necessary in a democratic society' for those aims."

EMD fandt, at der i den konkrete sag ikke var sket en krænkelse af artikel 8.

I sagen *Nacic and others v. Sweden (2012)* var familien indrejst sammen i Sverige og havde søgt om asyl. Familien bestod af to forældre og deres to sønner. Den ældste søn blev meddelt opholdstilladelse på baggrund af sit helbred, mens de tre andre klagere fik afslag på asyl. Sønnen, som fik opholdstilladelse, var på dette tidspunkt fyldt 18 år. De svenske myndigheder fandt, at der var tungtvejende grunde til at lade ham opretholde sin opholdstilladelse i Sverige. Efter at have konstateret, at klagernes indbyrdes forhold trods den ældste søns alder udgjorde familieliv, udtalte EMD i præmis 83-85:

"83. The Court further notes that both the Migration Court and the Migration Court of Appeal came to the conclusion that the third applicant could receive adequate medical care in Kosovo and Serbia. In this connection, the Court observes that mental health care is available in Kosovo and Serbia; albeit still under reconstruction and not of the same standard as in Sweden.

84. The third applicant is now 21 years old and has lived in Sweden with the other applicants since 2006. According to the most recent medical certificate, dated June 2011, he had begun to feel better since being granted a residence permit. He had left the treatment centre and moved to an apartment. He had also begun studies at a college for adults. However, his positive development had been halted by the threat of disruption of the family and he had showed signs of falling back into depression. While acknowledging that this information is worrying, the Court finds that it has to be taken into account that the medical certificate mainly contains a description of how the applicant himself feels and that it neither suggests that he currently has a medical condition, nor that he is undergoing psychiatric or other treatment. In the Court's opinion, the medical certificate also indicates that his state of health is connected to a large extent to the situation he is in at the moment. Furthermore, as far as the Court is informed, there has been no further deterioration of his health since June 2011.

85. Notwithstanding the Migration Court of Appeal's assessment of the third applicant's mental health state in November 2009, the Court agrees with the Government that his current state of health cannot be seen as creating an impediment for him to reunite with the other applicants in their country of origin. Moreover, if

necessary, he could receive medical care in Kosovo and Serbia. Against this background and taking into account the applicants' relatively limited ties to Sweden, the Court does not find that there are any insurmountable obstacles for the applicants to live together as a family in their country of origin."

Sagen *Hasanbasic v. Switzerland (2013)* omhandlede en klager, hvis opholdstilladelse blev annulleret af de nationale myndigheder i opholdslandet, idet klageren over for disse myndigheder havde tilkendegivet, at han ville rejse tilbage til sit hjemland med henblik på permanent at bosætte sig der. Klageren genindrejste dog fire måneder senere i opholdslandet, hvorefter hans ægtefælle, som stadig opholdt sig i opholdslandet, indgav en ansøgning om ny opholdstilladelse på baggrund af familiesammenføring. EMD har kategoriseret sagen *som refusal to renew residence visa*, hvorfor den er medtaget under dette punkt.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det komplette *legal summary* under afsnit 4.2.1.5. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

Efter i præmis 51 og 52 at have fastslået, at indgrebet var i overensstemmelse med loven og forfulgte et eller flere af de legitime hensyn, gennemgik EMD i præmis 53-56 de generelle principper, som var relevante i den konkrete sag for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund. EMD henviste i den forbindelse i præmis 53 til kriterierne som sammenfattet i Üner-dommen og udtalte i præmis 54 (uofficiel dansk oversættelse):

"54. Der skal ligeledes i givet fald tages højde for særlige omstændigheder i forbindelse med nærværende sag, som for eksempel lægelige informationer (Emre, nævnt ovenfor, præmis 71, 81-83)."

I præmis 57-63 anvendte EMD disse principper på forholdene i den konkrete sag. EMD gennemgik i præmis 57 længden og karakteren af klagernes ophold i opholdslandet og konstaterede, at dette land i en lang periode havde været centrum for deres privat- og familieliv. I præmis 58 gennemgik EMD den mandlige klagers lovstridige adfærd og fandt, at de pågældende forseelser ikke vejede tungt, og at klageren ikke kunne anses for at udgøre en fare eller trussel for sikkerheden eller den offentlige orden. I præmis 59 gennemgik EMD betydningen af klagerens store gæld til myndighederne i opholdslandet og de betydelige beløb, som klagerne havde modtaget i offentlig støtte og fandt, at opholdslandets myndigheder kunne tage højde for klagernes gæld og afhængighed af offentlig bistand, såfremt denne afhængighed måtte have indflydelse på landets økonomiske velvære, men at disse forhold kun udgjorde et aspekt blandt flere, som EMD skulle tage højde for. I præmis 60-61 gennemgik EMD klagernes familieliv, herunder med deres voksne børn, som var bosat i opholdslandet, og betydningen af, at den mandlige klager ville have mulighed for at besøge familien i opholdslandet. I præmis 62 gennemgik EMD fastheden af de sociale, kulturelle og familiemæssige bånd til opholdslandet og hjemlandet og konstaterede, at klagerne havde et betydeligt socialt netværk i opholdslandet, og at deres tilbagevenden til hjemlandet på grund af den betydelige varighed af deres ophold i opholdslandet uden tvivl ville stille dem over for visse vanskeligheder. I præmis 63 gennemgik EMD klagernes tilknytning til hjemlandet.

Herefter gennemgik EMD i præmis 64-65 betydningen af klagerens helbredsmæssige forhold (uofficiel dansk oversættelse):

"64. Henset til de nye informationer i de ovenfor nævnte lægeerklæringer (præmis 21 og 22) og under henvisning til, at det ikke tilkommer Domstolen at rejse tvivl om den vurdering, som de nationale instanser har foretaget af sagens faktiske forhold (Schenk mod Schweiz, 12. juli 1988, præmis 45-46, serie A nr. 140; og García Ruiz mod Spanien [Storkammeret], nr. 30544/96, præmis 28, EMD 1999-I), henviser Domstolen til, at klagers helbredstilstand er alvorligt svækket og kræver konstant opfølgning. Selv om Domstolen tvivler på sandfærdigheden af argumentet om, at den nødvendige behandling ikke skulle være tilgængelig i Bosnien-Hercegovina, der er medlem af Europarådet, udelukker Domstolen imidlertid ikke, at det, hvis klager rykkes op ved rode fra sit normale miljø i Schweiz, kan have en destabiliserende indvirkning på hans allerede svækkede helbred, og at dette vil kunne forårsage nye medicinske komplikationer (jf., mutatis mutandis, Emre, nævnt ovenfor, præmis 81-83). Selv om klagers helbredstilstand alene ikke måtte være tilstrækkelig til at forpligte de schweiziske myndigheder til at forny hans opholdstilladelse, skal Domstolen ikke undlade at se helt bort herfra i afvejningen af interesserne.

65. Domstolen udelukker ikke, at det faktum, at klager ikke vil modtage invalidepension, hvis han måtte vende tilbage til sit oprindelsesland – idet en sådan pension kun udbetales i udlandet, når invaliditetsgraden når op på 50 % (ovenstående præmis 26) – vil kunne forværre hans situation. Domstolen konstaterer, at klagerne ikke eksplicit har påberåbt sig dette argument ved de nationale domstole, men at Regeringen heller ikke længere bestrider dette i dennes bemærkninger til Domstolen."

EMD udtalte i præmis 66-67 (uofficiel dansk oversættelse):

"66. Domstolen vedgår henset til ovenstående, at landets økonomiske velfærd ganske vist kan tjene som et legitimt mål i forbindelse med en afvisning af at forny en opholdstilladelse. Denne årsag skal ikke desto mindre vurderes ud fra en retfærdig afvejning og i lyset af samtlige omstændigheder i sagen. Domstolen vurderer imidlertid ud fra den betydelige varighed af klagernes ophold i Schweiz og deres ubestridte sociale integration i landet, at den anfægtede foranstaltning ikke var berettiget ud fra et bydende nødvendigt samfundsmæssigt behov og ikke stod i forhold til de påberåbte legitime formål. Den indklagede stat har følgelig overskredet sin skønsmargen i den foreliggende sag.

67. Der er følgelig derfor sket en krænkelse af Konventionens artikel 8."

5. Familieliv i praksis

5.1. Hvad forstås ved familieliv

I *"Guide on Article 8 of the Convention – Right to respect for private and family life"*, udgivet af European Court of Human Rights (senest opdateret den 31. august 2021) (herefter betegnet Guiden) defineres – med udgangspunkt i EMD's praksis – hvad familieliv og familie er.

Under sektion III, punkt 292-296, er det således anført, at:

"292. The essential ingredient of family life is the right to live together so that family relationships may develop normally (Marckx v. Belgium, § 31) and members of the family may enjoy each other's company (Olsson

v. Sweden (no. 1), § 59). Regard for family unity and for family reunification in the event of separation are inherent considerations in the right to respect for family life under Article 8. (Strand Lobben and Others v. Norway [GC], § 204).

293. The notion of family life is an autonomous concept (Marckx v. Belgium, § 31). Consequently, whether or not "family life" exists is essentially a question of fact depending upon the real existence in practice of close personal ties (Paradiso and Campanelli v. Italy [GC], § 140). The Court will therefore look at de facto family ties, such as applicants living together, in the absence of any legal recognition of family life (Johnston and Others v. Ireland, § 56). Other factors will include the length of the relationship and, in the case of couples, whether they have demonstrated their commitment to each other by having children together (X, Y and Z v. the United Kingdom, § 36). Therefore, the notion of "family" in Article 8 concerns marriage-based relationships, and also other de facto "family ties", including between same-sex couples, where the parties are living together outside marriage or where other factors demonstrated that the relationship had sufficient constancy (Paradiso and Campanelli v. Italy [GC], § 140 and Oliari and Others v. Italy, § 130).

294. In Ahrens v. Germany, § 59, the Court found no de facto family life where the relationship between the mother and the applicant had ended approximately one year before the child was conceived and the ensuing relations were of a sexual nature only. In Evers v. Germany, the Court held that, in the very specific circumstances of the case, the mere fact that the applicant had been living in a common household with his partner and her mentally disabled daughter and that he was the daughter's biological father did not constitute a family link which was protected by Article 8 (§ 52). In this case, the applicant had likely sexually abused the mentally disabled daughter, which is why the domestic courts deemed the contact to the daughter detrimental and issued a contact ban. The Court held that Article 8 cannot be relied on in order to complain about the foreseeable negative consequences on "private life" as a result of criminal offences or other misconduct entailing a measure of legal responsibility (ibid, § 55). The Court stated also in Paradiso and Campanelli v. Italy [GC] that the conformity of the applicants' conduct with the law is a factor to be considered.

295. A child born of a marital relationship is ipso jure part of that "family" unit from the moment and by the very fact of his or her birth (Berrehab v. the Netherlands, § 21). Thus, there exists between the child and its parents a bond amounting to family life. The existence or non-existence of "family life" within the meaning of Article 8 is a question of fact depending upon the real existence in practice of close personal ties, for instance the demonstrable interest and commitment by the father to the child both before and after birth (L. v. the Netherlands, § 36).

296. Where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth, or as soon as practicable thereafter, the child's integration in his family (Kroon and Others v. the Netherlands, § 32)."

Videre fremgår det af Guiden, punkt 299, at:

"*Article 8 does not guarantee either the right to found a family or the right to adopt. The right to respect for "family life" does not safeguard the mere desire to found a family; it presupposes the existence of a family, or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father, or the relationship that arises from a genuine marriage, even if family life has not yet been*

fully established, or the relationship between a father and his legitimate child even if it proves, years later, to have had no biological basis (Paradiso and Campanelli v. Italy [GC], § 141). An applicant's intention to develop a previously non-existent "family life" with her nephew by becoming his legal tutor lies outside the scope of "family life" as protected by Article 8 (Lazoriva v. Ukraine, § 65)."

Det fremgår af Jon Fridrik Kjølbros bog *"Den Europæiske Menneskerettighedskonvention for praktikere" (2020)*, side 876ff., at:

"Et familieliv, der har eksisteret på tidspunktet for barnets fødsel, kan ophøre med at eksistere på grund af efterfølgende omstændigheder. Hvis den biologiske far ikke har kontakt til barnet i en længere periode efter fødslen, kan det bevirke, at der ikke længere består et familieliv, og det gælder, selv om det er moderen, der er årsag til den manglende kontakt. Ved vurderingen af, om der består et familieliv, selv om der ikke har været kontakt gennem længere tid, kan der lægges vægt på, om den biologiske far har udtrykt ønske om og gjort bestræbelse på at opnå kontakt med barnet. Der skal imidlertid forholdsvis meget til, før et familieliv mellem en biologisk far og et barn født uden for ægteskab ophører med at eksistere.

Når et barn fødes af forældre, der er gift med hinanden, vil der ipsojure og lige fra fødslen være tale om et bånd mellem barnet og forældrene, der udgør et familieliv i konventionens forstand, og medmindre der foreligger helt ekstraordinære omstændigheder, kan efterfølgende omstændigheder ikke ændre på det forhold, at der er tale om et familieliv.

Et sådant familiebånd bringes ikke til ophør blot fordi barnet ikke længere lever sammen med den ene forælder på grund af forældrenes separation eller skilsmisse.

De naturlige familiebånd ophører heller ikke som følge af, at et barn tvangsfjernes og anbringes i myndighedernes varetægt.

Adskillelse i lang tid på grund af fængselsophold eller udvisning er heller ikke nok til at bringe et familiebånd til ophør."

EMRK artikel 8 ses således ikke at beskytte retten til at *stifte* familie, men forudsætter, at der allerede foreligger et eksisterende familieliv. EMD udtalte i sagen *Lazoriva v. Ukraine (2018),* der omhandlede spørgsmålet om adoption, i præmis 65 in fine, at *"Article 8 does not guarantee the right to found a family"*.

EMD har ved sin praksis løbende defineret, hvornår en person har et familieliv, som er omfattet af EMRK artikel 8, stk. 1.

I sagen *Abdulaziz, Cabales and Balkandali v. the United Kingdom (1985)*, præmis 62, udtalte EMD, at:

"The Court recalls that, by guaranteeing the right to respect for family life, Article 8 (art. 8) 'presupposes the existence of a family' (see the Marckx judgment of 13 June 1979, Series A no. 31, p. 14, para. 31). However, this does not mean that all intended family life falls entirely outside its ambit. Whatever else the word 'family' may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage, such as that contracted by Mr. and Mrs. Abdulaziz and Mr. and Mrs. Balkandali, even if a family life of the kind referred to by the Government has not yet been fully established. Those marriages must be considered sufficient to attract such respect as may be due under Article 8 (art. 8)."

Derudover har EMD også taget stilling til afgørelser i familieliv i forskellige familiekonstallationer, herunder *Marckx v. Belgium (1979)* (tilknytningen mellem nære familiemedlemmer). Kommisionen tog endvidere stilling til familieliv i sagen *Wakefield v. the United Kingdom (1990)* (par med særbørn), og EMD tog stilling til ugifte samlevende i sagen Keegan v. Ireland (1994) i præmis 44-45.

EMD har i flere domme også fastslået, at forhold mellem parter af samme køn er omfattet af EMRK artikel 8 i forbindelse med vurderingen af, om der foreligger et beskyttelsesværdigt familieliv, jf. *Schalk and Kopf v. Austria (2010).*

EMD har i en række sager om udsendelse[27] af udlændinge taget stilling til, om klageren først og fremmest havde et familieliv i opholdsstaten og dernæst, om en udsendelse ville være i strid med personens ret til respekt for sit familieliv, som dette er defineret i EMRK artikel 8. Der foretages i den forbindelse en proportionalitetsafvejning mellem to modsatrettede hensyn: Det eller de hensyn, som staten påberåber sig, jf. undtagelsesbestemmelsen i artikel 8, stk. 2, og individets ret til respekt for privat- og/eller familielivet, jf. artikel 8, stk. 1. Hvorledes de to modsatrettede hensyn skal vægtes over for hinanden, er afhængigt af de faktuelle omstændigheder i den konkrete sag.

Det fremgår også af EMD's praksis, at staterne ikke har en generel pligt til at respektere en families valg af, i hvilket land familien ønsker at udøve sit familieliv, og at domstolen derfor også vurderer, om der er uoverstigelige hindringer for at udøve familielivet i et andet land, eller om opholdsstaten er nærmest til at beskytte familielivet.

I sagen *Priya v. Denmark (2006)* (afvisningsbeslutning) udtalte EMD udtalte indledningsvis:

"The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see inter alia Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A no. 94, §§ 67 and 68; Gül v. Switzerland, judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I, § 38; and Ahmut v. the Netherlands, judgment of 28 November 1996, Reports of Judgments and Decisions 1996-VI, § 63).

Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control

[27] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

(e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Solomon v. the Netherlands (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998, and Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999).Thus, a distinction must be drawn between those seeking entry into a country to pursue their newly established family life; those who had an established family life before one of the spouses obtained settlement in another country; and those who seek to remain in a country where they have already established close family life and other ties for a reasonable period of time (cf. e.g. Khannam v. United Kingdom (dec.) no 14112/88, DR 59, pp. 265- 273)".

Det bemærkes i den forbindelse, at EMD's praksis vedrørende indgreb i retten til familieliv i forbindelse med udsendelse af udlændinge i vidt omfang vedrører sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

Derfor er nedenstående afsnit vedrørende afvejningsforhold som familiemedlemmernes statsborgerskab, alder ved indrejse/længde af ophold, sproglige kundskaber, uddannelse og arbejdsmarkedstilknytning og andre kulturelle og sociale forhold inddelt i underafsnit om alvorlig kriminalitet, mindre alvorlig kriminalitet, opholdstilladelse opnået på grund af svig, ulovligt ophold, nægtelse af forlængelse/inddragelse eller bortfald, hvor der ikke foreligger kriminalitet, og familiesammenføringssager, fordi disse forhold også har betydning i proportionalitetsafvejningen. Hvad angår betydningen af hovedpersonens/klagerens selvstændige tilknytning til opholdslandet og hjemlandet, henvises til kapitel 4. Der henvises for så vidt angår proportionalitetsafvejningen til notatets kapitel 3.3.3.

I dette kapitel gennemgås i afsnit 5.2.2. EMD's praksis for familieliv i parforhold, hvor afsnittet fokuserer på ægtefællens forhold, men hvor barnets børnenes forhold også kan have spillet ind i EMD's samlet afvejning. Det kan være personer, der er gift/registreret eller er samlevende. Der kan både være tale om personer af samme køn eller personer af forskellige køn. Endelig kan der være tale om de facto familielivsforhold, hvor parterne hverken har indgået ægteskab/registreret partnerskab eller er samlevende, men på anden vis kan siges at have forpligtet sig over for hinanden.

I dansk ret omfatter ægteskabsbegrebet både forhold mellem to personer af samme køn og to personer af forskellige køn, som det fremgår af § 1 i lov om ægteskabs indgåelse og opløsning, og derfor er den korrekte betegnelse "*ægtefæller*" uanset kønskonstellation[28]. Europarådet og EMD bruger af hensyn til medlemssta-

[28] Fra den 15. juni 2012 er ægteskabsloven ændret sådan, at par af samme køn på samme måde som par af forskelligt køn kan indgå ægteskab i Danmark. Samtidig er lov om registreret partnerskab ophævet, og det er derfor ikke længere muligt at indgå registreret partnerskab i Danmark. Loven finder dog fortsat anvendelse på registrerede partnerskaber, der er indgået før denne dato. Et registreret partnerskab kan omdannes til et ægteskab, hvis partnerskabet er indgået i Danmark, og parterne er enige om, at partnerskabet skal omdannes.

ternes forskellige lovgivninger på området den engelske term "*same sex marriage*" om homoseksuelle ægteskaber, og det er hidtil blevet oversat til dansk som "*registreret partnerskab*". Derfor bruges termen "*registreret partnerskab/partner*" om homoseksuelle ægteskaber i dette notat.

Det skal bemærkes, at der herudover kan forekomme familiekonstellationer som EMD endnu ikke har taget stilling til.

I afsnit 5.3.2. gennemgås praksis for familieliv med børn og betydningen af barnets forhold for en forælders sag om udsendelse[29], hvor først familierelationen mellem forældre og børn, herunder også adoptivbørn, plejebørn og særbørn gennemgås.

I den forbindelse beskrives praksis for, hvilken betydning barnets forhold har for afvejningen af, om opholdslandet er nærmest til at beskytte familielivet, herunder hensynet til barnets tarv.

Efterfølgende gennemgås i afsnit 5.4. EMD's praksis for afgrænsningen af familieliv med børn i andre relationer, f.eks. med bedsteforældre, nevøer/niecer og mellem søskende.

Der gennemgås i afsnit 5.5. de særlige omstændigheder ved etableringen af familielivet, som eventuelt kan have skabt en berettiget forventning om fortsat ophold.

5.2. Familieliv i parforhold (ægtefællens forhold)

5.2.1. Forskellige former for parforhold

Parforhold kan defineres som et længerevarende mellemmenneskeligt forhold oftest stiftet på baggrund af kærlighed mellem to mennesker, som enten bor eller ikke bor sammen. I de følgende afsnit gennemgås de typer af parforhold, som EMD har fundet er omfattet af beskyttelsen i EMRK artikel 8. Afsnittet fokuserer på ægtefællens forhold, men barnets/børnenes forhold også kan have spillet ind i EMD's samlede afvejning.

5.2.1.1 Ægteskab/registreret partnerskab

Af Guiden, punkt 290, fremgår det, at:

"The Court has considered cases concerning the marital or parental status of individuals to fall within the ambit of private and family life. In particular, it found that the registration of a marriage, being a recognition of an individual's legal civil status, undoubtedly concerns both private and family life and comes within the

[29] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

scope of Article 8 § 1 (Dadouch v. Malta, § 48). An Austrian court's decision to nullify the applicant's marriage had implications for her legal status and in general on her private life. However, since the marriage had been fictitious, the interference with her private life was found to be proportionate (Benes v. Austria, Commission decision)."

I sagen *Abdulaziz, Cabales and Balkandal v. the United Kingdom (1985)* udtalte EMD i præmis 62, at:

"Whatever else the word 'family' may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage, such as that contracted by Mr. and Mrs. Abdulaziz and Mr. and Mrs. Balkandali, even if a family life of the kind referred to by the Government has not yet been fully established. Those marriages must be considered sufficient to attract such respect as may be due under Article 8 (art. 8)."

EMD har i flere domme også fastslået, at forhold mellem parter af samme køn er omfattet af EMRK artikel 8 i forbindelse med vurderingen af, om der foreligger et beskyttelsesværdigt familieliv.

I sagen *Schalk and Kopf v. Austria (2010)* tillod de nationale myndigheder ikke et homoseksuelt par at indgå ægteskab, og de var som følge heraf stillet juridisk ringere end gifte heteroseksuelle par. Klagerne havde for EMD anført, at dette var diskriminerende i henhold til EMRK artikel 8 og artikel 14.

EMD udtalte i præmis 90-95, at:

"90. It is undisputed in the present case that the relationship of a same-sex couple like the applicants' falls within the notion of 'private life' within the meaning of Article 8. However, in the light of the parties' comments the Court finds it appropriate to address the issue whether their relationship also constitutes 'family life'.

91. The Courts reiterates its established case-law in respect of different-sex couples, namely that the notion of 'family' under this provision is not confined to marriage-based relationships and may encompass other de facto 'family' ties where the parties are living together out of wedlock. A child born out of such a relationship is ipso jure part of that 'family' unit from the moment and by the very fact of his birth (see Elsholz v. Germany [GC], no. 25735/94, § 43, ECHR 2000-VIII; Keegan v. Ireland, 26 May 1994, § 44, Series A no. 290; and Johnston and Others v. Ireland, 18 December 1986, § 56, Series A no. 112).

92. In contrast, the Court's case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes 'private life' but has not found that it constitutes 'family life', even where a long-term relationship of cohabiting partners was at stake. In coming to that conclusion, the Court observed that despite the growing tendency in a number of European States towards the legal and judicial recognition of stable de facto partnerships between homosexuals, given the existence of little common ground between the Contracting States, this was an area in which they still enjoyed a wide margin of appreciation (see Mata Estevez v. Spain (dec.), no. 56501/00, ECHR 2001-VI, with further references). In Karner (cited above, § 33), concerning the succession of a same-sex couple's surviving partner to the deceased's tenancy rights, which fell under the notion of 'home', the Court explicitly left open the question whether the case also concerned the applicant's 'private and family life'.

93. The Court notes that since 2001, when the decision in Mata Estevez was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then, a considerable number of member States have afforded legal recognition to same-sex couples (see paragraphs 27-30 above). Certain provisions of European Union law also reflect a growing tendency to include same-sex couples in the notion of 'family' (see paragraph 26 above).

94. In view of this evolution, the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would.

95. The Court therefore concludes that the facts of the present case fall within the notion of 'private life' as well as 'family life' within the meaning of Article 8. Consequently, Article 14 taken in conjunction with Article 8 of the Convention applies."

I sagen *Berrehab v. the Netherlands (1988)* udtalte EMD i præmis 20 ligeledes, at:

"It has held that the relationship created between the spouses by a lawful and genuine marriage - such as that contracted by Mr. and Mrs. Berrehab - has to be regarded as 'family life'."

5.2.1.2 Samliv

Det fremgår af Jon Fridrik Kjølbro i "*Den Europæiske Menneskerettighedskonvention for praktikere*", 5. udgave (2020), side 875, at: "*Forholdet mellem samlevende ægtefæller vil klart være omfattet. Begrebet familie er imidlertid ikke begrænset til ægteskab idet også de facto forhold kan være omfattet. Det betyder, at forholdet mellem ugifte samlevende vil være omfattet.*"

EMD har ligeledes i flere sager fastslået, at der var tale om familieliv mellem samlevende par. EMD udtalte i sagen *Keegan v. Ireland (1994)* i præmis 45, at:

"In the present case, the relationship between the applicant and the child's mother lasted for two years during one of which they co-habited. Moreover, the conception of their child was the result of a deliberate decision and they had also planned to get married (see paragraph 6 above). Their relationship at this time had thus the hallmark of family life for the purposes of Article 8 (art. 8). The fact that it subsequently broke down does not alter this conclusion any more than it would for a couple who were lawfully married and in a similar situation. It follows that from the moment of the child's birth there existed between the applicant and his daughter a bond amounting to family life."

I sagen *Johnston and others v. Ireland (1986)* havde parret boet sammen i 15 år og fået et fælles barn uden at være gift, da den ene part var gift med en anden, og det ifølge national ret ikke var muligt at blive skilt.

EMD udtalte i præmis 55-56, at:

"55. The principles which emerge from the Court's case-law on Article 8 (art. 8) Includes the following:

(a) By guaranteeing the right to respect for family life, Article 8 (art. 8) presupposes the existence of a family (see the above-mentioned Marckx judgment, Series A no. 31, p. 14, § 31).
(b) Article 8 (art. 8) applies to the 'family life' of the 'illegitimate' family as well as to that of the 'legitimate' family (ibid.).
(c) Although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life. However, especially as far as those positive obligations are concerned, the notion of 'respect' is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (see the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, pp. 33-34, § 67).

56. In the present case, it is clear that the applicants, the first and second of whom have lived together for some fifteen years (see paragraph 11 above), constitute a 'family' for the purposes of Article 8 (art. 8). They are thus entitled to its protection, notwithstanding the fact that their relationship exists outside marriage."

I sagen *N.V. and C.C. v. Malta (2022)* boede den kvindelige klager sammen med sit særbarn og sin nye kæreste (den anden klager). På grund af uoverensstemmelser med særbarnets far traf de nationale myndigheder afgørelse om, at den anden klager ikke længere kunne opholde sig på den fælles bopæl sammen med barnet. EMD udtalte i præmis 54-55 og 61-62 om indholdet af familieliv og betydningen af et indgreb, der indebærer en afbrydelse af et samliv mellem et kærestepar:

"*54. The mutual enjoyment by members of a family of each other's company constitutes a fundamental element of family life (see Nasr and Ghali v. Italy, no. 44883/09, § 308, 23 February 2016). According to the Court's well-established case-law, domestic measures hindering such mutual enjoyment of each other's company amount to an interference with the right to respect for family life (see, inter alia, Strand Lobben and Others v. Norway [GC], no. 37283/13, § 202, 10 September 2019, and Penchevi v. Bulgaria, no. 77818/12, § 53, 10 February 2015).*

55. Any such interference would constitute a violation of this Article unless it is, first of all, "in accordance with the law". The phrase "in accordance with the law" does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be clear, accessible and foreseeable. Furthermore, the interference must pursue aims that are legitimate under paragraph 2 of Article 8 and can be regarded as "necessary in a democratic society". Necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. That in turn requires that "relevant" and "sufficient" reasons be put forward by the authorities to justify the interference (ibid. § 54).

[…]

61. The Court notes that the majority of the above-cited principles have developed in situations concerning family life between children and parents, but they nonetheless remain relevant in the present case, which the

Court considers can be limited to the applicants' sufferance as a result of the separation from each other (in so far as they could no longer live together or meet in E.'s presence), without it being necessary to enter into the analysis of the second applicant's separation from E. (or vice versa given that E. is not an applicant in the present case).

62. Regard for family unity and for family reunification in the event of separation are inherent considerations in the right to respect for family life under Article 8 (see Abdi Ibrahim, cited above, § 145). The Court considers that for the applicants, a couple in a stable relationship, the possibility of continuing to live together is a fundamental consideration falling under the concept of family, just as much as that of a parent with a child (compare Penchevi, cited above, § 59, in the latter scenario). Thus, an order with the effect of preventing the applicants from living together constitutes interference with one of the essential aspects of the applicants' family life (see, mutatis mutandis, Taddeucci and McCall v. Italy, no. 51362/09, § 59, 30 June 2016, and Neulinger and Shuruk, cited above, §§ 90-91)."

5.2.1.3. De facto familieliv uden samliv

Af Guiden, punkterne 306-309, om anerkendelsen af de facto forhold fremgår, at:

"306. The notion of "family" under Article 8 of the Convention is not confined solely to marriagebased relationships and may encompass other de facto "family ties" where the parties are living together outside marriage (i.e. out of wedlock) (Johnston and Others v. Ireland, § 56; Van der Heijden v. the Netherlands [GC], § 50, which dealt with the attempt to compel the applicant to give evidence in criminal proceedings against her long term cohabiting partner). Even in the absence of cohabitation there may still be sufficient ties for family life (Kroon and Others v. the Netherlands, § 30; contrast with Azerkane v. the Netherlands, § 65, where the couple did not live together and there was no information available on the nature of their relationship) as the existence of a stable union may be independent of cohabitation (Vallianatos and Others v. Greece [GC], §§ 49 and 73). However, that does not mean that de facto families and relationships have to be granted specific legal recognition (Babiarz v. Poland, § 54): thus, the State's positive obligations do not include an obligation to accept a petition for divorce filed by an applicant wishing to remarry after having a child with his new partner (§§ 56-57). Moreover, while nowadays cohabitation might not be a defining criterion for establishing the stability of a long-lasting relationship, it certainly is a factor which could help rebut other indications which raise doubts about the sincerity of a marriage (Concetta Schembri v. Malta (dec.), § 52 concerning a marriage that was considered not genuine).

307. The Court has further considered that intended family life may exceptionally fall within the ambit of Article 8, notably in cases where the fact that family life has not yet fully been established is not attributable to the applicant (Pini and Others v. Romania, §§ 143 and 146). In particular, where the circumstances warrant it, family life must extend to the potential relationship which may develop between a child born out of wedlock and the biological father. Relevant factors which may determine the real existence in practice of close personal ties in these cases include the nature of the relationship between the natural parents and a demonstrable interest in and commitment by the father to the child both before and after the birth (Nylund v. Finland (dec.); L. v. the Netherlands, § 36; Anayo v. Germany, § 57).

308. In general, however, cohabitation is not a sine qua non of family life between parents and children (Berrehab v. the Netherlands, § 21). Marriages which are not in accordance with national law are not a bar to family life (Abdulaziz, Cabales and Balkandali v. the United Kingdom, § 63). A couple who enters into a purely religious marriage not recognised by domestic law may come within the scope of family life within the meaning of Article 8. However, Article 8 cannot be interpreted as imposing an obligation on the State to recognise religious marriage, for example in relation to inheritance rights and survivors' pensions (Şerife Yiğit v. Turkey [GC], §§ 97-98 and 102) or where the marriage was contracted by a 14 year old child (Z.H. and R.H. v. Switzerland, § 44).

309. Finally, engagement does not in itself create family life (Wakefield v. the United Kingdom, Commission decision)."

Det fremgår tilsvarende af Jon Fridrik Kjølbro i *"Den Europæiske Menneskerettighedskonvention for praktikere", 5. udgave (2020)*, side 876, at*: "Et fast og stabilt forhold mellem to personer er ikke nødvendigvis betinget af samliv, for at kunne anerkendes som familieliv, idet der kan være mange praktiske og nødvendige grunde til, at et par i kortere eller længere tid lever adskilt, herunder på grund af arbejde".*

EMD har endvidere fastslået, at der også ud over de situationer hvor parret på grund af f.eks. arbejde er nødsaget til at leve adskilt, kan være tale om familieliv mellem to personer, som hverken har indgået ægteskab/registreret partnerskab eller er/har været samlevende, hvor parret på anden vis kan siges at have forpligtet sig over for hinanden.

I sagen *Abdulaziz, Cabales and Balkandal v. the United Kingdom (1985)* tog EMD stilling til, om forholdet mellem, to personer, som selv anså sig for værende gift, som ønskede at leve sammen, og som endnu ikke havde været samlevende eller fået børn sammen, udgjorde et familieliv.

EMD udtalte i præmis 63, at:

"The case of Mrs. Cabales has to be considered separately, having regard to the question raised as to the validity of her marriage (see paragraph 48 above). The Government argued that, in the circumstances, her application was inadmissible ratione materiae and thus did not have to be examined by the Court.
Although this plea was framed in terms of admissibility, the Court is of the opinion that it goes to the merits of the application and is therefore preferably dealt with on that basis (see, mutatis mutandis, the Airey judgment of 9 October 1979, Series A no. 32, p. 10, para. 18).

The Court does not consider that it has to resolve the difference of opinion that has arisen concerning the effect of Philippine law. Mr. and Mrs. Cabales had gone through a ceremony of marriage (see paragraph 45 above) and the evidence before the Court confirms that they believed themselves to be married and that they genuinely wished to cohabit and lead a normal family life. And indeed they subsequently did so. In the circumstances, the committed relationship thus established was sufficient to attract the application of Article 8 (art. 8)."

I sagen *Wakefield v. the United Kingdom (1990)* tog Kommissionen stilling til, om klagerens forhold til hans forlovede og hendes særbørn var omfattet af retten til respekt for familieliv, som dette var defineret i artikel 8. I den konkrete sag afsonede klageren to livstidsdomme. Han havde kun set sin forlovede én gang, men havde haft en omfattende korrespondance med hende.

Kommissionen udtalte:

"The Commission also finds that the relationship between the applicant and his fiancée cannot be said to amount to the kind of family life protected by Article 8 (Art. 8) of the Convention. For such family life to arise more substantial ties than the one meeting and correspondence in this case must exist. Moreover, there is no evidence in the case-file of any family relationship between the applicant and his fiancée's children. However, the Commission considers that the relationship between the applicant and his fiancée does fall within the scope of the notion of private life envisaged by Article 8 (Art. 8) of the Convention."

5.2.2. Afvejningen i praksis (ægtefælles/samlevers/partners forhold eller de facto forhold uden samliv)

Det fremgår af EMD's praksis, at når en udlænding har udøvet familieliv i opholdslandet, skal det i forbindelse med en beslutning om udsendelse[30] af den pågældende vurderes, hvilke konsekvenser en sådan udsendelse vil have, ikke blot for den person, som skal forlade landet, men også for dennes ægtefælle/samlever/partner eller i de facto forhold uden samliv.

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[3] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

EMD har i en række sager, hvor der er klaget over en afgørelse om udsendelse[3] af en udlænding, foretaget en vurdering af, om en udsendelse af klageren ville indebære et indgreb i retten til familieliv, som ikke var proportionalt med det legitime hensyn, herunder i hvilket omfang det ville være muligt for og rimeligt at forvente af klagerens ægtefælle/samlever/partner at udrejse med klageren til dennes hjemland med henblik på at udøve familielivet dér. Det skal for en god ordens skyld bemærkes, at det i sidstnævnte tilfælde selvfølgelig ikke påhviler ægtefællen/samleveren/partneren rent faktisk at udrejse med klageren til dennes hjemland.

Som eksempel på tilfælde, hvor det ikke vil være muligt for klagerens ægtefælle/samlever/partner at udrejse med klageren til dennes hjemland, kan nævnes den situation, hvor ægtefællen/samleveren/partneren er

[30] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

flygtet fra det samme land og risikerer forfølgelse eller overgreb ved en tilbagevenden dertil. Se som eksempel på sager, hvor EMD har vurderet, om klagerens ægtefælle ville være afskåret fra at følge med klageren til deres fælles hjemland, fordi hun der ville risikere forfølgelse eller overgreb, *sagen Bajsultanov v. Austria (2012)* , præmis 89-92:

"89. The Court further notes that the applicant's wife and the children are recognised refugees in Austria, with asylum status which has been awarded to them in separate decisions. However, the Court acknowledges that at the time the applicant's wife was considered to be at risk of persecution in Chechnya due to her husband being at risk. The applicant's wife herself never claimed a risk of ill-treatment because of her own conduct or her own role in any of the armed conflicts. Consequently, in view of the Court's finding with regard to the applicant's complaint under Article 3 of the Convention above, the applicant's wife can also not be considered as being at a real risk of being subjected to treatment contrary to Article 3 of the Convention if she returned to Chechnya.

90. The applicant's wife was born in Grozny and spent all her life in Chechnya until she left for Austria with her husband. The couple's children are still of an adaptable age (see Darren Omoregie and Others, cited above, § 66). The applicant's wife, who has resident status in Austria for herself and the children based on their asylum status, might have a considerable interest in not returning to Chechnya. But although the Court does not underestimate the difficulties of a relocation of the family, there is no indication that there are any insurmountable obstacles in the way of the applicant's wife and the children following the applicant to Chechnya and developing a family life there (see Gül v. Switzerland, 19 February 1996, § 42, Reports 1996-I, and Darren Omoregie and Others, cited above, ibid.).

91. Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention."

Se endvidere sagen *Zuluaga and others v. The United Kingdom (2011)*, hvor EMD i præmis 31-32 udtalte:

"31. On these facts alone, the Court finds no evidence to suggest that there would be any insurmountable obstacles to prevent the second, third and fourth applicants from relocating to Colombia, should they wish to do so. However, the Court was somewhat concerned by the allegation, made by the first applicant in the course of the asylum proceedings, that the second applicant had been raped by four men in Colombia. Although the first applicant did not mention this fact in the course of his original application for asylum, it formed part of the account given to the Asylum and Immigration Tribunal on reconsideration, an account which the Tribunal found to be "credible". If the second applicant was indeed the victim of such an attack, it could well impact upon her willingness to return to Colombia with the first applicant.

32. However, the Court observes that the applicants did not, at any stage of the domestic proceedings, seek to challenge the deportation on the ground that the second applicant would be unwilling to return to Colombia following the rape. Likewise, in their submissions to the Court, the applicants' complaints under Article 8 were founded entirely on the length of time that the family had been in the United Kingdom, the age at which the third and fourth applicants arrived in the United Kingdom, and the strength of the family ties and private life established there. Consequently, there is no evidence before the Court to suggest that the second applicant would be unwilling or unable to return to Colombia on account of her past experiences and the Court is therefore unable to weigh this factor in the balance in assessing the proportionality of the first applicant's deportation."

Nedenfor gennemgås de forskellige elementer, der ifølge den udfundne praksis har indgået i EMDs proportionalitetsvurdering af, om en udsendelse[31] af klageren vil udgøre en krænkelse af klagerens ret til respekt for familieliv for så vidt angår den del, der vedrører den pågældendes familieliv med sin ægtefælle/samlever/partner, herunder ægtefællens/samleverens/partnerens forhold.

EMD har i sin praksis udtalt, at vægtningen af de enkelte elementer i proportionalitetsafvejningen afhænger af de konkrete omstændigheder i hver enkelt sag, se f.eks. *Maslov v. Austria (2008)* , hvor EMD i præmis 70 udtalte, at:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

Der skal derefter på den ene side i den samlede afvejning ses på de elementer, som taler for hensynet til klageren, herunder tilknytningen til opholdslandet og tilknytningen til hjemlandet, og på den anden side ses på det eller de af staten påberåbte legitime formål og de faktiske forhold, som ligger til grund for medlemsstatens indgreb. EMD anvender i sin praksis følgende formulering, se f.eks. *Maslov v. Austria (2008)* præmis 76:

"Finally, the Court reiterates that national authorities enjoy a certain margin of appreciation when assessing whether an interference with a right protected by Article 8 was necessary in a democratic society and proportionate to the legitimate aim pursued (see Slivenko v. Latvia [GC], no. 48321/99, § 113, ECHR 2003-X, and Berrehab v. the Netherlands, 21 June 1988, § 28, Series A no. 138). However, the Court has consistently held that its task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests on the other (see, among many other authorities, Boultif, cited above, § 47). Thus, the State's

[31] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

margin of appreciation goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (see, mutatis mutandis, Société Colas Est and Others v. France, no. 37971/97, § 47, ECHR 2002-III). The Court is therefore empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8."

I sagen *Priya v. Denmark (2006)* (afvisningsbeslutning) udtalte EMD udtalte indledningsvis at:

"Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Solomon v. the Netherlands (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998, and Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999).Thus, a distinction must be drawn between those seeking entry into a country to pursue their newly established family life; those who had an established family life before one of the spouses obtained settlement in another country; and those who seek to remain in a country where they have already established close family life and other ties for a reasonable period of time (cf. e.g. Khannam v. United Kingdom (dec.) no 14112/88, DR 59, pp. 265- 273)".

5.2.2.1. Ægtefællens/samleverens/partnerens statsborgerskab

EMD har i flere sager taget stilling til betydningen af ægtefællens/samleverens/partnerens statsborgerskab i forbindelse med vurderingen af, om en udsendelse[32] af klageren vil indebære et indgreb i retten til familieliv, som ikke er proportionalt med det legitime hensyn. EMD har i den sammenhæng vurderet, om det vil være muligt for og rimeligt at forvente af klagerens ægtefælle/samlever/partner at udrejse med klageren til dennes hjemland med henblik på at udøve familielivet dér. Det skal for en god ordens skyld bemærkes, at det i sidstnævnte tilfælde selvfølgelig ikke påhviler ægtefællen/samleveren/partneren rent faktisk at udrejse med klageren til dennes hjemland.

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[5] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er

[32] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

5.2.2.1.1. Alvorlig kriminalitet

I sagen *Boultif v. Switzerland (2001)* var klageren, en statsborger fra Algeriet med opholdstilladelse i Italien, indrejst i Schweiz på et turistvisum, da han var 25 år gammel. Året efter giftede han sig med en statsborger fra opholdslandet. Klageren begik de følgende år alvorlig kriminalitet, herunder grov vold, våbenbesiddelse og røveri, og blev idømt to års fængsel. De nationale myndigheder nægtede at forlænge klagerens opholdstilladelse med henvisning til den begåede kriminalitet. På tidspunktet for afgørelsen var det seks år siden, han havde begået kriminaliteten. Klageren opholdt sig herefter ulovligt i Italien, da hans tidligere opholdstilladelse var bortfaldet.

EMD udtalte i præmis 53-56, at:

"53. The Court has considered, first, whether the applicant and his wife could live together in Algeria. The applicant's wife is a Swiss national. It is true that she can speak French and has had contact by telephone with her mother-in-law in Algeria. However, the applicant's wife has never lived in Algeria, she has no other ties with that country, and indeed does not speak Arabic. In these circumstances she cannot, in the Court's opinion, be expected to follow her husband, the applicant, to Algeria.

54. There remains the question of the possibility of establishing family life elsewhere, notably in Italy. In this respect the Court notes that the applicant lawfully resided in Italy from 1989 until 1992 when he left for Switzerland, and he now appears to be living with friends in Italy again, albeit unlawfully. In the Court's opinion, it has not been established that both the applicant and his wife could obtain authorisation to reside lawfully in Italy, so that they could lead their family life in that country. In that context, the Court has noted that the Government have argued that the applicant's current whereabouts are irrelevant in view of the nature of the offence which he has committed.

55. The Court considers that the applicant has been subjected to a serious impediment to establishing a family life, since it is practically impossible for him to live his family life outside Switzerland. On the other hand, when the Swiss authorities decided to refuse permission for the applicant to stay in Switzerland, he presented only a comparatively limited danger to public order. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued.

56. There has accordingly been a breach of Article 8 of the Convention."

I sagen *Amrollahi v. Denmark (2002)* var klageren, en statsborger fra Iran, der var indrejst i opholdslandet i en alder af 23 år, i byretten blevet idømt fængselsstraf for narkotikakriminalitet og udvist for bestandig. Klageren havde på daværende tidspunkt opholdt sig i Danmark i otte år og havde fire år forinden indledt et forhold til en dansk statsborger, som han blev gift med under sin afsoning. Parret fik to børn, som på tidspunktet for EMD´s behandling af sagen var henholdsvis et og seks år gamle. Klagerens ægtefælle havde tillige et mindreårigt særbarn fra et tidligere forhold, der boede hos parret.

EMD udtalte i præmis 41, at:

"The applicant's wife, A, is a Danish national. She has never been to Iran, she does not know Farsi and she is not a Muslim. Besides being married to an Iranian man, she has no ties with the country. In these circumstances the Court accepts even if it is not impossible for the spouse and the applicant's children to live in Iran that it would, nevertheless, cause them obvious and serious difficulties. In addition, the Court recalls that A's daughter from a previous relationship, who has lived with A since her birth in 1989, refuses to move to Iran. Taking this fact into account as well, A cannot, in the Court's opinion, be expected to follow the applicant to Iran."

EMD fandt således, at en udvisning af klageren ville være en krænkelse af artikel 8 og udtalte i præmis 43:

"Accordingly, as a consequence of the applicant's permanent exclusion from Denmark the family will be separated, since it is de facto impossible for them to continue their family life outside Denmark."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

EMD udtalte i præmis 49, at:

"The Court observes that the applicant's wife is a national of 'the former Yugoslav Republic of Macedonia', i.e. of the country to which the applicant was expelled. The applicant's wife, who was born in 1978, lived there until 1990 and knows Albanian and the country's culture. She has relatives there and visits the country every year. The domestic courts considered that she could reintegrate in 'the former Yugoslav Republic of Macedonia' without encountering serious difficulties, despite having lived in Switzerland for the past twenty years. The Court notes that the applicant's wife chose to follow him to Macedonia in 2011 and lived with him there until 2015, despite the fact that she could have remained in Switzerland as a holder of a permanent residence permit and maintained contact with the applicant through visits and means of telecommunication."

EMD udtalte i præmis 55, at:

"There has accordingly been no violation of Article 8 of the Convention."

I sagen *Bajsultanov v. Austria (2012)* var klageren meddelt asyl i opholdslandet. Han blev idømt i alt 20 måneders fængsel for bl.a. flere tilfælde af vold samt udvist. EMD fastsatte længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen. Klagerens ægtefælle var meddelt asyl afledt af klagerens forhold og de havde to børn, der på tidspunktet for EMD's behandling af sagen var otte og fem år.

Efter i præmis 79-82 at have konstateret, at udvisningen af klageren udgjorde et indgreb i hans ret til respekt for familieliv, og at dette indgreb var i overensstemmelse med loven og forfulgte et af de legitime hensyn, gennemgik EMD i præmis 83 de generelle principper, som indgår i afvejningen af, om indgrebet var nødvendigt i et demokratisk samfund, jf. kriterierne som sammenfattet i Boultif- og Üner-dommene.

Om karakteren og alvorligheden af den begåede kriminalitet udtalte EMD i præmis 84:

"Turning to the first set of criteria relating to the criminal offences committed by the applicant, the Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks' imprisonment, suspended with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions."

EMD udtalte i præmis 85-92, at:

"85. As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there.

86. On the other hand, the applicant lived in Chechnya for almost twenty-three years, went to school there and subsequently worked occasionally in different jobs. The applicant's parents and siblings still live in Chechnya, and the applicant has maintained regular contact with his father.

87. The Court therefore considers, in line with the Austrian authorities, that the applicant still has stronger social and cultural ties to his country of origin than to his host country.

88. As regards the applicant's family ties the Court notes that the applicant and his wife are Russian nationals, who arrived in Austria together in July 2003. The couple have two children, who were both born in Austria but who are also Russian nationals. The family lived together, apart from when the applicant was in prison, during which time however, the applicant's wife visited him regularly. After his release from prison the applicant went back to live with his family.

89. The Court further notes that the applicant's wife and the children are recognised refugees in Austria, with asylum status which has been awarded to them in separate decisions. However, the Court acknowledges that at the time the applicant's wife was considered to be at risk of persecution in Chechnya due to her husband

being at risk. The applicant's wife herself never claimed a risk of ill-treatment because of her own conduct or her own role in any of the armed conflicts. Consequently, in view of the Court's finding with regard to the applicant's complaint under Article 3 of the Convention above, the applicant's wife can also not be considered as being at a real risk of being subjected to treatment contrary to Article 3 of the Convention if she returned to Chechnya.

90. The applicant's wife was born in Grozny and spent all her life in Chechnya until she left for Austria with her husband. The couple's children are still of an adaptable age (see Darren Omoregie and Others, cited above, § 66). The applicant's wife, who has resident status in Austria for herself and the children based on their asylum status, might have a considerable interest in not returning to Chechnya. But although the Court does not underestimate the difficulties of a relocation of the family, there is no indication that there are any insurmountable obstacles in the way of the applicant's wife and the children following the applicant to Chechnya and developing a family life there (see Gül v. Switzerland, 19 February 1996, § 42, Reports 1996-I, and Darren Omoregie and Others, cited above, ibid.).

91. Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention."

I sagen *Üner v. the Netherlands (2006)* blev klageren idømt syv års fængsel for drab og udvist for bestandig. Klageren var indrejst som 12-årig sammen med sin mor og sine søskende som familiesammenført til faren. På det tidspunkt, hvor afgørelsen om udvisning blev endelig, havde han opholdt sig 17 år i opholdslandet og havde to mindreårige børn med sin nederlandske partner. Han var flyttet fra partneren efter halvandet års samliv, da det ældste barn var omkring ni måneder gammel, men forblev i tæt kontakt med partneren og barnet i de følgende omkring otte måneder indtil fængslingen. Partneren og det ældste barn besøgte klageren i fængslet mindst en gang om ugen og ofte hyppigere. Mens klageren var fængslet, fik parret endnu et barn, som klageren ligeledes så hver uge. Klageren havde på tidspunktet for EMD´s afgørelse opholdt sig 25 år i opholdslandet.

EMD fastslog i præmis 61, at der forelå et indgreb både i klagerens ret til respekt for familieliv og hans ret til respekt for privatliv. EMD udtalte imidlertid:

"[...] Even so, having regard to the particular issues at stake in the present case and the positions taken by the parties, the Court will pay special attention to the applicant's right to respect for his family life."

EMD udtalte i præmis 62-65, at:

"62. The Court considers at the outset that the applicant lived for a considerable length of time in the Netherlands, the country that he moved to at the age of 12 together with his mother and brothers in order to join his father, and where he held a permanent residence status. Moreover, he subsequently went on to found a

family there. In these circumstances, the Court does not doubt that the applicant had strong ties with the Netherlands. That said, it cannot overlook the fact that the applicant 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. As the Chamber put it in paragraph 46 of its judgment, "... the disruption of their family life would not have the same impact as it would [have had] if they had been living together as a family for a much longer time". Moreover, while it is true that the applicant came to the Netherlands at a relatively young age, the Court is not prepared to accept that he had spent so little time in Turkey that, at the time he was returned to that country, he no longer had any social or cultural (including linguistic) ties with Turkish society.

63. As to the criminal conviction which led to the impugned measures, the Court is of the view that the offences of manslaughter and assault committed by the applicant were of a very serious nature. While the applicant claimed that he had acted in self-defence – a claim that was in any event rejected by the trial courts (see paragraphs 44 and 50 above) – the fact remained that he had two loaded guns on his person. Taking his previous convictions into account (see paragraphs 14 and 16 above), the Court finds that the applicant may be said to have displayed criminal propensities. Having regard to Netherlands law and practice relating to early release (see paragraph 34 above), the Court is, furthermore, not inclined to attach particular weight to the fact that the applicant was released after serving two-thirds of his sentence.

64. The Court concurs with the Chamber in its finding that at the time the exclusion order became final the applicant's children were still very young – six and one and a half years old respectively – and thus of an adaptable age (see paragraph 46 of the Chamber judgment). Given that they have Netherlands nationality, they would – if they followed their father to Turkey – be able to return to the Netherlands regularly to visit other family members residing there. Even though it would not wish to underestimate the practical difficulties entailed for his Dutch partner in following the applicant to Turkey, the Court considers that in the particular circumstances of the case the family's interests were outweighed by the other considerations set out above (see paragraphs 62 and 63).

65. The Court appreciates that the exclusion order imposed on the applicant has even more far-reaching consequences than the withdrawal of his permanent residence permit, as it renders even short visits to the Netherlands impossible for as long as the order is in place. However, having regard to the nature and the seriousness of the offences committed by the applicant, and bearing in mind that the exclusion order is limited to ten years, the Court cannot find that the respondent State assigned too much weight to its own interests when it decided to impose that measure. In this context, the Court notes that the applicant, provided he complied with a number of requirements, would be able to return to the Netherlands once the exclusion order had been lifted (see paragraphs 32 and 51 above)."

EMD udtalte i præmis 67:

"In the light of the above, the Court finds that a fair balance was struck in this case in that the applicant's expulsion and exclusion from the Netherlands were proportionate to the aims pursued and therefore necessary in a democratic society.

Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Sezen v. the Netherlands (2006)* var den første klager indrejst i opholdslandet som 23-årig og havde fået opholdstilladelse som familiesammenført til sin ægtefælle (den anden klager), som havde boet i opholdslandet siden hun var syv år, og deres fælles barn. Tre år efter indrejsen blev den første klager idømt fire års fængsel for narkotikakriminalitet. Efter løsladelsen genoptog han samlivet med ægtefælle og barn, men fraflyttede senere det fælles hjem i en periode på omkring syv måneder. Knap fire måneder efter genoptagelse af samlivet fik klagerne endnu et barn. Den første klagers opholdstilladelse som familiesammenført blev omkring otte måneder senere nægtet forlænget under henvisning til samlivsafbrydelsen og straffedommen.

EMD udtalte i præmis 44-50, at:

"44. At the time the first applicant was arrested, i.e. on 31 July 1992, he had been residing lawfully in the Netherlands for less than one and a half years, having been granted a residence permit in February 1991. Applying the "sliding scale" principle, the authorities of the respondent State attached weight to this undeniably short duration of the first applicant's lawful stay in the Netherlands before he committed the offence. It is nevertheless to be noted that, following his conviction on 20 January 1993, it was not until more than four years later, namely on 5 June 1997, that the decision was taken to refuse the first applicant continued residence. Following his early release from prison in April 1995, the first applicant had thus been allowed to build up even closer ties with the Netherlands for a further two years. In addition, it appears that the first applicant has not re-offended and that he has been gainfully employed ever since his release from prison.

45. As to the first applicant's connections with his country of origin, the Court considers that his situation is not comparable to that of a second-generation immigrant, given that he arrived in the Netherlands at the age of twenty-three. Not having been informed otherwise, the Court assumes that he received his schooling in Turkey and that he is conversant with the Turkish language. Thus, he undoubtedly has ties with Turkey. His ties to the Netherlands are mainly connected to his wife – the second applicant – and their two children.

46. The Court notes with some concern that none of the domestic authorities involved in the decision-making process appear to have paid any attention to the possible effects which the refusal of continued residence would have on the first applicant's family life (see Yıldız v. Austria, no. 295/97, § 43, 31 October 2002). It is true that the Regional Court of The Hague, sitting in Amsterdam, quashed the decision to impose an exclusion order on the first applicant for the reason that the Deputy Minister had failed to accord insufficient weight to the interests of the applicants and their children (see paragraph 19 above). However, the Regional Court upheld the decision not to prolong the first applicant's residence permit, and its reasoning on the subject did not refer to the consequences of that decision on his family life. In this context it is further to be noted that the Government assume that both the second applicant and the children speak Turkish (see paragraph 38 above). Had this matter been addressed in the course of the domestic proceedings, the authorities would have been aware of the fact that the children speak Dutch and Kurdish, but not Turkish.

47. Unlike the first applicant, his wife – the second applicant – may be considered a second-generation immigrant, having moved to the Netherlands at the age of seven and having lawfully resided there ever since. It is submitted, and has not been disputed, that all her relatives are also living in the Netherlands and that she does not have any family in Turkey. Although the parties disagree as to whether the second applicant was aware of the criminal activities of her husband, the fact remains that he had not yet committed the offence at the time they married and she entered into a family relationship with him, which is the relevant criterion

in this context (see Boultif, cited above, § 48). Furthermore, the couple's two children were born in the Netherlands: Adem in 1990 and Mahsun in 1996. These two children have always lived in the Netherlands and its cultural and linguistic environment, and attend school there. Consequently, they can only have minimal ties, if any, to their parents' country of origin (see Şen v. the Netherlands, no. 31465/96, § 40, 21 December 2001) and, as noted above (paragraphs 32 and 46), they do not speak Turkish. In these circumstances, the Court accepts that following the first applicant to Turkey would mean a radical upheaval for the second applicant and in particular for the couple's children (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, p. 1971, § 36; see also Recommendation 1504 (2001) of the Parliamentary Assembly of the Council of Europe on the non-expulsion of long-term immigrants), and it finds that they cannot realistically be expected to do so.

48. The principal element which strikes the Court in the present case, however, is the fact that the applicants' marriage was deemed to have permanently broken down when the couple had merely ceased cohabiting for some six months in 1995/1996 and despite them making it clear to the authorities of the respondent State that cohabitation had been resumed and that there was no question of their marriage having broken down. Dutch law did not permit the first applicant's residence permit to be revoked or an exclusion order to be imposed at the time of his conviction, since he had held a strong residence status at that time (see Yılmaz v. Germany, no. 52853/99, § 48, 17 April 2003). Yet by ruling – four years after that conviction (paragraph 44 above) and notwithstanding the fact that a child had been conceived during the time the spouses were not living together – that the marriage had permanently broken down, the authorities were able to conclude that the first applicant had lost his indefinite right to remain and, subsequently, to refuse him continued residence on the basis of the criminal conviction. By that time the first applicant had served his sentence and, as illustrated by the fact that he obtained gainful employment and that a second child was born to him and his wife, had begun rebuilding his life.

49. It is true that, in theory at least, the first applicant is entitled to make occasional visits to the Netherlands, due to the fact that the exclusion order that was initially imposed on him was ultimately withdrawn without having been enforced (paragraph 20 above). However, in this context the Court notes that the present case does not concern a divorced father with an access arrangement, but a functioning family unit where the parents and children are living together. The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 of the Convention and that to split up a family is an interference of a very serious order (see Mehemi v. France (no. 2), no. 53470/99, § 45, ECHR 2003-IV). Having regard to its finding at paragraph 47 above that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same as long as the first applicant continues to be denied the right to reside in the Netherlands. In this context the Court notes the Government's submission that the first applicant's criminal record would normally militate against a new residence permit being issued to him for a period of ten years. Although they also argued that Article 8 of the Convention would be taken into account in assessing whether his conviction would still be held against him, the Government failed to indicate when, and under what conditions, such an assessment would lead to a positive decision being taken on any future request for a residence permit being lodged by the first applicant.

50. In conclusion, the Court is of the opinion that, in the particular circumstances of the present case, the respondent State failed to strike a fair balance between the applicants' interests on the one hand and its own interest in preventing disorder or crime on the other.

There has, accordingly, been a violation of Article 8 of the Convention."

I sagen *Salem v. Denmark (2016)* blev klageren dømt for narkotikakriminalitet og andre alvorlige forhold og idømt fem års fængsel samt udvist betinget med indrejseforbud gældende i to år. Klageren var indrejst i opholdslandet i en alder af 23 år og var først blevet meddelt opholdstilladelse som familiesammenført til sin tidligere ægtefælle, hvorefter han efterfølgende blev meddelt opholdstilladelse på baggrund af asyl. På tidspunktet, hvor de nationale myndigheder afsagde endelig dom om udvisning (2011), havde klageren og hans tidligere ægtefælle otte børn, som var i alderen fra fem til 16 år, og som alle var danske statsborgere. EMD afgjorde sagen fem år efter de nationale myndigheder (2016).

EMD udtalte i præmis 68, at:

"The applicant was 23 years old when he entered Denmark in 1993 and he had stayed in Denmark for approximately 18 years when the deportation order became final by the Supreme Court judgment of 12 October 2011."

EMD udtalte i præmis 70-74, at:

"70. The applicant is a stateless Palestinian, born in Lebanon, where he stayed until the age of 23. The applicant's ex-wife is a Danish citizen. She was born a Palestinian national and lived briefly in Lebanon, until she arrived in Denmark at the age of nine. The couple's children were Danish citizens and born in Denmark.

71. As to the applicant's ties with Denmark, the Supreme Court observed that he was not well integrated into Danish society and he had limited Danish language skills. He had no ties to Denmark via work or education. He had been receiving State early retirement pension since 2004. The applicant and his family spoke Arabic.

72. As to the applicant's connections with his country of origin, the Supreme Court noted that the applicant still had ties to Lebanon, where his mother and sister lived and where the applicant had lived until he entered Denmark. He also had ties to Syria, where a sister and her family lived, and where the applicant had stayed for three weeks in 2007, for four weeks in 2008, and in 2009. Before his arrest, the applicant had set about buying an apartment in Syria for the family to use during stays there. The applicant's now ex-spouse had family in Lebanon. Moreover, she had regular contact with the applicant's sister and family in Syria, and she had spent several vacations there, for instance in 2008 and 2009 as well as one and a half months in 2010 and two months in 2011. She had eighteen siblings in Denmark. At the relevant time, she had stated that she would not follow the applicant if he were deported from Denmark to Lebanon or Syria, and that the children would not live outside Denmark.

73. The applicant and his wife married in 1994, long before the offences at issue were committed. Thus, the criterion of whether the spouse knew about the offence at the time when he or she entered into a family relationship does not come into play in the present case. In respect of their marriage, it is noteworthy, though, that the spouses divorced with effect from 21 November 2012, less than two months after the deportation order became final. Moreover, in the domestic proceedings an amount of DKK 404,500 and gold jewellery

were found in the applicant's home and confiscated as profit from the crimes, and it was observed that the applicant and his wife, who both received State benefits and who, when calculating their expenses, apparently had a deficit in their household budget for 2007, 2008 and 2009 amounting to a total of at least DKK 2.5 million, could not substantiate that they had obtained the goods legally. For example, the applicant's wife denied knowledge of a receipt dated 20 October 2008 for gold jewellery bought in her name in Dubai for DKK 43,000. Moreover, documents were presented before the Supreme Court showing that over a period of less than 5 months, up until the applicant was arrested, there had been nine hundred and sixty-seven calls to and from overseas numbers on the applicant's and his wife's home telephone. In addition, from January 2006 to June 2011 the applicant, his wife and their children had made various transfers of money to Syria and Lebanon.

74. The remaining criteria in the case to be examined are "whether there are children of the marriage, and if so, their age" and "the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled".

EMD udtalte i præmis 77-83, at:

"77. In the present case, the applicant's eight children were between 5 and 16 years old when the deportation order became final. Before the Supreme Court the applicant's then wife stated that she would be unable to follow the applicant if he were deported from Denmark, and that the children would not manage outside Denmark. During the domestic proceedings, statements were obtained from the Children's Department at the municipality and the children's schools and day-care institutions, which recounted that several of the eight children had serious problems, including of a psychological and educational nature (see paragraph 25 above). Four of the children received special education and several of the children needed extra support and supervision in their schools and institutions. Massive public support measures had been provided due to a significant need to teach them normal social behaviour. Finally, the placement of some of the sons in public care was under consideration.

78. In the Court's view it is doubtful whether, on the basis of those statements, or on the material before it, the applicant has substantiated that he had a central role in the family (see paragraph 63 above) and that his children's best interests were adversely affected by his deportation (see, for example, A.W. Khan v. the United Kingdom, cited above, § 40).

79. The Supreme Court did not expressly state whether it found that there were no insurmountable obstacles for the applicant's wife and children to follow him. It rather appears that the majority found that in any event the separation of the applicant from his wife and children could not outweigh the other counterbalancing factors, notably that the applicant had a leading and central role in the commission of persistent, organised and aggravated drug crimes (see paragraph 39 above).

80. The Court notes in addition that it transpired from the statements mentioned above (see paragraphs 25 and 77) that several of the applicant's eight children had serious problems and therefore were being supported by various Danish authorities.

81. Finally, the Court notes that the applicant has not pointed to any obstacles for the children to visit him in Lebanon or for the family to maintain contact via the telephone or the internet.

82. In the light of the above, the Court recognises that the Supreme Court carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law, including the applicant's family situation. Moreover, having regard to the gravity of the drug crimes committed by the applicant, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court finds that the interference was supported by relevant and sufficient reasons, and was proportionate in that a fair balance was struck between the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other hand.

83. Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Otite v. the United Kingdom (2022)* blev klageren idømt fire år og otte måneders fængsel for økonomisk kriminalitet og udvist for bestandig. Klageren var indrejst som 31-årig som familiesammenført til sin ægtefælle, der havde oprindelse i samme land som klageren, og som ligesom parrets tre børn i alderen 12, 17 og 19 år var statsborger i opholdslandet. Klageren havde på tidspunktet for dommen opholdt sig i opholdslandet i 19 år. Han havde været på fri fod i 11 år og havde i fire af de 11 år været involveret i kriminalitet. Familien havde efter det oplyste ikke besøgt klageren under afsoningen.

I præmis 49 gennemgik EMD kriminalitetens alvor og lagde vægt på, at klageren over en fireårig periode havde drevet en dokumentfabrik, hvilket havde involveret et stort antal ofre og betragtelige pengebeløb, og at han ikke havde erkendt overtrædelsernes påvirkning og konsekvenser for ofrene og samfundet, ligesom der var betragtelig risiko for, at han ville fortsætte med at opføre sig som før.

Om betydningen af klagerens udvisning for hans familie udtalte EMD i præmis 51-54:

"*51. The third party intervenors suggest that in cases such as the present the bests [sic] interests of the children should be a primary consideration (see paragraphs 34-35 above). […]*

52. In the present case, while the applicant's deportation would undoubtedly be difficult for his wife and children, there is nothing to suggest that their need for his support is particularly acute. His children are now nineteen, seventeen and twelve years old. His eldest daughter has type 1 diabetes, but there is no evidence to suggest that the applicant's presence in the United Kingdom is important for her physical well-being. According to the evidence before the Upper Tribunal, the children did not have contact with him during the whole period while he was in prison (see paragraph 17 above). Following his custodial sentence he was detained in immigration detention (see paragraph 31 above). It is not known whether he returned to the family home following his release from detention.

53. Even if the applicant has returned to the family home, his wife has family in the United Kingdom and has established ties in the community (see paragraph 12 above). The family, which has already coped with his lengthy absence while in prison and immigration detention, would therefore have a support network in the event of his deportation. In addition, although the Upper Tribunal proceeded on the basis that the applicant's family would not return to Nigeria with him, there is no evidence to suggest that they could not do so. The applicant himself lived in Nigeria for the first thirty-one years of his life (see paragraph 5 above). Although his wife and children are British citizens, his wife is of Nigerian origin and his children would be entitled to Nigerian citizenship through him (see paragraph 12 above). The case is therefore readily distinguishable from that of Unuane, in which the applicant's partner and children had to stay in the United Kingdom as the eldest child was awaiting heart surgery, and the Upper Tribunal had itself acknowledged that they needed the applicant to be there with them to provide support (see Unuane, cited above, § 89).

54. The applicant has not brought forward any arguments which would speak against the possibility of his family visiting him in Nigeria and staying in contact via telephone and the internet (see Salem v. Denmark,

no. 77036/11, § 81, 1 December 2016; see also Külekci, cited above, §49). Furthermore, the applicant only left Nigeria when he was thirty-one years old (see paragraph 5 above), and there is no evidence to suggest that he no longer has family, social, cultural and linguistic ties there (see, for example, Külekci, cited above, § 50)."

Efter i præmis 54, 2. punktum, at have konstateret, at der ikke var noget, der tydede på, at klageren ikke længere havde bånd til hjemlandet, konkluderede EMD i præmis 56-57:

Herefter konkluderede EMD i præmis 56-57:

"*56. The foregoing considerations are sufficient to enable the Court to conclude that the strength of the applicant's family and private life in the United Kingdom is not such as to outweigh the public interest in his deportation.*

57. Accordingly, his deportation would not violate Article 8 of the Convention."

5.2.2.1.2. Mindre alvorlig kriminalitet

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis fem og seks måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden.

EMD gennemgik præmis 57 Boultif-kriterierne og udtalte i præmis 58:

"In addition, the Court will also take into account the particular ties which these immigrants have developed with the host country where they will have spent most of their life (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, § 36; Radovanovic, cited above, § 33; Üner, cited above, § 40)"

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som f.eks. narkotikahandel.

Vedrørende tilknytningen til opholdslandet udtalte EMD i præmis 61, at:

"*With regard to the applicant's personal and family situation, the Court notes that the applicant, at the time of the expulsion order of 22 January 1999, had been lawfully residing in Germany for 27 years, having moved to that country at the age of ten in order to live there with his parents and brother and where he received his secondary school education. While the parties do not agree on the extent of the applicant's professional work, he had been employed for a certain period of that time. Since 1988 he had been in possession of a permanent residence permit. While it is true that the applicant and his wife had been separated during the first five years of their marriage as the applicant's wife and their first son did not follow the applicant to Germany until 1989, the family had been living together in Germany for ten years and there is no indication that their marriage and family life was anything less than effective."*

EMD udtalte i præmis 62-66:

"62. *On the other hand, the Court is not persuaded that the applicant has become so estranged from the country where he spent the first ten years of his life that he would no longer be able to settle in Turkey, having regard to the fact that the applicant married his Turkish wife in Turkey, where their first son was born and that his wife and son did not follow him to Germany until 1989. It follows that the applicant must have entertained certain links to his country of origin at least until 1989. It can further be presumed that the applicant is familiar with the Turkish language, as he married a Turkish wife.*

63. With regard to the question of whether the applicant's family could reasonably be expected to follow the applicant to Turkey, the Court notes that the applicant's wife and four children are Turkish nationals. As the applicant's wife entered German territory as an adult and ten years before the issue of the expulsion order, it can be assumed that she has sufficient links which would allow her to re-integrate into Turkish society.

64. The Court notes, however, that the applicant's four sons – who were, at the time the expulsion order had been issued, between six and thirteen years of age – had been born in Germany respectively entered Germany at a very young age where they received all their school education. Even if the children should have knowledge of the Turkish language, they would necessarily have to face major difficulties with regard to the different language of instruction and the different curriculum in Turkish schools.

65. The Court finally notes that the expulsion order has been issued without setting a time-limit to the applicant's exclusion from the German territory. As pointed out by the Government, the domestic authorities, pursuant to section 8 § 2 of the Alien's Act, will generally set a time-limit to the exclusion from German territory upon the alien's request (see also Yilmaz, cited above, § 47). However, while the applicant has filed such requests in 2002 and 2003, no decision has yet been given, the reasons for which being in dispute between the parties.

66. *The Court considers that the applicant's expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant's children could be expected to face if they followed him to Turkey, the Court considers that an unlimited exclusion from the German territory violates the applicant's rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention."*

I sagen *Yildiz v. Austria (2002)* var den første klager indrejst i opholdslandet som 14-årig for at bo sammen med sine forældre og sine søskende. Han indledte et forhold til den anden klager, som var statsborger i den første klagers hjemland, men født og opvokset i opholdslandet. Nogle måneder senere traf opholdslandet afgørelse om udvisning af den første klager med indrejseforbud i fem år på baggrund af flere bødestraffe for tyveri og færdselslovsovertrædelser. Da udvisningsafgørelsen blev endelig, havde klagerne sammen fået et barn, den tredje klager. Klageren udrejste til hjemlandet, da barnet var knap to år gammelt. På tidspunktet for EMD's behandling af sagen boede han fortsat i hjemlandet. Den anden og tredje klager besøgte ham jævnligt, indtil parret blev skilt.

EMD udtalte i præmis 43-46, at:

"43. The Court will first examine the applicants' family situation and the length of their stay in Austria. It observes that the first applicant is not a second generation immigrant, i.e. a person who was born or has lived the main part of his life in the country from which he is going to be removed. He only came to Austria in 1989

at the age of fourteen and must therefore have links with his country of origin and in particular be able to speak Turkish. On the other hand, he was still an adolescent when he came to Austria, where his close family was and is still living. In December 1996, when the Administrative Court confirmed the residence ban against him, he had been living in Austria for seven years, he had been working there and had been co-habiting for a little less than three years with the second applicant, who is also a Turkish national but was born in Austria and has lived there all her life. Their daughter, the third applicant, was one year and four months old at the material time. In fact, the Austrian authorities issuing the residence ban acknowledged that the first applicant had reached a high degree of integration in Austria. Nevertheless, the Court considers that, as regards the possible effects of the residence ban on his family life, the authorities failed to establish whether the second applicant could be expected to follow him to Turkey, in particular whether she spoke Turkish and maintained any links, other than her nationality, with that country.

44. It is true that, meanwhile, the applicants' family situation has changed. The first and second applicant divorced in March 2001 and, while the second applicant is residing in Austria, the first applicant lives in Turkey. The third applicant is currently staying with relatives in Turkey although the second applicant, who has sole custody over the child, asserts that she intends to bring her back to Austria. However, the Court has to make its assessment in the light of the position when the residence ban became final (see paragraph 34 above). Its task is to state whether or not the domestic authorities complied with their obligation to respect the applicants' family life at that particular moment and it cannot have regard to circumstances which only came into being after the authorities took their decision. Nor can it be the Court's role to speculate as to whether there is – as claimed by the applicants – a causal link between the contested measure and the subsequent developments, in particular the first and second applicants' divorce.

45. Next, the Court will turn to the offences committed by the first applicant, as their gravity is an essential element for assessing the proportionality of the interference with the applicants' family life. The Court notes that in 1993 the first applicant, who was then still a minor, was convicted twice by the criminal courts, once for shop-lifting with a sentence of three days' imprisonment suspended on probation, and once for theft without a sentence being pronounced. Between 1992 and April 1994 he was convicted seven times of traffic offences, in particular driving without a license and once ignoring a red light and high speeding. The fines imposed on him amounted to a total sum of ATS 28,000 (equivalent to EUR 2,035). In sum, the Court finds that these offences were not negligible. However, as is shown by the modest penalties imposed, the domestic authorities considered them to be of a minor nature. Moreover, the first applicant did not commit any further offences between April 1994 and December 1996, when the residence ban proceedings were terminated. Thus, in the Court's view the authorities' fear that he constituted a danger to public order and security in that would commit further offences is mitigated by the particular circumstances of the case (see Boultif v. Switzerland, cited above, § 51, with further references).

46. Having regard to all these elements, the Court considers that the authorities failed to strike a fair balance between the different interests involved and that the interference with the applicants' right to respect for their family life was not proportionate to the legitimate aim pursued.

Accordingly, there has been a breach of Article 8 of the Convention."

5.2.2.1.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Antwi and others v. Norway (2012)* havde klageren ligeledes opnået sin opholdstilladelse på baggrund af svig. Klageren var i opholdslandet blevet gift og havde fået et barn. Syv år efter indrejsen fik opholdslandet kendskab til hans reelle identitet og året efter blev han udvist fra opholdslandet.

EMD udtalte i præmis 90-99, at:

"90. In applying the above principles [fra Nunez-dommen, red.] to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Nunez, cited above, § 71, and Darren Omoregie and Others v. Norway, no. 265/07, § 67, 31 July 2008; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Nunez and Darren Omoregie and Others, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Nunez, cited above, § 73).

91. Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country.

92. Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country.

93. Like the first applicant, the second applicant had grown up in Ghana. There she had lived until the age of seventeen when she was reunited with her father and siblings in Norway. Although she had become a Norwegian citizen and had family ties and employment links to Norway and probably would experience some difficulties in resettling in Ghana, there does not seem to be any particular obstacle preventing her from accompanying the first applicant to their country of origin. The Court has also taken note of her claim that, although aware that the first applicant originally had a Ghanaian background and had obtained a Ghanaian passport in connection with their marriage in Ghana on 11 February 2005, she should only have become aware of his true identity in this context. However, the above-mentioned factors cannot in the Court's view

outweigh the public interest in sanctioning the first applicant's aggravated offences against the immigration rules with the impugned measure.

94. As to the third applicant, the Court notes that she is a Norwegian national who since birth has spent her entire life in Norway, is fully integrated into Norwegian society and, according to the material submitted to the Court, speaks Norwegian with her parents at home. In comparison, her direct links to Ghana are very limited, having visited the country three times (see paragraph 44 above) and having little knowledge of the languages practiced there.

95. Furthermore, as a result of the first applicant no longer holding a work permit and staying full-time at home and of the second applicant's being particularly occupied by her work, the first applicant assumes an important role in the third applicant's daily care and up-bringing. He is the parent who follows up her home-work and parental contacts with her school and who facilitates her participation in sport activities. She is also at an age, ten years, when this kind of support would be valuable and she is strongly attached to her father as she is to her mother.

96. It would most probably be difficult for her to adapt to life in Ghana, were she and her mother to accompany the father to Ghana, and to readapt to Norwegian life later.

97. Against this background, the Court shares the High Court's view that the implementation of the expulsion order would not be beneficial to her.

98. However, the Court sees no reason to call into doubt the High Court's findings to the effect that, both parents having been born and brought up in Ghana and having visited the country three times with their daughter, there were no insurmountable obstacles in the way of the applicants settling together in Ghana or, at the least, to maintaining regular contacts. As to the allegation that the third applicant's rashes had been aggravated by heat during her previous stays in Ghana, the High Court majority found that this had not been sufficiently documented and could not be relied upon. The minority agreed that the evidence submitted in support of this contention had been weak and observed that the information appeared to have originated from the first and the second applicants. In the proceedings before the Court, the applicants submitted no further evidence in support of this argument or placed emphasis on it.

99. As also observed by the High Court, it does not emerge that the third applicant had any special care needs or that her mother would be unable to provide satisfactory care on her own."

EMD udtalte i præmis 103, at:

"There being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion."

EMD fandt, at der i den konkrete sag ikke var sket en krænkelse af artikel 8, idet EMD udtalte i præmis 105:

"*In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand.*

Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban would not entail a violation of Article 8 of the Convention."

I sagen *Eze v. Sweden (2019)* havde klageren i forbindelse med en ansøgning om asyl opgivet et navn og fødedato. Han blev meddelt afslag på asyl, da de nationale myndigheder fandt, at han ikke havde sandsynliggjort sin identitet. Klageren giftede sig efterfølgende med en statsborger fra opholdslandet, og søgte på ny om opholdstilladelse på baggrund af ægteskabet. Han opgav her et andet navn og fødedato. Klageren blev meddelt en midlertidig opholdstilladelse, da han havde fremvist en fødselsattest, hvoraf navnet fremgik. Klageren søgte to år efter om forlængelse af sin opholdstilladelse og indleverede i den forbindelse et forfalsket pas. Året efter indgivelsen af ansøgningen om forlængelse fik parret et barn. Klageren blev meddelt afslag på forlængelse af sin opholdstilladelse, da denne var opnået på baggrund af svig.

EMD udtalte i præmis 52-56, at:

"52. The Court acknowledges that the decision to refuse the applicant a permit to reside in Sweden will have a considerable impact on his family life, as his wife is a Swedish citizen and she and their common child are living in Sweden. However, there does not seem to be any insurmountable obstacles for them to move to the applicant in Nigeria. In any event, they have been visiting him there and could continue to do so.

53. Furthermore, an important factor in the present case is that the applicant and his wife created their family life at a time when the applicant had no residence permit. They started a relationship in mid-2011 when the applicant's asylum application had been rejected at first instance and married a year later when that application had been dismissed by a final decision and there was an enforceable deportation order against the applicant. Their son was born in June 2015, more than a year after the expiry of the applicant's temporary residence permit and following the Migration Agency's conclusion that the passport submitted in support of his application for an extension was a forgery. Thus, the applicant's family life was both established and extended at times when his immigration status was such that the persistence of that family life in Sweden was precarious. The applicant therefore had no reasonable expectation that he would be able to remain in the country and maintain his family life there.

54. In the above circumstances, the refused residence permit for the applicant could be incompatible with Article 8 only in exceptional circumstances. As the applicant and his wife have a four-year-old son, regard must be had to his best interests. In this respect, the Court notes that the Swedish authorities have carefully considered the issue, both under domestic law and under the Convention. In particular, the Migration Agency took into account that the applicant's wife and son should have no difficulties to visit the applicant in Nigeria. Furthermore, regard must be had to the fact that the son lived together with the applicant in Sweden only for a period of little more than a year, until the autumn of 2016. There are therefore no exceptional circumstances

at issue in the present case. Instead, the Court is satisfied that sufficient weight was attached to the best interests of the child in refusing the applicant a residence permit.

55. Having regard to the above considerations, the Court finds that the Swedish authorities, acting within their margin of appreciation, did not fail to strike a fair balance between the applicant's interests, on the one hand, and the State's interest in ensuring effective immigration control, on the other. Nor was their assessment disproportionate in pursuance of the legitimate aim under Article 8 of the Convention."

56. It follows that the application is manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention."

5.2.2.1.4. Ulovligt ophold

I sagen *Priya v. Denmark (2006) (afvisningsbeslutning)* var klageren indrejst fra Indien i opholdslandet på et forretningsvisum. Hun var på indrejsetidspunktet 27 år gammel. Efter to måneders ophold indgik hun ægteskab med en derboende statsborger fra Indien, der var indrejst i en alder af 28 år og tidligere havde været gift med en dansk kvinde. Klageren fik afslag på familiesammenføring og udrejste. Hun havde på daværende tidspunkt opholdt sig omkring 14 måneder i opholdslandet. Parret fik ca. tre måneder efter klagerens udrejse en søn. Året efter genindrejste klageren og søgte to gange om opholdstilladelse. Begge ansøgninger blev afslået, da parrets tilknytning til Indien blev vurderet større end parrets tilknytning til Danmark. Parret fik i mellemtiden endnu et barn. Begge børn fik opholdstilladelse i opholdslandet. Parret valgte at lade sig skille, og klageren forsøgte herefter at søge om opholdstilladelse under henvisning til herboende børn. På tidspunktet, hvor de nationale myndigheder traf den seneste afgørelse, havde klagerens ægtefælle opholdt sig ti år i opholdslandet.

EMD udtalte indledningsvis at:

"Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Solomon v. the Netherlands (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998, and Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999).Thus, a distinction must be drawn between those seeking entry into a country to pursue their newly established family life; those who had an established family life before one of the spouses obtained settlement in another country; and those who seek to remain in a country where they have already established close family life and other ties for a reasonable period of time (cf. e.g. Khannam v. United Kingdom (dec.) no 14112/88, DR 59, pp. 265- 273)"

EMD udtalte videre, at:

"Furthermore, the Court considers that the present case discloses no exceptional circumstances. It observes in this context that the applicant entered Denmark in January 1999, when she was twenty-seven years old. At the relevant time she had no ties to Denmark. Less than two months later, she married PK, an Indian national, who had entered Denmark illegally in October 1993, when he was twenty-eight years old. At the relevant time he had no ties to Denmark either. Both spouses were born and raised in India, where their family lived, and the applicant and her husband communicated in Punjabi and Hindi."

EMD udtalte derefter, at:

"Thus, there are no obstacles to the applicant, her husband and children enjoying their family life in their home country India, and the respondent State cannot be said to have failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other."

Sagen blev derefter afvist som *inadmissible*.

I sagen *Konstatinov v. the Netherlands (2007)* havde klageren fået opholdstilladelse i opholdslandet på baggrund af ægteskab med en derboende mand med ukendt statsborgerskab, men blev efterfølgende udvist fra opholdslandet. Parret fik et barn, og tre år efter sin udrejse indgav klageren på ny en ansøgning om opholdstilladelse, men blev meddelt afslag på denne, da hendes derboende ægtefælle ikke opfyldte et indkomstkrav, og da det var uvist, om parret havde været samboende. Det efterfølgende år indrejste klageren på ny og indgik på ny ægteskab med sin ægtefælle i opholdslandet. Klageren søgte endnu engang om familiesammenføring med sin ægtefælle. Denne ansøgning lå de næste syv år hen, mens klageren opholdt sig uden opholdstilladelse i opholdslandet. Klageren blev i mellemtiden dømt for seks tilfælde af tyveri og røveri og idømt fængselsstraffe på mellem seks uger til 12 måneder. Klageren bliver herefter udvist. Da EMD behandlede sagen, havde klagerens ægtefælle opholdt sig cirka 30 år i opholdslandet.

Om længden af ægtefællens ophold i opholdslandet fremgår det af præmis 6:

"As a young child and after the death of her mother, the applicant left Serbia with her father to travel. In 1986, the applicant contracted a traditional Roma marriage with Mr G., who was born in Rome in 1967 and who was living in the Netherlands where he had been granted a residence permit in 1977. His nationality, if any, is unknown."

EMD udtalte om klagerens ophold i præmis 49, at:

"Turning to the circumstances of the present case, the Court notes that the applicant has never held a Netherlands provisional admission or residence title and that the relationships relied on by her were created at a time and developed during a period when the persons involved were aware that the applicant's immigration status was precarious and that, until Mr G. complied with the minimum income requirement under the domestic immigration rules, the persistence of that family life within the Netherlands would remain precarious. This is not altered by the fact that the applicant's second request for a residence permit for stay with Mr G. filed on 1 November 1991 was left undetermined for a period of more than seven years because her file had been mislaid by the responsible immigration authorities, as – like in 1990 in respect of her first request for a residence permit for stay with Mr G. – one of the main reasons why this second request was rejected on 27 November 1998 by the Deputy Minister was because Mr G. failed to meet the minimum income requirement."

Om klagerens kriminalitet udtalte EMD i præmis 51, at:

"The Court further notes that, between 4 September 1992 and 8 November 2005, the applicant has amassed various convictions of criminal offences attracting a prison sentence of three years or more, thus rendering her immigration status in the Netherlands even more precarious as this entailed the risk of an exclusion order being imposed, which risk eventually materialised. On this point the Court reiterates that, where the admission of aliens is concerned, Contracting States are in principle entitled to expel an alien convicted of criminal offences (see Üner v. the Netherlands [GC], no. 46410/99, § 54, ECHR 2006-...)."

EMD udtalte videre i præmis 52-53, at:

"52. As regards the question whether there are any insurmountable obstacles for the exercise of the family life at issue outside of the Netherlands, the Court notes that the applicant's son will come of age in April 2007 whereas, according to its well-established case-law under Article 8, relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see Ezzouhdi v. France, no. 47160/99, § 34, 13 February 2001). The Court considers the fact that the applicant's son is suffering from asthma does not constitute such a further element of dependency. The Court further notes that the applicant was born in Serbia where she lived until the age of seven, that she held a valid passport issued in Pančevo (Serbia) by the authorities of the former Socialist Federal Republic of Yugoslavia when she filed her second request for a Netherlands residence permit in 1991, and that her claim of having become stateless after the dissolution of this Federal Republic is no more than conjecture. The same applies to her claim that Mr G. is stateless and might be denied admission to her country of origin. In any event, the decision to declare the applicant an undesirable alien does not entail a permanent exclusion order, but an exclusion order of a temporary validity in the sense that – at the applicant's request – it can be lifted after a limited number of years of residency outside of the Netherlands.

53. The foregoing considerations are sufficient to enable the Court to conclude that it cannot be said that the Netherlands authorities have failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration and public expenditure and in the prevention of disorder or crime on the other. Consequently, there has been no violation of the applicant's right to respect for her rights guaranteed by Article 8 of the Convention."

I sagen *Darren Omoregie a.o. v. Norway (2008)* var klageren indrejst som 22-årig og havde fået afslag på asyl, men undlod at efterkomme udrejsebeslutningen og arbejdede endvidere ulovligt i opholdslandet. Nogle måneder senere giftede han sig med en statsborger fra opholdslandet og søgte om familiesammenføring, hvilket blev afslået, og klageren blev på ny pålagt at udrejse, hvilket han ikke efterkom. Der blev endvidere truffet afgørelse om at udvise klageren med indrejseforbud i fem år med mulighed for genindrejse efter ansøgning allerede efter to år. Under domstolsbehandlingen af udvisningsafgørelsen blev klagerens ægtefælle gravid med deres fælles barn, som blev født fem år efter klagerens indrejse. Klageren fik på ny afslag på familiesammenføring og efter fem et halvt års ophold blev han udsendt.

I præmis 59-63 gennemgik EMD klagerens opholdsretlige status på tidspunktet før og efter etableringen af familielivet i opholdslandet og hvorvidt dette kunne give klageren og ægtefællen anledning til en berettigede forventninger med hensyn til mulighederne for klagerens fortsatte ophold i opholdslandet.

I præmis 64 udtalte EMD:

"Against this background the Court does not consider that the first and second applicants, by confronting the Norwegian authorities with the first applicant's presence in the country as a fait accompli, were entitled to expect that any right of residence would be conferred upon him (see Roslina Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003; Yash Priya v. Denmark (dec.) 13594/03; 6 July 2006; cf. Rodrigues da Silva and Hoogkamer, cited above, § 43)."

Om tilknytningen til henholdsvis klagerens hjemland og opholdsland samt om indrejseforbuddets varighed udtalte EMD i præmis 66-68, at:

"66. It should further be noted that the first applicant had lived in Nigeria since he was six months old until he left the country at the age of 22, had studied at university for four years and had three brothers with whom he was still in contact. Whereas his links to Nigeria were particularly strong, his links to Norway were comparatively weak, apart from the family bounds he had formed there with the second and third applicants pending the proceedings. The third applicant was still of an adaptable age at the time when the disputed measures were decided and implemented (see Ajayi and Others, cited above; Sarumi, cited above; and Sezai Demir c. France (dec.), no. 33736/03, 30 May 2006). The second applicant would probably experience some difficulties and inconveniences in settling in Nigeria, despite her experience from a period spent in another African country, South Africa, and the fact that English was also the official language of Nigeria. However, the Court does not find that there were insurmountable obstacles in the way of the applicants' developing family life in the first applicant's country of origin. In any event, nothing should prevent the second and third applicants from coming to visit the first applicant for periods in Nigeria.

67. Finally, the Court notes that the decision prohibiting the first applicant re-entry for five years was imposed as an administrative sanction, the purpose of which was to ensure that resilient immigrants do not undermine the effective implementation of rules on immigration control. Moreover, it was open to the first applicant to apply for re-entry already after two years.

68. Against this background, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed their margin of appreciation when deciding to expel the first applicant and to prohibit his re-entry for five years. The Court is not only satisfied that the impugned interference was supported by relevant and sufficient reasons but also that in reaching the disputed decision the domestic authorities struck a fair balance between the personal interests of the applicants on the one hand and the public interest in ensuring an effective implementation of immigration control on the other hand. In view of the first applicant's immigration status, the present case disclosed no exceptional circumstances requiring the respondent State to grant him a right of residence in Norway so as to enable the applicants to maintain and develop family life in that country. In sum, the Court finds that the national authorities could reasonably consider that the interference was 'necessary' within the meaning of Article 8 § 2 of the Convention. Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Jeunesse v. the Netherlands (2014)* var klageren indrejst i opholdslandet på et visum fra en tidligere hollandsk koloni og havde giftet sig med en statsborger i opholdslandet. Hun blev i landet efter udløbet af sit visum og fik med sin ægtefælle tre børn, som alle var statsborgere i opholdslandet. Klageren søgte flere gange

om opholdstilladelse, hvilket hver gang blev afslået, da klageren som udgangspunkt skulle søge fra hjemlandet. Efter 16 års ophold blev klageren forsøgt udsendt fra opholdslandet under henvisning til, at hun ikke havde et lovligt opholdsgrundlag. Børnene var på tidspunktet for Storkammerets afgørelse 14, knap ni og knap fire år.

EMD udtalte i præmis 115-123, at:

"115. The Court first and foremost takes into consideration the fact that all members of the applicant's family with the exception of herself are Netherlands nationals and that the applicant's spouse and their three children have a right to enjoy their family life with each other in the Netherlands. The Court further notes that the applicant held Netherlands nationality at birth. She subsequently lost her nationality when Suriname became independent. She then became a Surinamese national, not by her own choice but pursuant to Article 3 of the Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality (see paragraph 62 above). Consequently, her position cannot be simply considered to be on a par with that of other potential immigrants who have never held Netherlands nationality.

116. The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for more than sixteen years and that she has no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Netherlands authorities, while she repeatedly submitted residence requests and awaited the outcome of appeals. The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities.

117. Thirdly, the Court accepts, given the common background of the applicant and her husband and the relatively young age of their children, that there would appear to be no insurmountable obstacles for them to settle in Suriname. However, it is likely that the applicant and her family would experience a degree of hardship if they were forced to do so. When assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family.

118. The Court fourthly considers that the impact of the Netherlands authorities' decision on the applicant's three children is another important feature of this case. The Court observes that the best interests of the applicant's children must be taken into account in this balancing exercise (see above § 109). On this particular point, the Court reiterates 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 (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. For that purpose, in cases concerning family reunification, the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents (see Tuquabo-Tekle and Others v. the Netherlands, cited above, § 44).

119. Noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the

Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation. In this connection, the Court observes that the applicant's husband provides for the family by working full-time in a job that includes shift work. He is, consequently, absent from the home on some evenings. The applicant – being the mother and homemaker – is the primary and constant carer of the children who are deeply rooted in the Netherlands of which country – like their father – they are nationals. The materials in the case file do not disclose a direct link between the applicant's children and Suriname, a country where they have never been.

120. In examining whether there were insurmountable obstacles for the applicant and her family to settle in Suriname, the domestic authorities had some regard for the situation of the applicant's children (see paragraphs 23 (under 2.19 and 2.21), 28 and 34 (under 2.4.5) above). However, the Court considers that they fell short of what is required in such cases and it reiterates that national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any such removal in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (see above § 109). The Court is not convinced that actual evidence on such matters was considered and assessed by the domestic authorities. Accordingly, it must conclude that insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit."

121. The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. 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.

122. The Court, whilst confirming the relevant principles set out above (see paragraphs 106-109), finds that, on the basis of the above considerations (see paragraphs 115-120) and viewing the relevant factors cumulatively, the circumstances of the applicant's case must be regarded as exceptional. Accordingly, the Court concludes that a fair balance has not been struck between the competing interests involved. There has thus been a failure by the Netherlands authorities to secure the applicant's right to respect for her family life as protected by Article 8 of the Convention.

123. There has accordingly been a violation of Article 8 of the Convention."

5.2.2.1.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

Sagen *Hasanbasic v. Switzerland (2013)* omhandlede en klager, hvis opholdstilladelse blev annulleret af de nationale myndigheder i opholdslandet, idet klageren over for disse myndigheder havde tilkendegivet, at han ville rejse tilbage til sit hjemland med henblik på permanent at bosætte sig her. Klageren genindrejste dog fire måneder senere i opholdslandet, hvorefter hans ægtefælle, som stadig opholdt sig i opholdslandet, indgav en ansøgning om ægtefællesammenføring til klageren.

EMD har kategoriseret sagen *som refusal to renew residence visa*, hvorfor den er medtaget under dette punkt.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det komplette *legal summary* nedenfor. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

Efter i præmis 51 og 52 at have fastslået, at indgrebet var i overensstemmelse med loven og forfulgte et eller flere af de legitime hensyn, gennemgik EMD i præmis 53-56 de generelle principper, som var relevante i den konkrete sag for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund.

EMD henviste i den forbindelse i præmis 53 til kriterierne som sammenfattet i Üner-dommen og udtalte i præmis 54 (uofficiel dansk oversættelse):

"Der skal ligeledes i givet fald tages højde for særlige omstændigheder i forbindelse med nærværende sag, som for eksempel lægelige informationer (Emre, nævnt ovenfor, præmis 71, 81-83)."

I præmis 57-63 anvendte EMD disse principper på forholdene i den konkrete sag.

EMD udtalte i præmis 57, at:

"*Domstolen bemærker indledningsvist, at de to klagere længe har boet lovligt i Schweiz. Den mandlige klager ankom til Schweiz i 1986, den kvindelige klager ankom allerede i 1969. Varigheden af deres ophold udgør således på det tidspunkt, hvor Forbundsdomstolen afsagde sin dom i 2009, henholdsvis 23 og 40 år. Den kvindelige klager har endvidere haft en etableringstilladelse i Schweiz siden 1979, og dermed en tilladelse af en mere stabil karakter end en almindelig opholdstilladelse. Det er i øvrigt ikke bestridt, at Schweiz i en lang periode har været centrum for klagernes privat- og familieliv. Domstolen konstaterer ligeledes, at klagerne har opholdt sig uafbrudt i Schweiz, bortset fra i en periode på fire måneder fra mellem august og december 2004, efter at de nationale myndigheder havde afvist den kvindelige klagers anmodning om familiesammenføring (ovenstående præmis 14). Den foreliggende sag adskiller sig på dette punkt væsentligt fra sagen Gezginci (nævnt ovenfor, præmis 69 og 70), hvori klager gentagne gange tog til udlandet i længerevarende perioder. Domstolen vurderer under disse omstændigheder, at det tilkommer de nationale myndigheder på en overbevisende måde og ved hjælp af relevante og tilstrækkelige årsager at bevise, at der eksisterer et samfundsmæssigt bydende nødvendigt behov for at udvise den pågældende person, og navnlig, at denne foranstaltning står i forhold til det forfulgte legitime mål*."

I præmis 58 gennemgik EMD den mandlige klagers lovstridige adfærd og fandt, at de pågældende forseelser ikke vejede tungt, og at klageren ikke kunne anses for at udgøre en fare eller trussel for sikkerheden eller den offentlige orden.

I præmis 59 gennemgik EMD betydningen af klagerens store gæld til myndighederne i opholdslandet og de betydelige beløb, som klagerne havde modtaget i offentlig støtte og fandt, at opholdslandets myndigheder

kunne tage højde for klagernes gæld og afhængighed af offentlig bistand, såfremt denne afhængighed måtte have indflydelse på landets økonomiske velvære, men at disse forhold kun udgjorde et aspekt blandt flere, som EMD skulle tage højde for.

EMD udtalte i præmis 60-61, at:

"60. Med hensyn til de forskellige berørte personers nationalitet er de to klagere statsborgere fra Bosnien-Hercegovina. Domstolen henviser ligeledes til, at parret har to fællesbørn, der er født i 1982 og 1984, og som bor i Schweiz og har opholdstilladelse i dette land. Desuden bor ét af børnene, der er født i 1979 og stammer fra den mandlige klagers første ægteskab, ligeledes i Schweiz. Idet klagerne ikke over for Domstolen har påvist, at der mellem dem og børnene er supplerende afhængighedsforhold, ud over normale følelsesmæssige bånd, (Ezzouhdi mod Frankrig, nr. 47160/99, præmis 34, 13. februar 2001; og Kwakie-Nti og Dufie mod Nederlandene (dec.), nr. 31519/96, 7. november 2000), kan de naturligvis ikke påberåbe sig disse familieforhold med hensyn til artikel 8, idet børnene er voksne. Domstolen vurderer ikke desto mindre, at forholdene ikke er helt uden relevans for vurderingen af klagernes familiesituation.

61. Domstolen tager endvidere Regeringens argument til efterretning, ifølge hvilket klager, der ikke har indrejseforbud i Schweiz, regelmæssigt kan besøge sine børn og i givet fald sin hustru, hvis hun ikke følger med ham og bosætter sig i Bosnien-Hercegovina. Domstolen er i øvrigt underrettet om, at klager sporadisk kan rejse til Schweiz og opholde sig der i en periode på maksimalt tre måneder (ovenstående præmis 23). Domstolen vurderer i denne henseende, selv om de kompetente myndigheder måtte tage positivt imod sådanne anmodninger i fremtiden, at disse midlertidige foranstaltninger, der i givet fald måtte blive meddelt alene efter anmodning, under ingen omstændigheder ville kunne anses for at erstatte klagernes ret til at udøve rettigheden til at leve sammen, hvilket udgør ét af de grundlæggende aspekter ved retten til respekt for familielivet (jf., mutatis mutandis, dommene Agraw mod Schweiz, nr. 3295/06, præmis 51, og Mengesha Kimfe mod Schweiz, nr. 24404/05, præmis 69-72, begge af 29. juli 2010). 62. Et andet kriterium, der skal tages højde for i afvejningen af interesserne, er fastheden af de sociale, kulturelle og familiemæssige bånd med Schweiz og med Bosnien-Hercegovina. Forbundsdomstolen har selv i den foreliggende sag erkendt, at klagerne har et betydeligt socialt netværk i Schweiz, og at deres tilbagevenden til oprindelseslandet på grund af den betydelige varighed af deres ophold i Schweiz uden tvivl ville stille dem over for visse vanskeligheder (ovenstående præmis 20)."

I præmis 62 gennemgik EMD fastheden af de sociale, kulturelle og familiemæssige bånd til opholdslandet og hjemlandet og konstaterede, at klagerne havde et betydeligt socialt netværk i opholdslandet, og at deres tilbagevenden til hjemlandet på grund af den betydelige varighed af deres ophold i opholdslandet uden tvivl ville stille dem over for visse vanskeligheder.

I præmis 63 gennemgik EMD klagernes tilknytning til hjemlandet.

Herefter gennemgik EMD i præmis 64-65 betydningen af klagerens helbredsmæssige forhold (uofficiel dansk oversættelse):

"64. Henset til de nye informationer i de ovenfor nævnte lægeerklæringer (præmis 21 og 22) og under henvisning til, at det ikke tilkommer Domstolen at rejse tvivl om den vurdering, som de nationale instanser har foretaget af sagens faktiske forhold (Schenk mod Schweiz, 12. juli 1988, præmis 45-46, serie A nr. 140; og García Ruiz mod Spanien [Storkammeret], nr. 30544/96, præmis 28, EMD 1999-I), henviser Domstolen til, at klagerens helbredstilstand er alvorligt svækket og kræver konstant opfølgning. Selv om Domstolen tvivler på sandfærdigheden af argumentet om, at den nødvendige behandling ikke skulle være tilgængelig i Bosnien-Hercegovina, der er medlem af Europarådet, udelukker Domstolen imidlertid ikke, at det, hvis klageren rykkes op ved rode fra sit normale miljø i Schweiz, kan have en destabiliserende indvirkning på hans allerede svækkede helbred, og at dette vil kunne forårsage nye medicinske komplikationer (jf., mutatis mutandis, Emre, nævnt ovenfor, præmis 81-83). Selv om klagerens helbredstilstand alene ikke måtte være tilstrækkelig til at forpligte de schweiziske myndigheder til at forny hans opholdstilladelse, skal Domstolen ikke undlade at se helt bort herfra i afvejningen af interesserne.

65. Domstolen udelukker ikke, at det faktum, at klageren ikke vil modtage invalidepension, hvis han måtte vende tilbage til sit oprindelsesland – idet en sådan pension kun udbetales i udlandet, når invaliditetsgraden når op på 50 % (ovenstående præmis 26) – vil kunne forværre hans situation. Domstolen konstaterer, at klagerne ikke eksplicit har påberåbt sig dette argument ved de nationale domstole, men at Regeringen heller ikke længere bestrider dette."

EMD udtalte i præmis 66-67 (uofficiel dansk oversættelse):

"66. Domstolen vedgår henset til ovenstående, at landets økonomiske velfærd ganske vist kan tjene som et legitimt mål i forbindelse med en afvisning af at forny en opholdstilladelse. Denne årsag skal ikke desto mindre vurderes ud fra en retfærdig afvejning og i lyset af samtlige omstændigheder i sagen. Domstolen vurderer imidlertid ud fra den betydelige varighed af klagernes ophold i Schweiz og deres ubestridte sociale integration i landet, at den anfægtede foranstaltning ikke var berettiget ud fra et bydende nødvendigt samfundsmæssigt behov og ikke stod i forhold til de påberåbte legitime formål. Den indklagede stat har følgelig overskredet sin skønsmargen i den foreliggende sag.

67. Der er derfor sket en krænkelse af Konventionens artikel 8."

Af *legal summary* fremgår:

"Judgment 11.6.2013 [Section II]

Article 8

Expulsion

Refusal to renew residence visa because of applicant's debts and dependence on public funds: violation

Facts – The applicants are a couple from Bosnia and Herzegovina. The wife had lived in Switzerland since 1969 and the husband since 1986. They had two children together. In 2004 Mr Hasanbasic told the immigration authorities that he was leaving Switzerland for good to return to his home country, where he had had a house

built. His settlement permit was accordingly cancelled. He returned to Switzerland four months later, with a tourist visa, and lived with his wife. Mrs Hasanbasic submitted an application for him to be allowed to stay in the country under the family reunion programme, but her request was rejected, inter alia because the family was dependent on welfare and had accumulated debts to the tune of some EUR 133,300, and Mr Hasanbasic had been convicted of nine criminal offences between 1995 and 2002.

Law – Article 8: The interference with the applicants' private and family life was in accordance with the law and pursued the legitimate aims of the country's economic well-being, the prevention of disorder or crime and the protection of the rights and freedoms of others. The fundamental principles applicable to the expulsion of a person for committing a criminal offence, when that person had spent a considerable length of time in the country, were well-established in the Court's case-law and had recently been brought to the fore, for example in the Üner, Maslov and Emre cases. The present case differed from these other cases in so far as the applicants' complaint about the Swiss authorities' refusal to renew the settlement permit relied firstly on the family's strong roots in Swiss society, considering that they had lived there for so long. The husband's criminal record seemed only to have played a secondary role in the domestic authorities' decision. In any event, the above-mentioned principles had to be applied, mutatis mutandis, in such a situation.*

At the time of the Federal Court's decision in 2009 the applicants had been living in Switzerland without interruption for forty and twenty-three years respectively, except for the four months in 2004. Furthermore, since 1979 Mrs Hasanbasic had held a permit of a more permanent type than a simple residence permit. For many years, therefore, Switzerland had been the centre of the applicants' private and family life.

The husband had been convicted several times between 1995 and 2002, and sentenced to fines not exceeding 400 Swiss francs (CHF) and to a total of seventeen days' imprisonment, for road-traffic offences and trespassing. These were not serious offences and had to be placed in perspective. In addition, the applicant had committed no other offences since 2002. He could therefore not be considered a danger or a threat to security or public order.

What seemed to have played a major role in the authorities' assessment of the interests in issue were the sizable debts the family had accrued and the considerable amount of money they had received in welfare benefits (a total of about CHF 333,000, or EUR 277,500). The economic well-being of the country was expressly provided for in the Convention as a legitimate aim justifying interference with the right to respect for private and family life. The Swiss authorities were therefore justified in taking into account the applicants' debts and their dependence on the welfare system in so far as that dependence affected the country's economic well-being. However, this was only one factor among many to be taken into consideration by the Court.

It was true that, considering the children's ages, as the applicants had not shown that there were any further elements of dependency between them and their children, involving more than the normal emotional bonds, they could not rely on family ties under Article 8. Family ties were not completely devoid of relevance, however, when analysing the applicants' family situation. The fact that the husband was able to visit Switzerland from time to time, with the proper authorisation, could by no means be considered to replace the applicants' right to live together.

The applicants had a large social network in Switzerland and, considering how long they had lived there, to have to return to their country of origin would doubtless have placed them in some difficulty. It was true that they had had a house built back in their country of origin, and that one of the children from Mr Hasanbasic's former marriage, and his sister, were living there. And in August 2004 the applicant had told the Swiss authorities that he was returning permanently to Bosnia and Herzegovina, which was one of the domestic authorities' main reasons for refusing to renew his residence permit. That argument had to be assessed in the light of subsequent developments, however. Furthermore, Mr Hasanbasic's health had declined seriously, leaving him in need of constant treatment. The possibility that removing him from his familiar surroundings in Switzerland might adversely affect his already declining health and cause new medical complications could not be ruled out. Consequently, although the applicant's state of health was not sufficient in itself to compel the Swiss authorities to renew his residence permit, it could not be completely ignored in the general balance of interests in issue. Lastly, the fact that the applicant would not receive an invalidity pension if he returned to his country of origin might adversely affect his situation.

So, while the economic well-being of the country could indeed be a legitimate reason for refusing to renew a residence permit, that reason should be placed in perspective in the light of all the circumstances of the case. In this instance, regard being had in particular to the considerable length of time the applicants had spent in Switzerland and their undeniable social integration there, the measure in issue had not been justified by a pressing social need and was not proportionate to the legitimate aims pursued. The respondent State had therefore overstepped its margin of appreciation.

Conclusion: violation (unanimously)."

5.2.2.1.6. Familiesammenføring til udlændinge, der har børn med lovligt ophold i opholdslandet

Der er ved gennemgangen af praksis ikke fundet domme, hvor EMD har taget stilling til betydningen af ægtefællens/samleverens/partnerens statsborgerskab i sager om familiesammenføring.

5.2.2.2. Ægtefællens/samleverens/partnerens alder ved indrejse/længden af ophold i opholdslandet

EMD har i flere sager taget stilling til betydningen af klagerens ægtefælles/samlevers/partners alder ved indrejse i opholdslandet, længden af den pågældendes ophold i opholdslandet og længden af den pågældendes evt. ophold i klagerens hjemland ved vurderingen af, om en udsendelse[33] af klageren vil indebære et indgreb i retten til familieliv, som ikke er proportionalt med det legitime hensyn. EMD har i den forbindelse vurderet, om det vil være muligt for og rimeligt at forvente af klagerens ægtefælle/samlever/partner at udrejse med

[33] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

klageren til dennes hjemland med henblik på at udøve familielivet dér. Det skal for en god ordens skyld bemærkes, at det i sidstnævnte tilfælde selvfølgelig ikke påhviler ægtefællen/samleveren/partneren rent faktisk at udrejse med klageren til dennes hjemland.

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[6] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

5.2.2.2.1. Alvorlig kriminalitet

I sagen *Amrollahi v. Denmark (2002)* var klageren, en statsborger fra Iran, der var indrejst i opholdslandet i en alder af 23 år, i byretten blevet idømt fængselsstraf for narkotikakriminalitet og udvist for bestandig. Klageren havde på daværende tidspunkt opholdt sig i Danmark i otte år og havde fire år forinden indledt et forhold til en dansk statsborger, som han blev gift med under sin afsoning. Parret fik to børn, som på tidspunktet for EMD´s behandling af sagen var henholdsvis et og seks år gamle. Klagerens ægtefælle havde tillige et mindreårigt særbarn fra et tidligere forhold, der boede hos parret.

EMD gennemgik arten og alvoren af kriminaliteten, der var blevet begået i præmis 36-37 samt tilknytningen til hans hjemland i præmis 38.

EMD udtalte i præmis 39-43, at:

"39. As to the applicant's ties with Denmark, these are mainly connected with his wife, children and stepdaughter, who are all Danish citizens. The applicant and A got married in September 1997, one week before his conviction by the City Court. However, noting that their relationship commenced in 1992 and that they had their first child in October 1996 the Court has no doubt as to the "effectiveness" of the couple's family life and it considers that the applicant must be considered to have strong ties with Denmark.

40. The Court has next examined the possibility of the applicant, his wife and his children establishing family life elsewhere. The Court has considered, first, whether the applicant and his wife and their children could live together in Iran.

41. The applicant's wife, A, is a Danish national. She has never been to Iran, she does not know Farsi and she is not a Muslim. Besides being married to an Iranian man, she has no ties with the country. In these circumstances the Court accepts even if it is not impossible for the spouse and the applicant's children to live in Iran that it would, nevertheless, cause them obvious and serious difficulties. In addition, the Court recalls that A's daughter from a previous relationship, who has lived with A since her birth in 1989, refuses to move to Iran. Taking this fact into account as well, A cannot, in the Court's opinion, be expected to follow the applicant to Iran.

42. The question of establishing family life elsewhere must also be examined. In this connection the Court notes that during the period from April 1987 until August 1989 the applicant stayed in Turkey and Greece

respectively. Nevertheless, the applicant was apparently residing there illegally and it has not been established that he or A has any attachment to either of those countries. In the Court's opinion there is therefore no indication that both spouses can obtain authorisation to reside lawfully in either of the said countries or in any other country but Iran.

43. Accordingly, as a consequence of the applicant's permanent exclusion from Denmark the family will be separated, since it is de facto impossible for them to continue their family life outside Denmark."

I sagen *Boultif v. Switzerland (2001)* var klageren, en statsborger fra Algeriet med opholdstilladelse i Italien, indrejst i Schweiz på et turistvisum, da han var 25 år. Året efter giftede han sig med en statsborger fra opholdslandet. Klageren begik de følgende år alvorlig kriminalitet, herunder grov vold, våbenbesiddelse og røveri, og blev idømt to års fængsel. De nationale myndigheder nægtede at forlænge klagerens opholdstilladelse med henvisning til den begåede kriminalitet. På tidspunktet for afgørelsen var det seks år siden, han havde begået kriminaliteten. Klageren opholdt sig herefter ulovligt i Italien, da hans tidligere opholdstilladelse var bortfaldet.

EMD forholdt sig til arten og alvoren af kriminaliteten, der var blevet begået i præmis 50 – 51, hvor de fremhævede, at selvom de lovovertrædelser, som han havde begået, kunne give anledning til frygt for, at han ville være til fare for den offentlige orden og sikkerhed for fremtiden, fandt EMD dog, at dette ikke var tilfældet i denne sag.

EMD udtalte i præmis 52-56, at:

"52. The Court has next examined the possibility for the applicant and his wife to establish their family life elsewhere.

53. The Court has considered, first, whether the applicant and his wife could live together in Algeria. The applicant's wife is a Swiss national. It is true that she can speak French and has had contact by telephone with her mother-in-law in Algeria. However, the applicant's wife has never lived in Algeria, she has no other ties with that country, and indeed does not speak Arabic. In these circumstances she cannot, in the Court's opinion, be expected to follow her husband, the applicant, to Algeria.

54. There remains the question of the possibility of establishing family life elsewhere, notably in Italy. In this respect the Court notes that the applicant lawfully resided in Italy from 1989 until 1992 when he left for Switzerland, and he now appears to be living with friends in Italy again, albeit unlawfully. In the Court's opinion, it has not been established that both the applicant and his wife could obtain authorisation to reside lawfully in Italy, so that they could lead their family life in that country. In that context, the Court has noted that the Government have argued that the applicant's current whereabouts are irrelevant in view of the nature of the offence which he has committed.

55. The Court considers that the applicant has been subjected to a serious impediment to establishing a family life, since it is practically impossible for him to live his family life outside Switzerland. On the other hand, when the Swiss authorities decided to refuse permission for the applicant to stay in Switzerland, he presented only a comparatively limited danger to public order. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued.

56. There has accordingly been a breach of Article 8 of the Convention."

I sagen *Sezen v. the Netherlands (2006)* var den første klager indrejst i opholdslandet som 23-årig og havde fået opholdstilladelse som familiesammenført til sin ægtefælle (den anden klager), som havde boet i opholdslandet siden hun var syv år, og deres fælles barn. Tre år efter indrejsen blev den første klager idømt fire års fængsel for narkotikakriminalitet. Efter løsladelsen genoptog han samlivet med ægtefælle og barn, men fraflyttede senere det fælles hjem i en periode på omkring syv måneder. Knap fire måneder efter genoptagelse af samlivet fik klagerne endnu et barn. Den første klagers opholdstilladelse som familiesammenført blev omkring otte måneder senere nægtet forlænget under henvisning til samlivsafbrydelsen og straffedommen.

EMD udtalte i præmis 44-47:

"44. At the time the first applicant was arrested, i.e. on 31 July 1992, he had been residing lawfully in the Netherlands for less than one and a half years, having been granted a residence permit in February 1991. Applying the "sliding scale" principle, the authorities of the respondent State attached weight to this undeniably short duration of the first applicant's lawful stay in the Netherlands before he committed the offence. It is nevertheless to be noted that, following his conviction on 20 January 1993, it was not until more than four years later, namely on 5 June 1997, that the decision was taken to refuse the first applicant continued residence. Following his early release from prison in April 1995, the first applicant had thus been allowed to build up even closer ties with the Netherlands for a further two years. In addition, it appears that the first applicant has not re-offended and that he has been gainfully employed ever since his release from prison.

45. As to the first applicant's connections with his country of origin, the Court considers that his situation is not comparable to that of a second-generation immigrant, given that he arrived in the Netherlands at the age of twenty-three. Not having been informed otherwise, the Court assumes that he received his schooling in Turkey and that he is conversant with the Turkish language. Thus, he undoubtedly has ties with Turkey. His ties to the Netherlands are mainly connected to his wife – the second applicant – and their two children.

46. The Court notes with some concern that none of the domestic authorities involved in the decision-making process appear to have paid any attention to the possible effects which the refusal of continued residence would have on the first applicant's family life (see Yıldız v. Austria, no. 295/97, § 43, 31 October 2002). It is true that the Regional Court of The Hague, sitting in Amsterdam, quashed the decision to impose an exclusion order on the first applicant for the reason that the Deputy Minister had failed to accord insufficient weight to the interests of the applicants and their children (see paragraph 19 above). However, the Regional Court upheld the decision not to prolong the first applicant's residence permit, and its reasoning on the subject did not refer to the consequences of that decision on his family life. In this context it is further to be noted that the Government assume that both the second applicant and the children speak Turkish (see paragraph 38 above). Had this matter been addressed in the course of the domestic proceedings, the authorities would have been aware of the fact that the children speak Dutch and Kurdish, but not Turkish.

47. Unlike the first applicant, his wife – the second applicant – may be considered a second-generation immigrant, having moved to the Netherlands at the age of seven and having lawfully resided there ever since. It is submitted, and has not been disputed, that all her relatives are also living in the Netherlands and that she does not have any family in Turkey. Although the parties disagree as to whether the second applicant was aware of the criminal activities of her husband, the fact remains that he had not yet committed the offence

at the time they married and she entered into a family relationship with him, which is the relevant criterion in this context (see Boultif, cited above, § 48). Furthermore, the couple's two children were born in the Netherlands: Adem in 1990 and Mahsun in 1996. These two children have always lived in the Netherlands and its cultural and linguistic environment, and attend school there. Consequently, they can only have minimal ties, if any, to their parents' country of origin (see Şen v. the Netherlands, no. 31465/96, § 40, 21 December 2001) and, as noted above (paragraphs 32 and 46), they do not speak Turkish. In these circumstances, the Court accepts that following the first applicant to Turkey would mean a radical upheaval for the second applicant and in particular for the couple's children (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, p. 1971, § 36; see also Recommendation 1504 (2001) of the Parliamentary Assembly of the Council of Europe on the non-expulsion of long-term immigrants), and it finds that they cannot realistically be expected to do so."

EMD udtalte i præmis 49-50, at:

"49. It is true that, in theory at least, the first applicant is entitled to make occasional visits to the Netherlands, due to the fact that the exclusion order that was initially imposed on him was ultimately withdrawn without having been enforced (paragraph 20 above). However, in this context the Court notes that the present case does not concern a divorced father with an access arrangement, but a functioning family unit where the parents and children are living together. The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 of the Convention and that to split up a family is an interference of a very serious order (see Mehemi v. France (no. 2), no. 53470/99, § 45, ECHR 2003-IV). Having regard to its finding at paragraph 47 above that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same as long as the first applicant continues to be denied the right to reside in the Netherlands. In this context the Court notes the Government's submission that the first applicant's criminal record would normally militate against a new residence permit being issued to him for a period of ten years. Although they also argued that Article 8 of the Convention would be taken into account in assessing whether his conviction would still be held against him, the Government failed to indicate when, and under what conditions, such an assessment would lead to a positive decision being taken on any future request for a residence permit being lodged by the first applicant.

50. In conclusion, the Court is of the opinion that, in the particular circumstances of the present case, the respondent State failed to strike a fair balance between the applicants' interests on the one hand and its own interest in preventing disorder or crime on the other. There has, accordingly, been a violation of Article 8 of the Convention."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

EMD udtalte i præmis 49, at:

"The Court observes that the applicant's wife is a national of 'the former Yugoslav Republic of Macedonia', i.e. of the country to which the applicant was expelled. The applicant's wife, who was born in 1978, lived there until 1990 and knows Albanian and the country's culture. She has relatives there and visits the country every year. The domestic courts considered that she could reintegrate in 'the former Yugoslav Republic of Macedonia' without encountering serious difficulties, despite having lived in Switzerland for the past twenty years. The Court notes that the applicant's wife chose to follow him to Macedonia in 2011 and lived with him there until 2015, despite the fact that she could have remained in Switzerland as a holder of a permanent residence permit and maintained contact with the applicant through visits and means of telecommunication."

I præmis 50 gennemgik EMD børnenes forhold og deres mulighed for at tage ophold i klagerens hjemland.

Betydningen af længden af klagerens ophold blev gennemgået i præmis 51 og 52, hvor EMD vurderede hans tilknytning til henholdsvis opholdslandet og hjemlandet:

"51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'."

EMD udtalte herefter i præmis 53-55:

"53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

5.2.2.2.2 Mindre alvorlig kriminalitet

I sagen *Yildiz v. Austria (2002)* var den første klager indrejst i opholdslandet som 14-årig for at bo sammen med sine forældre og sine søskende. Han indledte et forhold til den anden klager, som var statsborger i den første klagers hjemland, men født og opvokset i opholdslandet. Nogle måneder senere traf opholdslandet afgørelse om udvisning af den første klager med indrejseforbud i fem år på baggrund af flere bødestraffe for tyveri og færdselslovsovertrædelser. Da udvisningsafgørelsen blev endelig, havde klagerne sammen fået et barn, den tredje klager. Klageren udrejste til hjemlandet, da barnet var knap to år gammelt. På tidspunktet for EMD's behandling af sagen boede han fortsat i hjemlandet. Den anden og tredje klager besøgte ham jævnligt, indtil parret blev skilt.

EMD udtalte i præmis 43-46, at:

"43. The Court will first examine the applicants' family situation and the length of their stay in Austria. It observes that the first applicant is not a second generation immigrant, i.e. a person who was born or has lived the main part of his life in the country from which he is going to be removed. He only came to Austria in 1989 at the age of fourteen and must therefore have links with his country of origin and in particular be able to speak Turkish. On the other hand, he was still an adolescent when he came to Austria, where his close family was and is still living. In December 1996, when the Administrative Court confirmed the residence ban against him, he had been living in Austria for seven years, he had been working there and had been co-habiting for a little less than three years with the second applicant, who is also a Turkish national but was born in Austria and has lived there all her life. Their daughter, the third applicant, was one year and four months old at the material time. In fact, the Austrian authorities issuing the residence ban acknowledged that the first applicant had reached a high degree of integration in Austria. Nevertheless, the Court considers that, as regards the possible effects of the residence ban on his family life, the authorities failed to establish whether the second applicant could be expected to follow him to Turkey, in particular whether she spoke Turkish and maintained any links, other than her nationality, with that country.

44. It is true that, meanwhile, the applicants' family situation has changed. The first and second applicant divorced in March 2001 and, while the second applicant is residing in Austria, the first applicant lives in Turkey. The third applicant is currently staying with relatives in Turkey although the second applicant, who has sole custody over the child, asserts that she intends to bring her back to Austria. However, the Court has to make its assessment in the light of the position when the residence ban became final (see paragraph 34 above). Its task is to state whether or not the domestic authorities complied with their obligation to respect the applicants' family life at that particular moment and it cannot have regard to circumstances which only came into being after the authorities took their decision. Nor can it be the Court's role to speculate as to whether there is – as claimed by the applicants – a causal link between the contested measure and the subsequent developments, in particular the first and second applicants' divorce.

45. Next, the Court will turn to the offences committed by the first applicant, as their gravity is an essential element for assessing the proportionality of the interference with the applicants' family life. The Court notes that in 1993 the first applicant, who was then still a minor, was convicted twice by the criminal courts, once for shop-lifting with a sentence of three days' imprisonment suspended on probation, and once for theft without a sentence being pronounced. Between 1992 and April 1994 he was convicted seven times of traffic offences, in particular driving without a license and once ignoring a red light and high speeding. The fines imposed on him amounted to a total sum of ATS 28,000 (equivalent to EUR 2,035). In sum, the Court finds that these offences were not negligible. However, as is shown by the modest penalties imposed, the domestic authorities considered them to be of a minor nature. Moreover, the first applicant did not commit any further offences between April 1994 and December 1996, when the residence ban proceedings were terminated. Thus, in the Court's view the authorities' fear that he constituted a danger to public order and security in that would commit further offences is mitigated by the particular circumstances of the case (see Boultif v. Switzerland, cited above, § 51, with further references).

46. Having regard to all these elements, the Court considers that the authorities failed to strike a fair balance between the different interests involved and that the interference with the applicants' right to respect for their family life was not proportionate to the legitimate aim pursued.

Accordingly, there has been a breach of Article 8 of the Convention."

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis fem og seks måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden.

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som f.eks. narkotikahandel.

EMD udtalte i præmis 61-64, at:

"61. With regard to the applicant's personal and family situation, the Court notes that the applicant, at the time of the expulsion order of 22 January 1999, had been lawfully residing in Germany for 27 years, having moved to that country at the age of ten in order to live there with his parents and brother and where he received his secondary school education. While the parties do not agree on the extent of the applicant's professional work, he had been employed for a certain period of that time. Since 1988 he had been in possession of a permanent residence permit. While it is true that the applicant and his wife had been separated during the first five years of their marriage as the applicant's wife and their first son did not follow the applicant to Germany until 1989, the family had been living together in Germany for ten years and there is no indication that their marriage and family life was anything less than effective.

62. On the other hand, the Court is not persuaded that the applicant has become so estranged from the country where he spent the first ten years of his life hat he would no longer be able to settle in Turkey, having regard to the fact that the applicant married his Turkish wife in Turkey, where their first son was born and that his wife and son did not follow him to Germany until 1989. It follows that the applicant must have entertained certain links to his country of origin at least until 1989. It can further be presumed that the applicant is familiar with the Turkish language, as he married a Turkish wife.

63. With regard to the question of whether the applicant's family could reasonably be expected to follow the applicant to Turkey, the Court notes that the applicant's wife and four children are Turkish nationals. As the applicant's wife entered German territory as an adult and ten years before the issue of the expulsion order, it can be assumed that she has sufficient links which would allow her to re-integrate into Turkish society.

64. The Court notes, however, that the applicant's four sons – who were, at the time the expulsion order had been issued, between six and thirteen years of age – had been born in Germany respectively entered Germany at a very young age where they received all their school education. Even if the children should have knowledge of the Turkish language, they would necessarily have to face major difficulties with regard to the different language of instruction and the different curriculum in Turkish schools."

I præmis 65 gennemgik EMD spørgsmålet om den manglende tidsbegrænsning i klagerens indrejseforbud.

Endelig udtalte EMD i præmis 66, at:

"The Court considers that the applicant's expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant's children could be expected to face if they followed him to Turkey, the Court considers that an unlimited exclusion from the German territory violates the applicant's rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention."

5.2.2.2.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Antwi and others v. Norway (2012)* havde klageren ligeledes opnået sin opholdstilladelse på baggrund af svig. Klageren var i opholdslandet blevet gift og havde fået et barn. Syv år efter indrejsen fik opholdslandet kendskab til hans reelle identitet og året efter blev han udvist fra opholdslandet.

EMD udtalte i præmis 90-99:

90. In applying the above principles [fra Nunez-dommen, red.] to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Nunez, cited above, § 71, and Darren Omoregie and Others v. Norway, no. 265/07, § 67, 31 July 2008; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Nunez and Darren Omoregie and Others, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Nunez, cited above, § 73).

91. Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country.

92. Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country."

93. Like the first applicant, the second applicant had grown up in Ghana. There she had lived until the age of seventeen when she was reunited with her father and siblings in Norway. Although she had become a Norwegian citizen and had family ties and employment links to Norway and probably would experience some difficulties in resettling in Ghana, there does not seem to be any particular obstacle preventing her from accompanying the first applicant to their country of origin. The Court has also taken note of her claim that, although aware that the first applicant originally had a Ghanaian background and had obtained a Ghanaian passport in connection with their marriage in Ghana on 11 February 2005, she should only have become aware of his true identity in this context. However, the above-mentioned factors cannot in the Court's view outweigh the public interest in sanctioning the first applicant's aggravated offences against the immigration rules with the impugned measure.

94. As to the third applicant, the Court notes that she is a Norwegian national who since birth has spent her entire life in Norway, is fully integrated into Norwegian society and, according to the material submitted to the Court, speaks Norwegian with her parents at home. In comparison, her direct links to Ghana are very

limited, having visited the country three times (see paragraph 44 above) and having little knowledge of the languages practiced there.

95. Furthermore, as a result of the first applicant no longer holding a work permit and staying full-time at home and of the second applicant's being particularly occupied by her work, the first applicant assumes an important role in the third applicant's daily care and up-bringing. He is the parent who follows up her home-work and parental contacts with her school and who facilitates her participation in sport activities. She is also at an age, ten years, when this kind of support would be valuable and she is strongly attached to her father as she is to her mother.

96. It would most probably be difficult for her to adapt to life in Ghana, were she and her mother to accompany the father to Ghana, and to readapt to Norwegian life later.

97. Against this background, the Court shares the High Court's view that the implementation of the expulsion order would not be beneficial to her.

98. However, the Court sees no reason to call into doubt the High Court's findings to the effect that, both parents having been born and brought up in Ghana and having visited the country three times with their daughter, there were no insurmountable obstacles in the way of the applicants settling together in Ghana or, at the least, to maintaining regular contacts. As to the allegation that the third applicant's rashes had been aggravated by heat during her previous stays in Ghana, the High Court majority found that this had not been sufficiently documented and could not be relied upon. The minority agreed that the evidence submitted in support of this contention had been weak and observed that the information appeared to have originated from the first and the second applicants. In the proceedings before the Court, the applicants submitted no further evidence in support of this argument or placed emphasis on it.

99. As also observed by the High Court, it does not emerge that the third applicant had any special care needs or that her mother would be unable to provide satisfactory care on her own."

EMD udtalte i præmis 103-105:

"103. There being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion.

104. The above considerations are not altered by the duration of the prohibition on re-entry – five years. In this connection, the Court reiterates that in a comparable case, Darren Omoregie (cited above, §§ 63-68), it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case.

105. In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand.

Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban would not entail a violation of Article 8 of the Convention."

5.2.2.2.4. Ulovligt ophold

I sagen *Priya v. Denmark (2006)* (afvisningsbeslutning) var klageren indrejst fra Indien i opholdslandet på et forretningsvisum. Hun var på indrejsetidspunktet 27 år. Efter to måneders ophold indgik hun ægteskab med en derboende statsborger fra Indien, der var indrejst i en alder af 28 år og tidligere havde været gift med en dansk kvinde. Klageren fik afslag på familiesammenføring og udrejste. Hun havde på daværende tidspunkt opholdt sig omkring 14 måneder i opholdslandet. Parret fik ca. tre måneder efter klagerens udrejse en søn. Året efter genindrejste klageren og søgte to gange om opholdstilladelse. Begge ansøgninger blev afslået, da parrets tilknytning til Indien blev vurderet større end parrets tilknytning til Danmark. Parret fik i mellemtiden endnu et barn. Begge børn fik opholdstilladelse i opholdslandet. Parret valgte at lade sig skille, og klageren forsøgte herefter at søge om opholdstilladelse under henvisning til herboende børn. På tidspunktet, hvor de nationale myndigheder traf den seneste afgørelse, havde klagerens ægtefælle opholdt sig ti år i opholdslandet.

EMD udtalte indledningsvis at:

"Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Solomon v. the Netherlands (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998, and Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999).Thus, a distinction must be drawn between those seeking entry into a country to pursue their newly established family life; those who had an established family life before one of the spouses obtained settlement in another country; and those who seek to remain in a country where they have already established close family life and other ties for a reasonable period of time (cf. e.g. Khannam v. United Kingdom (dec.) no 14112/88, DR 59, pp. 265- 273)"

EMD udtalte endvidere om den konkrete sag, at:

"Furthermore, the Court considers that the present case discloses no exceptional circumstances. It observes in this context that the applicant entered Denmark in January 1999, when she was twenty-seven years old. At the relevant time she had no ties to Denmark. Less than two months later, she married PK, an Indian national, who had entered Denmark illegally in October 1993, when he was twenty-eight years old. At the relevant time he had no ties to Denmark either. Both spouses were born and raised in India, where their family lived, and the applicant and her husband communicated in Punjabi and Hindi.

The applicant alleges that the legal separation of the spouses in November 2002 and the following agreement on custody and access to the children were realities. Consequently, she maintained, since the children have been granted a residence permit in Denmark until they become of age (at the age of eighteen) and they are to stay with their father, it will be impossible for her to exercise her family life with her children in India.

In this connection the Court observes firstly that the Ministry of Refugee, Immigration and Integration Affairs in its decision of 7 March 2003 stated that according to the applicant's counsel the reason for the legal separation had merely been an attempt to enhance the applicant's chances to stay in Denmark. Moreover, on 24 March 2003 the applicant's counsel informed the police that the applicant wished to obtain a divorce from PK since allegedly such would be the only possible way of her staying in Denmark.

Secondly, the Court observes that several elements in the case indicate that the spouses still live together.

Finally, more than three years and six month after the legal separation the applicant has still not submitted any documents or information substantiating that the separation have been followed up by a divorce or a real wish by the spouses to so.

In these circumstances the Court cannot but assume that the applicant and PK are still married.

Thus, there are no obstacles to the applicant, her husband and children enjoying their family life in their home country India, and the respondent State cannot be said to have failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention."

I sagen *Konstatinov v. the Netherlands (2007)* havde klageren fået opholdstilladelse i opholdslandet på baggrund af ægteskab med en derboende mand med ukendt statsborgerskab, men blev efterfølgende udvist fra opholdslandet. Parret fik et barn, og tre år efter sin udrejse indgav klageren på ny en ansøgning om opholdstilladelse, men blev meddelt afslag på denne, da hendes derboende ægtefælle ikke opfyldte et indkomstkrav, og da det var uvist, om parret havde været samboende. Det efterfølgende år indrejste klageren på ny og indgik på ny ægteskab med sin ægtefælle i opholdslandet. Klageren søgte endnu engang om familiesammenføring med sin ægtefælle. Denne ansøgning lå de næste syv år hen, mens klageren opholdt sig uden opholdstilladelse i opholdslandet. Klageren blev i mellemtiden dømt for seks tilfælde af tyveri og røveri og idømt fængselsstraffe på mellem seks uger til 12 måneder. Klageren bliver herefter udvist. Da EMD behandlede sagen, havde klagerens ægtefælle opholdt sig cirka 30 år i opholdslandet.

Om længden af ægtefællens ophold i opholdslandet fremgår det af præmis 6:

"As a young child and after the death of her mother, the applicant left Serbia with her father to travel. In 1986, the applicant contracted a traditional Roma marriage with Mr G., who was born in Rome in 1967 and who was living in the Netherlands where he had been granted a residence permit in 1977. His nationality, if any, is unknown."

EMD udtalte om klagerens ophold i præmis 49, at:

"Turning to the circumstances of the present case, the Court notes that the applicant has never held a Netherlands provisional admission or residence title and that the relationships relied on by her were created at a time and developed during a period when the persons involved were aware that the applicant's immigration status was precarious and that, until Mr G. complied with the minimum income requirement under the domestic immigration rules, the persistence of that family life within the Netherlands would remain precarious. This is not altered by the fact that the applicant's second request for a residence permit for stay with Mr G. filed on 1 November 1991 was left undetermined for a period of more than seven years because her file had been mislaid by the responsible immigration authorities, as – like in 1990 in respect of her first request for a residence permit for stay with Mr G. – one of the main reasons why this second request was rejected on 27 November 1998 by the Deputy Minister was because Mr G. failed to meet the minimum income requirement."

Om ægtefællens opfyldelse af indkomstkravene for familiesammenføring og klagerens kriminalitet udtalte EMD i præmis 50-51, at:

"50. In principle, the Court does not consider unreasonable a requirement that an alien having achieved a settled status in a Contracting State and who seeks family reunion there must demonstrate that he/she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought. As to the question whether such a requirement was reasonable in the instant case, the Court considers that it has not been demonstrated that, between 1990 and 1998, Mr G. has in fact ever complied with the minimum income requirement or at least made any efforts to comply with this requirement whereas the applicant's claim that he is incapacitated for work has remained wholly unsubstantiated.

51. The Court further notes that, between 4 September 1992 and 8 November 2005, the applicant has amassed various convictions of criminal offences attracting a prison sentence of three years or more, thus rendering her immigration status in the Netherlands even more precarious as this entailed the risk of an exclusion order being imposed, which risk eventually materialised. On this point the Court reiterates that, where the admission of aliens is concerned, Contracting States are in principle entitled to expel an alien convicted of criminal offences (see Üner v. the Netherlands [GC], no. 46410/99, § 54, ECHR 2006-...)."

EMD udtalte videre i præmis 52-53, at:

"52. As regards the question whether there are any insurmountable obstacles for the exercise of the family life at issue outside of the Netherlands, the Court notes that the applicant's son will come of age in April 2007 whereas, according to its well-established case-law under Article 8, relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see Ezzouhdi v. France, no. 47160/99, § 34, 13 February 2001). The Court considers the fact that the applicant's son is suffering from asthma does not constitute such a further element of dependency. The Court further notes that the applicant was born in Serbia where she lived until the age of seven,

that she held a valid passport issued in Pančevo (Serbia) by the authorities of the former Socialist Federal Republic of Yugoslavia when she filed her second request for a Netherlands residence permit in 1991, and that her claim of having become stateless after the dissolution of this Federal Republic is no more than conjecture. The same applies to her claim that Mr G. is stateless and might be denied admission to her country of origin. In any event, the decision to declare the applicant an undesirable alien does not entail a permanent exclusion order, but an exclusion order of a temporary validity in the sense that – at the applicant's request – it can be lifted after a limited number of years of residency outside of the Netherlands.

53. The foregoing considerations are sufficient to enable the Court to conclude that it cannot be said that the Netherlands authorities have failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration and public expenditure and in the prevention of disorder or crime on the other. Consequently, there has been no violation of the applicant's right to respect for her rights guaranteed by Article 8 of the Convention."

5.2.2.2.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

Sagen *Hasanbasic v. Switzerland (2013)* omhandlede en klager, hvis opholdstilladelse blev annulleret af de nationale myndigheder i opholdslandet, idet klageren over for disse myndigheder havde tilkendegivet, at han ville rejse tilbage til sit hjemland med henblik på permanent at bosætte sig her. Klageren genindrejste dog fire måneder senere i opholdslandet, hvorefter hans ægtefælle, som stadig opholdt sig i opholdslandet, hvor hun havde været siden 1969, indgav en ansøgning om ægtefællesammenføring til klageren.

EMD har kategoriseret sagen som *refusal to renew residence visa*, hvorfor den er medtaget under dette punkt.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det komplette *legal summary* under afsnit 5.2.2.1.5. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

Efter i præmis 51 og 52 at have fastslået, at indgrebet var i overensstemmelse med loven og forfulgte et eller flere af de legitime hensyn, gennemgik EMD i præmis 53-56 de generelle principper, som var relevante i den konkrete sag for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund. EMD henviste i den forbindelse i præmis 53 til kriterierne som sammenfattet i Üner-dommen og udtalte i præmis 54 (uofficiel dansk oversættelse):

"Der skal ligeledes i givet fald tages højde for særlige omstændigheder i forbindelse med nærværende sag, som for eksempel lægelige informationer (Emre, nævnt ovenfor, præmis 71, 81-83)."

I præmis 57-63 anvendte EMD disse principper på forholdene i den konkrete sag.

EMD gennemgik i præmis 57 længden og karakteren af klagernes ophold i opholdslandet og udtalte, at:

"Domstolen bemærker indledningsvist, at de to klagere længe har boet lovligt i Schweiz. Den mandlige klager ankom til Schweiz i 1986, den kvindelige klager ankom allerede i 1969. Varigheden af deres ophold udgør således på det tidspunkt, hvor Forbundsdomstolen afsagde sin dom i 2009, henholdsvis 23 og 40 år. Den kvindelige klager har endvidere haft en etableringstilladelse i Schweiz siden 1979, og dermed en tilladelse af en mere stabil karakter end en almindelig opholdstilladelse. Det er i øvrigt ikke bestridt, at Schweiz i en lang periode har været centrum for klagernes privatog familieliv.

Domstolen konstaterer ligeledes, at klagerne har opholdt sig uafbrudt i Schweiz, bortset fra i en periode på fire måneder fra mellem august og december 2004, efter at de nationale myndigheder havde afvist den kvindelige klagers anmodning om familiesammenføring (ovenstående præmis 14). Den foreliggende sag adskiller sig på dette punkt væsentligt fra sagen Gezginci (nævnt ovenfor, præmis 69 og 70), hvori klager gentagne gange tog til udlandet i længerevarende perioder.

Domstolen vurderer under disse omstændigheder, at det tilkommer de nationale myndigheder på en overbevisende måde og ved hjælp af relevante og tilstrækkelige årsager at bevise, at der eksisterer et samfundsmæssigt bydende nødvendigt behov for at udvise den pågældende person, og navnlig, at denne foranstaltning står i forhold til det forfulgte legitime mål."

I præmis 58 gennemgik EMD den mandlige klagers lovstridige adfærd og fandt, at de pågældende forseelser ikke vejede tungt, og at klageren ikke kunne anses for at udgøre en fare eller trussel for sikkerheden eller den offentlige orden.

I præmis 59 gennemgik EMD betydningen af klagerens store gæld til myndighederne i opholdslandet og de betydelige beløb, som klagerne havde modtaget i offentlig støtte og fandt, at opholdslandets myndigheder kunne tage højde for klagernes gæld og afhængighed af offentlig bistand, såfremt denne afhængighed måtte have indflydelse på landets økonomiske velvære, men at disse forhold kun udgjorde et aspekt blandt flere, som EMD skulle tage højde for.

EMD udtalte i præmis 60-61 (uofficiel dansk oversættelse), at:

"60. Med hensyn til de forskellige berørte personers nationalitet er de to klagere statsborgere fra Bosnien-Hercegovina. Domstolen henviser ligeledes til, at parret har to fællesbørn, der er født i 1982 og 1984, og som bor i Schweiz og har opholdstilladelse i dette land. Desuden bor ét af børnene, der er født i 1979 og stammer fra den mandlige klagers første ægteskab, ligeledes i Schweiz. Idet klagerne ikke over for Domstolen har påvist, at der mellem dem og børnene er supplerende afhængighedsforhold, ud over normale følelsesmæssige bånd, (Ezzouhdi mod Frankrig, nr. 47160/99, præmis 34, 13. februar 2001; og Kwakie-Nti og Dufie mod Nederlandene (dec.), nr. 31519/96, 7. november 2000), kan de naturligvis ikke påberåbe sig disse familieforhold med hensyn til artikel 8, idet børnene er voksne. Domstolen vurderer ikke desto mindre, at forholdene ikke er helt uden relevans for vurderingen af klagernes familiesituation.

61. Domstolen tager endvidere Regeringens argument til efterretning, ifølge hvilket klager, der ikke har indrejseforbud i Schweiz, regelmæssigt kan besøge sine børn og i givet fald sin hustru, hvis hun ikke følger med ham og bosætter sig i Bosnien-Hercegovina. Domstolen er i øvrigt underrettet om, at klager sporadisk kan

rejse til Schweiz og opholde sig der i en periode på maksimalt tre måneder (ovenstående præmis 23). Domstolen vurderer i denne henseende, selv om de kompetente myndigheder måtte tage positivt imod sådanne anmodninger i fremtiden, at disse midlertidige foranstaltninger, der i givet fald måtte blive meddelt alene efter anmodning, under ingen omstændigheder ville kunne anses for at erstatte klagernes ret til at udøve rettigheden til at leve sammen, hvilket udgør ét af de grundlæggende aspekter ved retten til respekt for familielivet (jf., mutatis mutandis, dommene Agraw mod Schweiz, nr. 3295/06, præmis 51, og Mengesha Kimfe mod Schweiz, nr. 24404/05, præmis 69-72, begge af 29. juli 2010). 62. Et andet kriterium, der skal tages højde for i afvejningen af interesserne, er fastheden af de sociale, kulturelle og familiemæssige bånd med Schweiz og med Bosnien-Hercegovina. Forbundsdomstolen har selv i den foreliggende sag erkendt, at klagerne har et betydeligt socialt netværk i Schweiz, og at deres tilbagevenden til oprindelseslandet på grund af den betydelige varighed af deres ophold i Schweiz uden tvivl ville stille dem over for visse vanskeligheder (ovenstående præmis 20)."

I præmis 63 gennemgik EMD klagernes tilknytning til hjemlandet, og i præmis 64-65 gennemgik EMD betydningen af klagerens helbredsmæssige forhold.

EMD udtalte i præmis 66-67 (uofficiel dansk oversættelse):

"66. Domstolen vedgår henset til ovenstående, at landets økonomiske velfærd ganske vist kan tjene som et legitimt mål i forbindelse med en afvisning af at forny en opholdstilladelse. Denne årsag skal ikke desto mindre vurderes ud fra en retfærdig afvejning og i lyset af samtlige omstændigheder i sagen. Domstolen vurderer imidlertid ud fra den betydelige varighed af klagernes ophold i Schweiz og deres ubestridte sociale integration i landet, at den anfægtede foranstaltning ikke var berettiget ud fra et bydende nødvendigt samfundsmæssigt behov og ikke stod i forhold til de påberåbte legitime formål. Den indklagede stat har følgelig overskredet sin skønsmargen i den foreliggende sag.

67. Der er derfor sket en krænkelse af Konventionens artikel 8."

5.2.2.2.6. Familiesammenføring til udlændinge, der har børn med lovligt ophold i opholdslandet

Der er ved gennemgangen af praksis ikke fundet domme, hvor EMD har taget stilling til betydningen af længden af ægtefællens/samleverens/partnerens ophold i henholdsvis opholdsland og klagerens hjemland i sager om familiesammenføring.

5.2.2.3. Ægtefællens/samleverens/partnerens sprogkundskaber i forhold til klagerens hjemland

EMD har i enkelte sager taget stilling til betydningen af klagerens ægtefælles/samlevers/partners sprogkundskaber i forhold til klagerens hjemland ved vurderingen af, om en udsendelse[34] af klageren vil indebære et

[34] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga.

indgreb i retten til familieliv, som ikke er proportionalt med det legitime hensyn. EMD har i den forbindelse vurderet, om det vil være muligt for og rimeligt at forvente af klagerens ægtefælle/samlever/partner at udrejse med klageren til dennes hjemland med henblik på at udøve familielivet dér. Det skal for en god ordens skyld bemærkes, at det i sidstnævnte tilfælde selvfølgelig ikke påhviler ægtefællen/samleveren/partneren rent faktisk at udrejse med klageren til dennes hjemland.

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[7] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

5.2.2.3.1. Alvorlig kriminalitet

I sagen *Beldjoudi v. France (1992)* var klageren født i opholdslandet og blev i perioden fra han var 19 år til han var 35 år dømt for flere alvorlige kriminelle forhold. Han afsonede i den forbindelse mere end 10 års fængsel. Klageren giftede sig som 20-årig med en statsborger i opholdslandet. Da EMD behandlede sagen, havde både klageren, der nu var 42 år, og hans ægtefælle, som var fransk statsborger, kun opholdt sig i opholdslandet.

EMD udtalte i præmis 75-79, at:

"75. In the present case, as was rightly emphasised by the Government, Mr Beldjoudi's criminal record appears much worse than that of Mr Moustaquim (see the above-mentioned judgment, Series A no. 193, p. 19, para. 44). It should therefore be examined whether the other circumstances of the case, relating to both applicants or to one of them only, are enough to compensate for this important fact.

76. The applicants lodged a single application and raised the same complaints. Having regard to their age and the fact that they have no children, the interference in question primarily affects their family life as spouses, as the Government rightly pointed out. They were married in France over twenty years ago and have always had their matrimonial home there. The periods when Mr Beldjoudi was in prison undoubtedly prevented them from living together for a considerable time, but did not terminate their family life, which remained under the protection of Article 8 (art. 8).

77. Mr Beldjoudi, the person immediately affected by the deportation, was born in France of parents who were then French. He had French nationality until 1 January 1963. He was deemed to have lost it on that date, as his parents had not made a declaration of recognition before 27 March 1967 (see paragraph 9 above). It should not be forgotten, however, that he was a minor at the time and unable to make a declaration personally. Moreover, as early as 1970, a year after his first conviction but over nine years before the adoption of the deportation order, he manifested the wish to recover French nationality; after being registered at his

svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

request in 1971, he was declared by the French military authorities to be fit for national service (see paragraphs 31 and 33 above). Furthermore, Mr Beldjoudi married a Frenchwoman. His close relatives all kept French nationality until 1 January 1963, and have resided in France for several decades. Finally, he has spent his whole life - over forty years - in France, was educated in French and appears not to know Arabic. He does not seem to have any links with Algeria apart from that of nationality.

78. Mrs Beldjoudi for her part was born in France of French parents, has always lived there and has French nationality. Were she to follow her husband after his deportation, she would have to settle abroad, presumably in Algeria, a State whose language she probably does not know. To be uprooted like this could cause her great difficulty in adapting, and there might be real practical or even legal obstacles, as was indeed acknowledged by the Government Commissioner before the Conseil d'État (see paragraph 27 above). The interference in question might therefore imperil the unity or even the very existence of the marriage.

79. Having regard to these various circumstances, it appears, from the point of view of respect for the applicants' family life, that the decision to deport Mr Beldjoudi, if put into effect, would not be proportionate to the legitimate aim pursued and would therefore violate Article 8 (art. 8)."

I sagen *Boultif v. Switzerland (2001)* var klageren, en statsborger fra Algeriet med opholdstilladelse i Italien, indrejst i Schweiz på et turistvisum, da han var 25 år gammel. Året efter giftede han sig med en statsborger fra opholdslandet. Klageren begik de følgende år alvorlig kriminalitet, herunder grov vold, våbenbesiddelse og røveri, og han blev idømt to års fængsel. De nationale myndigheder nægtede med henvisning til den begåede kriminalitet at forlænge klagerens opholdstilladelse. På tidspunktet for afgørelsen var det seks år siden, han havde begået kriminaliteten. Klageren opholdt sig herefter ulovligt i Italien, da hans tidligere opholdstilladelse var bortfaldet.

EMD forholdt sig til arten og alvoren af kriminaliteten der var blevet begået i præmis 50-51, hvor de fremhævede, at selvom de lovovertrædelser, klageren havde begået, kunne give anledning til frygt for, at han ville være til fare for den offentlige orden og sikkerhed for fremtiden, fandt EMD dog, at det ikke var tilfældet i denne sag.

EMD udtalte i præmis 52-56, at:

"52. The Court has next examined the possibility for the applicant and his wife to establish their family life elsewhere.

53. The Court has considered, first, whether the applicant and his wife could live together in Algeria. The applicant's wife is a Swiss national. It is true that she can speak French and has had contact by telephone with her mother-in-law in Algeria. However, the applicant's wife has never lived in Algeria, she has no other ties with that country, and indeed does not speak Arabic. In these circumstances she cannot, in the Court's opinion, be expected to follow her husband, the applicant, to Algeria.

54. There remains the question of the possibility of establishing family life elsewhere, notably in Italy. In this respect the Court notes that the applicant lawfully resided in Italy from 1989 until 1992 when he left for Switzerland, and he now appears to be living with friends in Italy again, albeit unlawfully. In the Court's opinion, it has not been established that both the applicant and his wife could obtain authorisation to reside lawfully in Italy, so that they could lead their family life in that country. In that context, the Court has noted that the

Government have argued that the applicant's current whereabouts are irrelevant in view of the nature of the offence which he has committed.

55. The Court considers that the applicant has been subjected to a serious impediment to establishing a family life, since it is practically impossible for him to live his family life outside Switzerland. On the other hand, when the Swiss authorities decided to refuse permission for the applicant to stay in Switzerland, he presented only a comparatively limited danger to public order. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued.

56. There has accordingly been a breach of Article 8 of the Convention."

I sagen *Amrollahi v. Denmark (2002)* var klageren, en statsborger fra Iran, der var indrejst i opholdslandet i en alder af 23 år, i byretten blevet idømt fængselsstraf for narkotikakriminalitet og udvist for bestandig. Klageren havde på daværende tidspunkt opholdt sig i Danmark i otte år og havde fire år forinden indledt et forhold til en dansk statsborger, som han blev gift med under sin afsoning. Parret fik to børn, som på tidspunktet for EMD´s behandling af sagen var henholdsvis et og seks år gamle. Klagerens ægtefælle havde tillige et mindreårigt særbarn fra et tidligere forhold, der boede hos parret.

EMD udtalte i præmis 36-37, at:

"36. The Court has first considered the nature and seriousness of the offence committed. It notes that the applicant arrived in Denmark in 1989 and was subsequently convicted for drug trafficking committed during 1996. In its judgment of 1 October 1997 the City Court of Hobro found the applicant guilty, inter alia, of drug trafficking with regard to at least 450 grams of heroine contrary to Article 191 of the Criminal Code. The expulsion order was therefore based on a serious offence.

37. In view of the devastating effects drugs have on people's lives, the Court understands why the authorities show great firmness to those who actively contribute to the spread of this scourge (see, inter alia, the Dalia v. France judgment of 19 February 1998, Reports 1998-I, p. 92, §54). In the Court's view, even if the applicant had not previously been convicted, this does not detract from the seriousness and gravity of such a crime (see the Bouchelkia v. France judgment of 29 January 1997, Reports, 1997-I, p. 65, § 51 and Nwosu v. Denmark (dec.), no. 50359/99, 10 July 2001)."

EMD gennemgik klagers tilknytning til henholdsvis hjemland og opholdsland i præmis 38-39.

EMD udtalte i præmis 40-41, at:

"40. The Court has next examined the possibility of the applicant, his wife and his children establishing family life elsewhere. The Court has considered, first, whether the applicant and his wife and their children could live together in Iran.

41. The applicant's wife, A, is a Danish national. She has never been to Iran, she does not know Farsi and she is not a Muslim. Besides being married to an Iranian man, she has no ties with the country. In these circumstances the Court accepts even if it is not impossible for the spouse and the applicant's children to live in Iran that it would, nevertheless, cause them obvious and serious difficulties. In addition, the Court recalls that A's

daughter from a previous relationship, who has lived with A since her birth in 1989, refuses to move to Iran. Taking this fact into account as well, A cannot, in the Court's opinion, be expected to follow the applicant to Iran."

EMD udtalte i præmis 43-44:

"43. Accordingly, as a consequence of the applicant's permanent exclusion from Denmark the family will be separated, since it is de facto impossible for them to continue their family life outside Denmark.

44. In the light of the above elements, the Court considers that the expulsion of the applicant to Iran would be disproportionate to the aims pursued. The implementation of the expulsion would accordingly be in breach of Article 8 of the Convention."

I sagen *Bajsultanov v. Austria (2012)* var klageren meddelt asyl i opholdslandet. Han blev idømt i alt 20 måneders fængsel for bl.a. flere tilfælde af vold samt udvist. EMD fastsatte længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen. Klagerens ægtefælle var meddelt asyl afledt af klagerens forhold og de havde to børn, der på tidspunktet for EMD's behandling af sagen var otte og fem år.

Efter i præmis 79-82 at have konstateret, at udvisningen af klageren udgjorde et indgreb i hans ret til respekt for familieliv, og at dette indgreb var i overensstemmelse med loven og forfulgte et af de legitime hensyn, gennemgik EMD i præmis 83 de generelle principper, som indgår i afvejningen af, om indgrebet var nødvendigt i et demokratisk samfund, jf. kriterierne som sammenfattet i Boultif- og Üner-dommene.

Om karakteren og alvorligheden af den begåede kriminalitet udtalte EMD i præmis 84:

"Turning to the first set of criteria relating to the criminal offences committed by the applicant, the Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks' imprisonment, suspended with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions."

I præmis 85-92 udtalte EMD, at:

"85. As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there.

86. On the other hand, the applicant lived in Chechnya for almost twenty-three years, went to school there and subsequently worked occasionally in different jobs. The applicant's parents and siblings still live in Chechnya, and the applicant has maintained regular contact with his father.

87. The Court therefore considers, in line with the Austrian authorities, that the applicant still has stronger social and cultural ties to his country of origin than to his host country.

88. As regards the applicant's family ties the Court notes that the applicant and his wife are Russian nationals, who arrived in Austria together in July 2003. The couple have two children, who were both born in Austria but who are also Russian nationals. The family lived together, apart from when the applicant was in prison, during which time however, the applicant's wife visited him regularly. After his release from prison the applicant went back to live with his family.

89. The Court further notes that the applicant's wife and the children are recognised refugees in Austria, with asylum status which has been awarded to them in separate decisions. However, the Court acknowledges that at the time the applicant's wife was considered to be at risk of persecution in Chechnya due to her husband being at risk. The applicant's wife herself never claimed a risk of ill-treatment because of her own conduct or her own role in any of the armed conflicts. Consequently, in view of the Court's finding with regard to the applicant's complaint under Article 3 of the Convention above, the applicant's wife can also not be considered as being at a real risk of being subjected to treatment contrary to Article 3 of the Convention if she returned to Chechnya.

90. The applicant's wife was born in Grozny and spent all her life in Chechnya until she left for Austria with her husband. The couple's children are still of an adaptable age (see Darren Omoregie and Others, cited above, § 66). The applicant's wife, who has resident status in Austria for herself and the children based on their asylum status, might have a considerable interest in not returning to Chechnya. But although the Court does not underestimate the difficulties of a relocation of the family, there is no indication that there are any insurmountable obstacles in the way of the applicant's wife and the children following the applicant to Chechnya and developing a family life there (see Gül v. Switzerland, 19 February 1996, § 42, Reports 1996-I, and Darren Omoregie and Others, cited above, ibid.).

91. Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor

klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

I præmissen 46 gennemgik EMD klagerens opførsel og domstolsbehandlingen af hans sag efter begåelsen af lovovertrædelsen.

EMD udtalte i præmis 47-55, at:

"47. The Court notes that the expulsion order was served in July 2009, shortly before the applicant's release on parole. It became final in July 2010, following the exhaustion of remedies against it. Observing that roughly ten years passed between the commission of the offence and the conclusion of the court proceedings concerning the applicant's expulsion, the Court considers that this considerable length of time cannot be imputed to the respondent State, for the applicant commenced serving his prison sentence only in 2006, following the exhaustion of remedies against his criminal conviction, and his expulsion was not possible before he had served at least two thirds of his sentence, in 2009. Therefore, the Court finds that the proceedings were conducted with reasonable expedition.

48. As regards the applicant's family situation, he has been married to his wife since 1999 and it has, explicitly, not been contested by the respondent Government that real and effective family existed between the applicant, his wife and their two children. It has to be noted that the applicant's wife could not know about the offences at issue at the time when she entered into a family relationship with the applicant, as the couple married in 1999 and thus prior to the commission of the offences in 2000. It has to be noted that the applicant, with the exception of the purchase and consumption of marihuana, for which he was fined in 2007, committed the criminal offences prior to the birth of his children.

49. The Court observes that the applicant's wife is a national of "the former Yugoslav Republic of Macedonia", i.e. of the country to which the applicant was expelled. The applicant's wife, who was born in 1978, lived there until 1990 and knows Albanian and the country's culture. She has relatives there and visits the country every year. The domestic courts considered that she could reintegrate in "the former Yugoslav Republic of Macedonia" without encountering serious difficulties, despite having lived in Switzerland for the past twenty years. The Court notes that the applicant's wife chose to follow him to Macedonia in 2011 and lived with him there until 2015, despite the fact that she could have remained in Switzerland as a holder of a permanent residence permit and maintained contact with the applicant through visits and means of telecommunication.

50. The Court observes that the couple's children, born in 2001 and in 2005, are likewise the nationals of "the former Yugoslav Republic of Macedonia". At the time the expulsion order became binding, the elder child was in primary school, whereas the younger one was in kindergarten. They were, thus, still of an adaptable age. While the Court accepts that the economic living conditions in "the former Yugoslav Republic of Macedonia"

are less favourable than in Switzerland, it also notes that the former is a Contracting State of the Council of Europe. It further accepts that the children knew the country's culture to a certain extent due to visits they had made together with their mother. While it is not clear to what extent the children knew Albanian, it does not appear arbitrary to accept that the presence of their parents, who both originate from the country, as well as further relatives from their mother's side, would alleviate their difficulties in integrating in "the former Yugoslav Republic of Macedonia". Moreover, it has to be noted that the children were not forced to move there, but could have remained in Switzerland with their mother as holders of permanent residence permits and maintained contact with the applicant through visits and means of telecommunication.

51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'.

53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Hamesevic v. Denmark (2017)* var klageren indrejst som 23-årig og fik det efterfølgende år opholdstilladelse som flygtning. Han blev i Danmark gift med en tidligere statsborger fra sit hjemland. Parret fik tre børn, som på tidspunktet for EMD´s behandling af sagen var 16, 18 og 19 år gamle. Efter 19 års ophold blev klageren idømt tre års fængsel for våbensmugling og udvist for bestandig. Klageren var fem år tidligere blevet skilt fra sin ægtefælle, og børnene boede hos hende. Klageren var under sin afsoning blevet gift på ny med en tidligere statsborger i sit hjemland og havde anmodet om genåbning af en faderskabssag vedrørende hendes yngste barn, som han sandsynligvis var far til. Klagerens ægtefælle havde derudover to mindreårige særbørn, der boede hos hende. Klageren havde fortsat familie i hjemlandet, hvor han ofte havde været på ferie, og hvor han også havde planlagt at købe et hus. Klageren havde endelig tidligere været i beskæftigelse i Danmark, men havde to år forud for sin fængsling modtaget offentlige ydelser, da han var i behandling for en depression.

EMD udtalte i præmis 31-37, at:

"31. The Court considers it established that there was an interference with the applicant's right to respect for his private and family life within the meaning of Article 8, that the expulsion order was "in accordance with the law", and that it pursued the legitimate aim of preventing disorder and crime (see also, for example, Salem v. Denmark, cited above, § 61).

32. In the first set of proceedings, the applicant was convicted of smuggling loaded weapons from Bosnia and Herzegovina to Denmark for the purpose of resale in respect of four AK 47 machine guns and two pistols, and attempting to do so in respect of ten pistols. He was also convicted of offences under the Weapons Act, notably possession of ammunition. The applicant was found to be the instigator and was sentenced on appeal to three years' imprisonment. In its judgment of 20 January 2015 the High Court took into account the seriousness of the crime committed and the sentence imposed. The Court notes in addition that the crimes were of such a nature that they could have had serious consequences for the lives of others.

33. The applicant was 23 years old when he entered Denmark in 1994 and he had stayed in Denmark legally for approximately twenty-one years when the judgment refusing to revoke the expulsion order became final on 13 April 2015. The applicant had had work in Denmark, but for the two previous years before his imprisonment he had received social welfare benefits. He had been in Denmark for approximately eighteen years when he committed the crimes in question. Before that he had been convicted once, in 2007 (see paragraph 6 above).

34. The applicant had three children from his first marriage. They are all Danish nationals. The High Court noted, in its judgment of 20 January 2015, that they were approximately 19, 18 and 16 years old and lived with their mother. In respect of the two eldest, who were of age, the Court reiterates that relations between parents and adult children do not constitute family life for the purpose of Article 8 unless the applicant can demonstrate additional elements of dependence (see, for example, A.S. v. Switzerland, no. 39350/13, § 49, 30 June 2015 and F.N. v. the United Kingdom (dec.), no. 3202/09, § 36, 17 September 2013). The applicant did not point to such dependence. Nor did he point to any obstacle to his maintaining contact with his 16-

year-old child remaining with his ex-wife in Denmark, via the telephone or the internet, or by visits to Bosnia and Herzegovina, the country of origin of both the applicant and the child's mother.

35. The applicant's wife, A, is a Danish national. She originated from Bosnia and Herzegovina. They married on 31 May 2013 after having lived together for some years. When they commenced their relationship she could not have known about the offences which would be committed in 2012. It is noteworthy, though, that she and the applicant committed the offences together and that A was sentenced to one year's imprisonment.

36. On 17 October 2013 it was established that the applicant was also father of E, born in 2007, who is also a Danish national. The Court notes, however, that R had been registered as E's father until 12 July 2013 (see paragraph 14 above) and that the applicant was detained from August 2012 until his deportation around June 2015.

37. A has four other children, who had close contact with their father, R, who lived in Denmark. Two of them were of age and had moved away from home. At the time of the applicant's deportation, A lived in an apartment with her three youngest children, including E, who were then 16, 14 and 8 years old. The children spoke Danish and Bosnian. A did not have a job."

EMD udtalte i præmis 42-55, at:

"42. In its judgment of 20 January 2015 the High Court gave weight to the fact that both the applicant and A were from Bosnia and Herzegovina and accordingly spoke Bosnian. Moreover, it noted that A had stated that her three youngest children, who lived with her, including E, spoke Danish and Bosnian. Therefore, the High Court found it established that it was possible for them to continue family life with the applicant in Bosnia and Herzegovina.

43. The Court finds no grounds for concluding that such a finding was arbitrary or manifestly unreasonable. In addition, it notes, as appeared from the first set of proceedings, that the applicant and A had actually planned to buy a house in Bosnia and Herzegovina (see paragraphs 9 and 10 above).

44. Moreover, if A were to choose to remain in Denmark with her youngest children, including E, the applicant has not pointed to any obstacles for them to visit him in Bosnia and Herzegovina or for the family to maintain contact via the telephone or the internet.

45. Finally, the Court observes that the applicant had strong ties with his country of origin. He only left Bosnia and Herzegovina when he was 23 years old. At that time his parents were still alive. During the two years before his arrest in 2012, he had been on vacation there about five times, and he had planned to buy there. The nature of the crimes committed also suggests that he had maintained such ties.

46. Having regard to the above, the Court is satisfied that the interference with the applicant's private life – the refusal to revoke his deportation order – was supported by relevant and sufficient reasons and that it was not disproportionate given all the circumstances of the case.

47. The Court notes that the expulsion order was served in July 2009, shortly before the applicant's release on parole. It became final in July 2010, following the exhaustion of remedies against it. Observing that roughly ten years passed between the commission of the offence and the conclusion of the court proceedings concerning the applicant's expulsion, the Court considers that this considerable length of time cannot be imputed

to the respondent State, for the applicant commenced serving his prison sentence only in 2006, following the exhaustion of remedies against his criminal conviction, and his expulsion was not possible before he had served at least two thirds of his sentence, in 2009. Therefore, the Court finds that the proceedings were conducted with reasonable expedition.

48. As regards the applicant's family situation, he has been married to his wife since 1999 and it has, explicitly, not been contested by the respondent Government that real and effective family existed between the applicant, his wife and their two children. It has to be noted that the applicant's wife could not know about the offences at issue at the time when she entered into a family relationship with the applicant, as the couple married in 1999 and thus prior to the commission of the offences in 2000. It has to be noted that the applicant, with the exception of the purchase and consumption of marihuana, for which he was fined in 2007, committed the criminal offences prior to the birth of his children.

49. The Court observes that the applicant's wife is a national of 'the former Yugoslav Republic of Macedonia', i.e. of the country to which the applicant was expelled. The applicant's wife, who was born in 1978, lived there until 1990 and knows Albanian and the country's culture. She has relatives there and visits the country every year. The domestic courts considered that she could reintegrate in 'the former Yugoslav Republic of Macedonia' without encountering serious difficulties, despite having lived in Switzerland for the past twenty years. The Court notes that the applicant's wife chose to follow him to Macedonia in 2011 and lived with him there until 2015, despite the fact that she could have remained in Switzerland as a holder of a permanent residence permit and maintained contact with the applicant through visits and means of telecommunication.

50. The Court observes that the couple's children, born in 2001 and in 2005, are likewise the nationals of "the former Yugoslav Republic of Macedonia". At the time the expulsion order became binding, the elder child was in primary school, whereas the younger one was in kindergarten. They were, thus, still of an adaptable age. While the Court accepts that the economic living conditions in "the former Yugoslav Republic of Macedonia" are less favourable than in Switzerland, it also notes that the former is a Contracting State of the Council of Europe. It further accepts that the children knew the country's culture to a certain extent due to visits they had made together with their mother. While it is not clear to what extent the children knew Albanian, it does not appear arbitrary to accept that the presence of their parents, who both originate from the country, as well as further relatives from their mother's side, would alleviate their difficulties in integrating in "the former Yugoslav Republic of Macedonia". Moreover, it has to be noted that the children were not forced to move there, but could have remained in Switzerland with their mother as holders of permanent residence permits and maintained contact with the applicant through visits and means of telecommunication.

51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have

any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'.

53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 toavoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

5.2.2.3.2. Mindre alvorlig kriminalitet

I sagen *Yildiz v. Austria (2002)* var den første klager indrejst i opholdslandet som 14-årig for at bo sammen med sine forældre og sine søskende. Han indledte et forhold til den anden klager, som var statsborger i den første klagers hjemland, men født og opvokset i opholdslandet. Nogle måneder senere traf opholdslandet afgørelse om udvisning af den første klager med indrejseforbud i fem år på baggrund af flere bødestraffe for tyveri og færdselslovsovertrædelser. Da udvisningsafgørelsen blev endelig, havde klagerne sammen fået et barn, den tredje klager. Klageren udrejste til hjemlandet, da barnet var knap to år gammelt. På tidspunktet for EMD's behandling af sagen boede han fortsat i hjemlandet. Den anden og tredje klager besøgte ham jævnligt, indtil parret blev skilt.

EMD udtalte i præmis 43-46:

"43. The Court will first examine the applicants' family situation and the length of their stay in Austria. It observes that the first applicant is not a second generation immigrant, i.e. a person who was born or has lived the main part of his life in the country from which he is going to be removed. He only came to Austria in 1989 at the age of fourteen and must therefore have links with his country of origin and in particular be able to speak Turkish. On the other hand, he was still an adolescent when he came to Austria, where his close family was and is still living. In December 1996, when the Administrative Court confirmed the residence ban against him, he had been living in Austria for seven years, he had been working there and had been co-habiting for a little less than three years with the second applicant, who is also a Turkish national but was born in Austria and has lived there all her life. Their daughter, the third applicant, was one year and four months old at the material time. In fact, the Austrian authorities issuing the residence ban acknowledged that the first applicant had reached a high degree of integration in Austria. Nevertheless, the Court considers that, as regards the possible effects of the residence ban on his family life, the authorities failed to establish whether the second applicant could be expected to follow him to Turkey, in particular whether she spoke Turkish and maintained any links, other than her nationality, with that country.

44. It is true that, meanwhile, the applicants' family situation has changed. The first and second applicant divorced in March 2001 and, while the second applicant is residing in Austria, the first applicant lives in Turkey. The third applicant is currently staying with relatives in Turkey although the second applicant, who has sole custody over the child, asserts that she intends to bring her back to Austria. However, the Court has to make its assessment in the light of the position when the residence ban became final (see paragraph 34 above). Its task is to state whether or not the domestic authorities complied with their obligation to respect the applicants' family life at that particular moment and it cannot have regard to circumstances which only came into being after the authorities took their decision. Nor can it be the Court's role to speculate as to whether there is – as claimed by the applicants – a causal link between the contested measure and the subsequent developments, in particular the first and second applicants' divorce.

45. Next, the Court will turn to the offences committed by the first applicant, as their gravity is an essential element for assessing the proportionality of the interference with the applicants' family life. The Court notes that in 1993 the first applicant, who was then still a minor, was convicted twice by the criminal courts, once for shop-lifting with a sentence of three days' imprisonment suspended on probation, and once for theft without a sentence being pronounced. Between 1992 and April 1994 he was convicted seven times of traffic offences, in particular driving without a license and once ignoring a red light and high speeding. The fines imposed on him amounted to a total sum of ATS 28,000 (equivalent to EUR 2,035). In sum, the Court finds that these offences were not negligible. However, as is shown by the modest penalties imposed, the domestic authorities considered them to be of a minor nature. Moreover, the first applicant did not commit any further offences between April 1994 and December 1996, when the residence ban proceedings were terminated. Thus, in the Court's view the authorities' fear that he constituted a danger to public order and security in that would commit further offences is mitigated by the particular circumstances of the case (see Boultif v. Switzerland, cited above, § 51, with further references).

46. Having regard to all these elements, the Court considers that the authorities failed to strike a fair balance between the different interests involved and that the interference with the applicants' right to respect for their family life was not proportionate to the legitimate aim pursued.

Accordingly, there has been a breach of Article 8 of the Convention."

5.2.2.3.3. Opholdstilladelse opnået på baggrund af svig

Der er ved gennemgangen af praksis ikke fundet domme, hvor EMD har udtalt sig om betydningen af ægtefællens/samleverens/partnerens sprogkundskaber i sager om opholdstilladelse opnået på baggrund af svig.

5.2.2.3.4. Ulovligt ophold

I sagen *Priya v. Denmark (2006) (afvisningsbeslutning)* var klageren indrejst fra Indien i opholdslandet på et forretningsvisum. Hun var på indrejsetidspunktet 27 år gammel. Efter to måneders ophold indgik hun ægteskab med en derboende statsborger fra Indien, der var indrejst i en alder af 28 år og tidligere havde været gift med en dansk kvinde. Klageren fik afslag på familiesammenføring og udrejste. Hun havde på daværende tidspunkt opholdt sig omkring 14 måneder i opholdslandet. Parret fik ca. tre måneder efter klagerens udrejse en søn. Året efter genindrejste klageren og søgte to gange om opholdstilladelse. Begge ansøgninger blev afslået, da parrets tilknytning til Indien blev vurderet større end parrets tilknytning til Danmark. Parret fik i mellemtiden endnu et barn. Begge børn fik opholdstilladelse i opholdslandet. Parret valgte at lade sig skille, og klageren forsøgte herefter at søge om opholdstilladelse under henvisning til herboende børn. På tidspunktet, hvor de nationale myndigheder traf den seneste afgørelse, havde klagerens ægtefælle opholdt sig ti år i opholdslandet.

EMD udtalte, at:

"Turning to the circumstances of the present case, the applicant entered Denmark on 22 January 1999 on a three month visa, unmarried and without any ties to Denmark. She left six month later on 22 July 1999, married to an Indian national, PK, and expecting his child.

On 14 July 2000 the applicant re-entered Denmark together with the child, GK on a visa valid for thirty days. The applicant still remains in the country although her requests to be granted a residence permit has been refused. The first decision in this respect was taken on 20 February 2001 by the Aliens Authorities, which at the same time ordered the applicant to leave the country within 30 days from the day on which she was notified of the decision. Accordingly, most of the applicant's stay in Denmark has been illegal."

EMD udtalte videre, at:

"In the present case the applicant was never given any assurances that she would be granted a right of residence by the competent Danish authorities. Moreover, having regard to the applicable rules at the relevant time, which the applicant and PK were advised on in June 1999, in July 2000 she could hardly expect that any right of residence would be conferred on her and the first child as a fait accompli due to their presence in the country. Nor could she expect to be able to continue a family life in Denmark (cf. Bouchelkia v. France, judgment of 29 January 1997, Reports 1997-I, p. 65, § 53; and Baghli v. France, no. 34374/97, § 48, ECHR 1999-VIII).

Furthermore, the Court considers that the present case discloses no exceptional circumstances. It observes in this context that the applicant entered Denmark in January 1999, when she was twenty-seven years old. At the relevant time she had no ties to Denmark. Less than two months later, she married PK, an Indian national,

who had entered Denmark illegally in October 1993, when he was twenty-eight years old. At the relevant time he had no ties to Denmark either. Both spouses were born and raised in India, where their family lived, and the applicant and her husband communicated in Punjabi and Hindi."

EMD lagde til grund, at ægtefællerne stadig var gift.

EMD udtalte derefter, at:

"Thus, there are no obstacles to the applicant, her husband and children enjoying their family life in their home country India, and the respondent State cannot be said to have failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention."

I sagen *Darren Omoregie a.o. v. Norway (2008)* var klageren indrejst som 22-årig og havde fået afslag på asyl, men undlod at efterkomme udrejsebeslutningen og arbejdede endvidere ulovligt i opholdslandet. Nogle måneder senere giftede han sig med en statsborger fra opholdslandet og søgte om familiesammenføring, hvilket blev afslået, og klageren blev på ny pålagt at udrejse, hvilket han ikke efterkom. Der blev endvidere truffet afgørelse om at udvise klageren med indrejseforbud i fem år med mulighed for genindrejse efter ansøgning allerede efter to år. Under domstolsbehandlingen af udvisningsafgørelsen blev klagerens ægtefælle gravid med deres fælles barn, som blev født fem år efter klagerens indrejse. Klageren fik på ny afslag på familiesammenføring og efter fem et halvt års ophold blev han udsendt.

EMD udtalte i præmis 58-62, at:

"58. In this regard the Court first observes that when the first applicant arrived and applied for asylum in Norway on 25 August 2001, he was an adult and had no links to the country. His family links to the second and third applicants were formed at different stages during his stay in the country.

59. The first and second applicants met in October 2001 and started co-habiting in March 2002. Already from the beginning of their relationship it must have been clear to them both that their prospects of being able to settle as a couple in Norway were precarious. The first applicant's asylum request was rejected, first by the Directorate of Immigration on 22 May 2002, and then by the Immigration Appeals Board on 11 September 2002, giving him until 30 September 2002 to leave the country. No judicial appeal was lodged against these decisions, which became final. Nevertheless, the first applicant opted to evade his duty to leave and stayed in Norway unlawfully.

60. On 2 February 2003, while the first applicant was staying illegally in Norway, he got married to the second applicant. Because of his lack of residence status the marriage had not been contracted in accordance with domestic law, though this shortcoming did not deprive the marriage of its validity.

61. In the Court's view, at no stage prior to their marriage on 2 February 2003 could the first and the second applicants have reasonably held any expectation that he would be granted leave to remain in Norway.

62. This state of affairs was not changed, but was confirmed rather, by the developments in the case in the ensuing period. On 14 February 2003 the first applicant made a new request on the ground of family reunification with the second applicant, but again his request was rejected and he was ordered to leave the country, in a decision of 26 April 2003, notified to him on 7 May 2003. Therefore the applicant could not reasonably expect a right to reside in Norway based on these proceedings.

EMD gennemgik i præmis 63-65 udvisningsafgørelsen.

EMD udtalte i præmis 66, at:

"It should further be noted that the first applicant had lived in Nigeria since he was six months old until he left the country at the age of 22, had studied at university for four years and had three brothers with whom he was still in contact. Whereas his links to Nigeria were particularly strong, his links to Norway were comparatively weak, apart from the family bounds he had formed there with the second and third applicants pending the proceedings. The third applicant was still of an adaptable age at the time when the disputed measures were decided and implemented (see Ajayi and Others, cited above; Sarumi, cited above; and Sezai Demir c. France (dec.), no. 33736/03, 30 May 2006). The second applicant would probably experience some difficulties and inconveniences in settling in Nigeria, despite her experience from a period spent in another African country, South Africa, and the fact that English was also the official language of Nigeria. However, the Court does not find that there were insurmountable obstacles in the way of the applicants' developing family life in the first applicant's country of origin. In any event, nothing should prevent the second and third applicants from coming to visit the first applicant for periods in Nigeria."

EMD fandt i den konkrete sag, at der ikke var sket en krænkelse af artikel 8.

I sagen *Arvelo Aponte v. the Netherlands (2011)* var klageren indrejst som turist i opholdslandet, hvor hun indledte et forhold til en derboende statsborger. Klageren var fem år tidlige dømt og udvist for medvirken til kokainsmugling mellem hendes hjemland og et andet europæisk land. Klageren oplyste ikke dette, da hun ansøgte om opholdstilladelse i opholdslandet på baggrund af sit samliv med en derboende statsborger. Mens myndighederne stadig behandlede hendes sag om opholdstilladelse, indgik parret ægteskab, og året efter fik de en søn. Klagerens ansøgning om opholdstilladelse blev afslået, da de nationale myndigheder blev bekendt med klagerens tidligere dom.

EMD udtalte i præmis 56-62, at:

"56. Turning to the facts of the case, the Court notes that the applicant had resided – with the exception of the time she was imprisoned in Germany – all her life in Venezuela when she arrived as a tourist in 2000 in the Netherlands where she met and started a relationship with Mr T. She was subsequently granted permission – in the form of a provisional residence visa – to enter the Netherlands and apply for a residence permit for the purpose of family formation with Mr T. It appears that, in the procedure on her request for a provisional residence visa, it was erroneously not brought to the applicant's explicit attention that, if she were to file a subsequent request for a residence permit, she would be questioned about any possible criminal antecedents. Her request for a residence permit was actually rejected and a ten-year exclusion order was imposed on her after it had appeared – in the context of her request for a residence permit filed in 2001 – that in 1996 she had been sentenced to imprisonment for a narcotics offence in Germany. It also appears that she had not been convicted of any crime since 1996.

57. The Courts considers that the fact that a significant period of good conduct elapses between the date on which a person has served his or her sentence imposed for a criminal offence and the date on which immigration is sought by the person concerned necessarily has a certain impact on the assessment of the risk which that person poses to society. As regards the severity of the offence at issue, the Court reiterates that, in view of the devastating effects of drugs on people's lives, it understands why the authorities show great firmness towards those who actively contribute to the spread of this scourge (see, for instance, Dalia v. France, 19 February 1998, § 54, Reports 1998-I; and Baghli v. France, no. 34374/97, § 48, ECHR 1999-VIII).

58. The Court notes that the applicant's offence was quite serious as it involved the participation in the importation of a not negligible quantity of cocaine, which resulted in a prison sentence of two years and six months (see § 6 above). The severity of this offence must therefore weigh heavily in the balance. In so far as the applicant raises arguments based on sentencing guidelines used in the Netherlands by the Haarlem Regional Court in relation to the decision to impose an exclusion order on her, the Court does not find it necessary to determine these arguments as these guidelines did not exist at the time when the offences of which the applicant was convicted in Germany were committed.

59. The Court also notes that the family life at issue was developed further during a period when the applicant and Mr T. were aware that the applicant's immigration status was precarious. The applicant must be considered as having become aware as early as 15 August 2001 – thus well before her marriage to Mr T. and the birth of their child – that there was a serious possibility that an exclusion order would be imposed on her. Although she has continued to reside in the Netherlands, she did not do so on the basis of a residence permit issued to her by the Dutch authorities. Moreover, the applicant's presence in the Netherlands – as from the date on which she was notified of the decision to impose an exclusion order on her – constituted a criminal offence, even if no criminal proceedings for that offence have been taken against her. It therefore appears that her presence in the Netherlands as from that date was tolerated while she awaited the outcome of the administrative appeal proceedings taken by her. This cannot, however, be equated with lawful stay where the authorities explicitly grant an alien permission to settle in their country (see Useinov, cited above; and Narenji Haghighi v. the Netherlands (dec.), no. 38165/07, 14 April 2009). Accordingly, the total length of her stay in the Netherlands cannot be given the weight attributed to it by the applicant.

60. As regards the question whether there are any insurmountable obstacles for the exercise of the family life at issue outside of the Netherlands, the Court notes that the applicant has been born and raised in Venezuela where she has resided for most of her life and where she has relatives who could help the applicant and her family to resettle there. Further noting that her husband stated on 31 March 2004, when heard before the official board of enquiry, that he had a reasonable command of Spanish and also noting that their child is of a young and adaptable age, the Court finds that it may reasonably be assumed that they can make the transition to Venezuelan culture and society, although the Court appreciates that this transition might entail a certain degree of social and economic hardship.

61. Having regard to all the above considerations, the Court concludes that it cannot be said that the Netherlands authorities have failed to strike a fair balance between the competing interests. Consequently, there has been no violation of the applicant's right to respect for her rights guaranteed by Article 8 of the Convention.

62. Accordingly, there has been no violation of Article 8 of the Convention."

5.2.2.3.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

Der er ved gennemgangen af praksis ikke fundet domme, hvor EMD har taget stilling til betydningen af ægtefællens/samleverens/partnerens sprogkundskaber i sager vedrørende inddragelse, nægtelse af forlængelse eller bortfald af klagerens opholdstilladelse, hvor der ikke foreligger kriminalitet.

5.2.2.3.6. Familiesammenføring til udlændinge, der har børn med lovligt ophold i opholdslandet

Der er ved gennemgangen af praksis ikke fundet domme, hvor EMD har taget stilling til betydningen af ægtefællens/samleverens/partnerens sprogkundskaber i forhold til klagerens hjemland i sager om familiesammenføring.

5.2.2.4 Ægtefællens/samleverens/partnerens personlige, sociale og/eller kulturelle tilknytning til opholdslandet og klagerens hjemland

EMD har i flere sager taget stilling til betydningen af klagerens ægtefælles/samlevers/partners sociale og kulturelle tilknytning til henholdsvis klagerens hjemland og opholdslandet ved vurderingen af, om en udsendelse[35] af klageren vil indebære et indgreb i retten til familieliv, som ikke er proportionalt med det legitime hensyn. EMD har i den forbindelse vurderet, om det vil være muligt for og rimeligt at forvente af klagerens ægtefælle/samlever/partner at udrejse med klageren til dennes hjemland med henblik på at udøve familielivet dér. Det skal for en god ordens skyld bemærkes, at det i sidstnævnte tilfælde selvfølgelig ikke påhviler ægtefællen/samleveren/partneren rent faktisk at udrejse med klageren til dennes hjemland.

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[6] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

5.2.2.4.1 Alvorlig kriminalitet

I sagen *Boultif v. Switzerland (2001)* var klageren, en statsborger fra Algeriet med opholdstilladelse i Italien, indrejst i Schweiz på et turistvisum, da han var 25 år gammel. Året efter giftede han sig med en statsborger fra opholdslandet. Klageren begik de følgende år alvorlig kriminalitet, herunder grov vold, våbenbesiddelse

[35] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

og røveri, og blev idømt to års fængsel. De nationale myndigheder nægtede med henvisning til den begåede kriminalitet at forlænge klagerens opholdstilladelse. På tidspunktet for afgørelsen var det seks år siden, han havde begået kriminaliteten. Klageren opholdt sig herefter ulovligt i Italien, da hans tidligere opholdstilladelse var bortfaldet.

EMD udtalte i præmis 49-56, at:

"49. The Court notes that the applicant arrived in Switzerland in 1992, and that he married his wife in 1993, whereupon he obtained a residence permit. However, the permit was not renewed following his criminal conviction in 1997. The Zürich Court of Appeal considered in its judgment of 31 January 1997 that the applicant's culpability was severe. The Government, moreover, have drawn attention to the brutal manner in which the offence concerned had been committed, and that it had occurred only sixteen months after the applicant entered Switzerland.

50. The Court has first considered the extent to which the offence committed by the applicant can provide a basis for assuming that he constituted a danger to public order and security.

51. It is true that the applicant committed a serious offence and was sentenced to a prison sentence which he has served in the meantime. The Court further notes that the Zürich District Court in its judgment of 17 May 1995 had considered that a mere conditional sentence of eighteen months' imprisonment, suspended on probation, was adequate punishment for the offence committed by the applicant. The Zürich Court of Appeal later pronounced an unconditional sentence of two years' imprisonment. Furthermore, the offence at issue was committed in 1994, and in the six years thereafter until the applicant's departure from Switzerland in 2000 he committed no further offence. Before he began his prison sentence, he obtained professional training as a waiter and worked as a painter. His conduct in prison was exemplary, and indeed he was given early release. As from May 1999 until his departure from Switzerland in 2000 he worked as a gardener and an electrician, with the possibility of continuing employment. As a result, whilst the offence which the applicant committed may give rise to certain fears that he constitutes a danger to public order and security for the future, in the Court's opinion such fears are mitigated by the particular circumstances of the present case (see, mutatis mutandis, Ezzouhdi v. France, no. 47160/99, § 34, 13 February 2001, unreported, and Baghli v. France, no. 34374/97, § 48, ECHR 1999-VIII).

52. The Court has next examined the possibility for the applicant and his wife to establish their family life elsewhere.

53. The Court has considered, first, whether the applicant and his wife could live together in Algeria. The applicant's wife is a Swiss national. It is true that she can speak French and has had contact by telephone with her mother-in-law in Algeria. However, the applicant's wife has never lived in Algeria, she has no other ties with that country, and indeed does not speak Arabic. In these circumstances she cannot, in the Court's opinion, be expected to follow her husband, the applicant, to Algeria.

54. There remains the question of the possibility of establishing family life elsewhere, notably in Italy. In this respect the Court notes that the applicant lawfully resided in Italy from 1989 until 1992 when he left for Switzerland, and he now appears to be living with friends in Italy again, albeit unlawfully. In the Court's opinion, it has not been established that both the applicant and his wife could obtain authorisation to reside lawfully in Italy, so that they could lead their family life in that country. In that context, the Court has noted that the

Government have argued that the applicant's current whereabouts are irrelevant in view of the nature of the offence which he has committed.

55. The Court considers that the applicant has been subjected to a serious impediment to establishing a family life, since it is practically impossible for him to live his family life outside Switzerland. On the other hand, when the Swiss authorities decided to refuse permission for the applicant to stay in Switzerland, he presented only a comparatively limited danger to public order. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued.

56. There has accordingly been a breach of Article 8 of the Convention."

I sagen *Sezen v. the Netherlands (2006)* var den første klager indrejst i opholdslandet som 23-årig og havde fået opholdstilladelse som familiesammenført til sin ægtefælle (den anden klager), som havde boet i opholdslandet siden hun var syv år, og deres fælles barn. Tre år efter indrejsen blev den første klager idømt fire års fængsel for narkotikakriminalitet. Efter løsladelsen genoptog han samlivet med ægtefælle og barn, men fraflyttede senere det fælles hjem i en periode på omkring syv måneder. Knap fire måneder efter genoptagelse af samlivet fik klagerne endnu et barn. Den første klagers opholdstilladelse som familiesammenført blev omkring otte måneder senere nægtet forlænget under henvisning til samlivsafbrydelsen og straffedommen.

EMD udtalte i præmis 44-50, at:

"44. At the time the first applicant was arrested, i.e. on 31 July 1992, he had been residing lawfully in the Netherlands for less than one and a half years, having been granted a residence permit in February 1991. Applying the "sliding scale" principle, the authorities of the respondent State attached weight to this undeniably short duration of the first applicant's lawful stay in the Netherlands before he committed the offence. It is nevertheless to be noted that, following his conviction on 20 January 1993, it was not until more than four years later, namely on 5 June 1997, that the decision was taken to refuse the first applicant continued residence. Following his early release from prison in April 1995, the first applicant had thus been allowed to build up even closer ties with the Netherlands for a further two years. In addition, it appears that the first applicant has not re-offended and that he has been gainfully employed ever since his release from prison.

45. As to the first applicant's connections with his country of origin, the Court considers that his situation is not comparable to that of a second-generation immigrant, given that he arrived in the Netherlands at the age of twenty-three. Not having been informed otherwise, the Court assumes that he received his schooling in Turkey and that he is conversant with the Turkish language. Thus, he undoubtedly has ties with Turkey. His ties to the Netherlands are mainly connected to his wife – the second applicant – and their two children.

46. The Court notes with some concern that none of the domestic authorities involved in the decision-making process appear to have paid any attention to the possible effects which the refusal of continued residence would have on the first applicant's family life (see Yıldız v. Austria, no. 295/97, § 43, 31 October 2002). It is true that the Regional Court of The Hague, sitting in Amsterdam, quashed the decision to impose an exclusion order on the first applicant for the reason that the Deputy Minister had failed to accord insufficient weight to the interests of the applicants and their children (see paragraph 19 above). However, the Regional Court upheld the decision not to prolong the first applicant's residence permit, and its reasoning on the subject did not refer to the consequences of that decision on his family life. In this context it is further to be noted that the

Government assume that both the second applicant and the children speak Turkish (see paragraph 38 above). Had this matter been addressed in the course of the domestic proceedings, the authorities would have been aware of the fact that the children speak Dutch and Kurdish, but not Turkish.

47. Unlike the first applicant, his wife – the second applicant – may be considered a second-generation immigrant, having moved to the Netherlands at the age of seven and having lawfully resided there ever since. It is submitted, and has not been disputed, that all her relatives are also living in the Netherlands and that she does not have any family in Turkey. Although the parties disagree as to whether the second applicant was aware of the criminal activities of her husband, the fact remains that he had not yet committed the offence at the time they married and she entered into a family relationship with him, which is the relevant criterion in this context (see Boultif, cited above, § 48). Furthermore, the couple's two children were born in the Netherlands: Adem in 1990 and Mahsun in 1996. These two children have always lived in the Netherlands and its cultural and linguistic environment, and attend school there. Consequently, they can only have minimal ties, if any, to their parents' country of origin (see Şen v. the Netherlands, no. 31465/96, § 40, 21 December 2001) and, as noted above (paragraphs 32 and 46), they do not speak Turkish. In these circumstances, the Court accepts that following the first applicant to Turkey would mean a radical upheaval for the second applicant and in particular for the couple's children (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, p. 1971, § 36; see also Recommendation 1504 (2001) of the Parliamentary Assembly of the Council of Europe on the non-expulsion of long-term immigrants), and it finds that they cannot realistically be expected to do so.

48. The principal element which strikes the Court in the present case, however, is the fact that the applicants' marriage was deemed to have permanently broken down when the couple had merely ceased cohabiting for some six months in 1995/1996 and despite them making it clear to the authorities of the respondent State that cohabitation had been resumed and that there was no question of their marriage having broken down. Dutch law did not permit the first applicant's residence permit to be revoked or an exclusion order to be imposed at the time of his conviction, since he had held a strong residence status at that time (see Yılmaz v. Germany, no. 52853/99, § 48, 17 April 2003). Yet by ruling – four years after that conviction (paragraph 44 above) and notwithstanding the fact that a child had been conceived during the time the spouses were not living together – that the marriage had permanently broken down, the authorities were able to conclude that the first applicant had lost his indefinite right to remain and, subsequently, to refuse him continued residence on the basis of the criminal conviction. By that time the first applicant had served his sentence and, as illustrated by the fact that he obtained gainful employment and that a second child was born to him and his wife, had begun rebuilding his life

49. It is true that, in theory at least, the first applicant is entitled to make occasional visits to the Netherlands, due to the fact that the exclusion order that was initially imposed on him was ultimately withdrawn without having been enforced (paragraph 20 above). However, in this context the Court notes that the present case does not concern a divorced father with an access arrangement, but a functioning family unit where the parents and children are living together. The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 of the Convention and that to split up a family is an interference of a very serious order (see Mehemi v. France (no. 2), no. 53470/99, § 45, ECHR 2003-IV). Having regard to its finding at paragraph 47 above that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family

being split up therefore remains the same as long as the first applicant continues to be denied the right to reside in the Netherlands. In this context the Court notes the Government's submission that the first applicant's criminal record would normally militate against a new residence permit being issued to him for a period of ten years. Although they also argued that Article 8 of the Convention would be taken into account in assessing whether his conviction would still be held against him, the Government failed to indicate when, and under what conditions, such an assessment would lead to a positive decision being taken on any future request for a residence permit being lodged by the first applicant.

50. In conclusion, the Court is of the opinion that, in the particular circumstances of the present case, the respondent State failed to strike a fair balance between the applicants' interests on the one hand and its own interest in preventing disorder or crime on the other. There has, accordingly, been a violation of Article 8 of the Convention."

I sagen *Amrollahi v. Denmark (2002)* var klageren, en statsborger fra Iran, der var indrejst i opholdslandet i en alder af 23 år, i byretten blevet idømt fængselsstraf for narkotikakriminalitet og udvist for bestandig. Klageren havde på daværende tidspunkt opholdt sig i Danmark i otte år og havde fire år forinden indledt et forhold til en dansk statsborger, som han blev gift med under sin afsoning. Parret fik to børn, som på tidspunktet for EMD´s behandling af sagen var henholdsvis et og seks år gamle. Klagerens ægtefælle havde tillige et mindreårigt særbarn fra et tidligere forhold, der boede hos parret.

EMD gennemgik arten og alvoren af kriminaliteten, der var blevet begået i præmis 36-37 samt tilknytningen til hans hjemland i præmis 38.

EMD udtalte i præmis 39-44, at:

"39. As to the applicant's ties with Denmark, these are mainly connected with his wife, children and stepdaughter, who are all Danish citizens. The applicant and A got married in September 1997, one week before his conviction by the City Court. However, noting that their relationship commenced in 1992 and that they had their first child in October 1996 the Court has no doubt as to the "effectiveness" of the couple's family life and it considers that the applicant must be considered to have strong ties with Denmark.

40. The Court has next examined the possibility of the applicant, his wife and his children establishing family life elsewhere. The Court has considered, first, whether the applicant and his wife and their children could live together in Iran.

41. The applicant's wife, A, is a Danish national. She has never been to Iran, she does not know Farsi and she is not a Muslim. Besides being married to an Iranian man, she has no ties with the country. In these circumstances the Court accepts even if it is not impossible for the spouse and the applicant's children to live in Iran that it would, nevertheless, cause them obvious and serious difficulties. In addition, the Court recalls that A's daughter from a previous relationship, who has lived with A since her birth in 1989, refuses to move to Iran. Taking this fact into account as well, A cannot, in the Court's opinion, be expected to follow the applicant to Iran.

42. The question of establishing family life elsewhere must also be examined. In this connection the Court notes that during the period from April 1987 until August 1989 the applicant stayed in Turkey and Greece

respectively. Nevertheless, the applicant was apparently residing there illegally and it has not been established that he or A has any attachment to either of those countries. In the Court's opinion there is therefore no indication that both spouses can obtain authorisation to reside lawfully in either of the said countries or in any other country but Iran.

43. Accordingly, as a consequence of the applicant's permanent exclusion from Denmark the family will be separated, since it is de facto impossible for them to continue their family life outside Denmark.

44. In the light of the above elements, the Court considers that the expulsion of the applicant to Iran would be disproportionate to the aims pursued. The implementation of the expulsion would accordingly be in breach of Article 8 of the Convention."

I sagen *Bajsultanov v. Austria (2012)* var klageren meddelt asyl i opholdslandet. Han blev idømt i alt 20 måneders fængsel for bl.a. flere tilfælde af vold samt udvist. EMD fastsatte længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen. Klagerens ægtefælle var meddelt asyl afledt af klagerens forhold og de havde to børn, der på tidspunktet for EMD's behandling af sagen var otte og fem år.

Efter i præmis 79-82 at have konstateret, at udvisningen af klageren udgjorde et indgreb i hans ret til respekt for familieliv, og at dette indgreb var i overensstemmelse med loven og forfulgte et af de legitime hensyn, gennemgik EMD i præmis 83 de generelle principper, som indgår i afvejningen af, om indgrebet var nødvendigt i et demokratisk samfund, jf. kriterierne som sammenfattet i Boultif- og Üner-dommene.

Om karakteren og alvorligheden af den begåede kriminalitet udtalte EMD i præmis 84:

"Turning to the first set of criteria relating to the criminal offences committed by the applicant, the Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks' imprisonment, suspended with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions."

EMD udtalte i præmis 85-92, at:

"85. As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there.

86. On the other hand, the applicant lived in Chechnya for almost twenty-three years, went to school there and subsequently worked occasionally in different jobs. The applicant's parents and siblings still live in Chechnya, and the applicant has maintained regular contact with his father.

87. The Court therefore considers, in line with the Austrian authorities, that the applicant still has stronger social and cultural ties to his country of origin than to his host country.

88. As regards the applicant's family ties the Court notes that the applicant and his wife are Russian nationals, who arrived in Austria together in July 2003. The couple have two children, who were both born in Austria but who are also Russian nationals. The family lived together, apart from when the applicant was in prison, during which time however, the applicant's wife visited him regularly. After his release from prison the applicant went back to live with his family.

89. The Court further notes that the applicant's wife and the children are recognised refugees in Austria, with asylum status which has been awarded to them in separate decisions. However, the Court acknowledges that at the time the applicant's wife was considered to be at risk of persecution in Chechnya due to her husband being at risk. The applicant's wife herself never claimed a risk of ill-treatment because of her own conduct or her own role in any of the armed conflicts. Consequently, in view of the Court's finding with regard to the applicant's complaint under Article 3 of the Convention above, the applicant's wife can also not be considered as being at a real risk of being subjected to treatment contrary to Article 3 of the Convention if she returned to Chechnya.

90. The applicant's wife was born in Grozny and spent all her life in Chechnya until she left for Austria with her husband. The couple's children are still of an adaptable age (see Darren Omoregie and Others, cited above, § 66). The applicant's wife, who has resident status in Austria for herself and the children based on their asylum status, might have a considerable interest in not returning to Chechnya. But although the Court does not underestimate the difficulties of a relocation of the family, there is no indication that there are any insurmountable obstacles in the way of the applicant's wife and the children following the applicant to Chechnya and developing a family life there (see Gül v. Switzerland, 19 February 1996, § 42, Reports 1996-I, and Darren Omoregie and Others, cited above, ibid.).

91. Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før

klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

EMD udtalte i præmis 44-55, at:

"44. The Court observes that the applicant was, in 2003, convicted for embezzlement, committed in September 2000, and given a suspended sentence of three months' imprisonment. More importantly, he was convicted, in 2004, for homicide with indirect intent and serious violations of the rules of road traffic, committed while he was engaged in a car race with an acquaintance. The Court considers that the offence was characterised by a high degree of recklessness and that expert reports could not entirely exclude the possibility that the applicant would engage in a car race again, despite his maturation process. The Court takes into account that the prison sentence of five years and three months bears testimony to the severity of the offence. It is not convinced by the applicant's submission that the domestic courts were of the opinion that the offence and his guilt were not severe by sentencing him to five years and three months' imprisonment while the maximum penalty possible for homicide was twenty years' imprisonment, noting that the range of penalties for homicide also applied to homicide committed with direct intent.
45. As regards the length of the applicant's stay in Switzerland, the Court observes that he arrived in Switzerland in 1989 at the age of nine and lived in Switzerland for more than twenty years. His stay in Switzerland was, thus, of a considerable length of time.

46. With regard to the time elapsed since the offence was committed and the applicant's conduct during that period, the Court notes that he committed both the embezzlement and the homicide in 2000, even though he was only convicted for those offences in 2003 and 2004, respectively. Noting that the applicant commenced the service of his prison sentence only in 2006, six years after the commission of the offence and that he was released on parole in October 2009 after having served two thirds of his sentence, the Court observes that he has, apart from a fine in the amount of 120 CHF for the purchase and consumption of marihuana in 2007, not reoffended after his criminal conviction.

47. The Court notes that the expulsion order was served in July 2009, shortly before the applicant's release on parole. It became final in July 2010, following the exhaustion of remedies against it. Observing that roughly ten years passed between the commission of the offence and the conclusion of the court proceedings concerning the applicant's expulsion, the Court considers that this considerable length of time cannot be imputed to the respondent State, for the applicant commenced serving his prison sentence only in 2006, following the exhaustion of remedies against his criminal conviction, and his expulsion was not possible before he had served at least two thirds of his sentence, in 2009. Therefore, the Court finds that the proceedings were conducted with reasonable expedition.

48. As regards the applicant's family situation, he has been married to his wife since 1999 and it has, explicitly, not been contested by the respondent Government that real and effective family existed between the applicant, his wife and their two children. It has to be noted that the applicant's wife could not know about the offences at issue at the time when she entered into a family relationship with the applicant, as the couple

married in 1999 and thus prior to the commission of the offences in 2000. It has to be noted that the applicant, with the exception of the purchase and consumption of marihuana, for which he was fined in 2007, committed the criminal offences prior to the birth of his children.

49. The Court observes that the applicant's wife is a national of 'the former Yugoslav Republic of Macedonia', i.e. of the country to which the applicant was expelled. The applicant's wife, who was born in 1978, lived there until 1990 and knows Albanian and the country's culture. She has relatives there and visits the country every year. The domestic courts considered that she could reintegrate in 'the former Yugoslav Republic of Macedonia' without encountering serious difficulties, despite having lived in Switzerland for the past twenty years. The Court notes that the applicant's wife chose to follow him to Macedonia in 2011 and lived with him there until 2015, despite the fact that she could have remained in Switzerland as a holder of a permanent residence permit and maintained contact with the applicant through visits and means of telecommunication.

50. The Court observes that the couple's children, born in 2001 and in 2005, are likewise the nationals of "the former Yugoslav Republic of Macedonia". At the time the expulsion order became binding, the elder child was in primary school, whereas the younger one was in kindergarten. They were, thus, still of an adaptable age. While the Court accepts that the economic living conditions in "the former Yugoslav Republic of Macedonia" are less favourable than in Switzerland, it also notes that the former is a Contracting State of the Council of Europe. It further accepts that the children knew the country's culture to a certain extent due to visits they had made together with their mother. While it is not clear to what extent the children knew Albanian, it does not appear arbitrary to accept that the presence of their parents, who both originate from the country, as well as further relatives from their mother's side, would alleviate their difficulties in integrating in "the former Yugoslav Republic of Macedonia". Moreover, it has to be noted that the children were not forced to move there, but could have remained in Switzerland with their mother as holders of permanent residence permits and maintained contact with the applicant through visits and means of telecommunication.

51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'.

53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26

above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 toavoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

5.2.2.4.2. Mindre alvorlig kriminalitet

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis fem og seks måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden.

EMD gennemgik i præmis 57 Boultif-kriterierne og udtalte i præmis 58:

"In addition, the Court will also take into account the particular ties which these immigrants have developed with the host country where they will have spent most of their life (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, § 36; Radovanovic, cited above, § 33; Üner, cited above, § 40)"

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som f.eks. narkotikahandel.

EMD udtalte i præmis 61-66, at:

"61. With regard to the applicant's personal and family situation, the Court notes that the applicant, at the time of the expulsion order of 22 January 1999, had been lawfully residing in Germany for 27 years, having moved to that country at the age of ten in order to live there with his parents and brother and where he received his secondary school education. While the parties do not agree on the extent of the applicant's professional work, he had been employed for a certain period of that time. Since 1988 he had been in possession of a permanent residence permit. While it is true that the applicant and his wife had been separated during the first five years of their marriage as the applicant's wife and their first son did not follow the applicant to Germany until 1989, the family had been living together in Germany for ten years and there is no indication that their marriage and family life was anything less than effective.

62. On the other hand, the Court is not persuaded that the applicant has become so estranged from the country where he spent the first ten years of his life that he would no longer be able to settle in Turkey, having regard to the fact that the applicant married his Turkish wife in Turkey, where their first son was born and that his wife and son did not follow him to Germany until 1989. It follows that the applicant must have entertained certain links to his country of origin at least until 1989. It can further be presumed that the applicant is familiar with the Turkish language, as he married a Turkish wife.

63. With regard to the question of whether the applicant's family could reasonably be expected to follow the applicant to Turkey, the Court notes that the applicant's wife and four children are Turkish nationals. As the applicant's wife entered German territory as an adult and ten years before the issue of the expulsion order, it can be assumed that she has sufficient links which would allow her to re-integrate into Turkish society.

64. The Court notes, however, that the applicant's four sons – who were, at the time the expulsion order had been issued, between six and thirteen years of age – had been born in Germany respectively entered Germany at a very young age where they received all their school education. Even if the children should have knowledge of the Turkish language, they would necessarily have to face major difficulties with regard to the different language of instruction and the different curriculum in Turkish schools.

65. The Court finally notes that the expulsion order has been issued without setting a time-limit to the applicant's exclusion from the German territory. As pointed out by the Government, the domestic authorities, pursuant to section 8 § 2 of the Alien's Act, will generally set a time-limit to the exclusion from German territory upon the alien's request (*see also Yilmaz, cited above, § 47). However, while the applicant has filed such requests in 2002 and 2003, no decision has yet been given, the reasons for which being in dispute between the parties.*

66. The Court considers that the applicant's expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant's children could be expected to face if they followed him to Turkey, the Court considers that an unlimited exclusion from the German territory violates the applicant's rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention."

I sagen *Yildiz v. Austria (2002)* var den første klager indrejst i opholdslandet som 14-årig for at bo sammen med sine forældre og sine søskende. Han indledte et forhold til den anden klager, som var statsborger i den første klagers hjemland, men født og opvokset i opholdslandet. Nogle måneder senere traf opholdslandet afgørelse om udvisning af den første klager med indrejseforbud i fem år på baggrund af flere bødestraffe for tyveri og færdselslovsovertrædelser. Da udvisningsafgørelsen blev endelig, havde klagerne sammen fået et barn, den tredje klager. Klageren udrejste til hjemlandet, da barnet var knap to år gammelt. På tidspunktet for EMD's behandling af sagen boede han fortsat i hjemlandet. Den anden og tredje klager besøgte ham jævnligt, indtil parret blev skilt.

EMD udtalte i præmis 43-46, at:

"43. The Court will first examine the applicants' family situation and the length of their stay in Austria. It observes that the first applicant is not a second generation immigrant, i.e. a person who was born or has lived the main part of his life in the country from which he is going to be removed. He only came to Austria in 1989 at the age of fourteen and must therefore have links with his country of origin and in particular be able to speak Turkish. On the other hand, he was still an adolescent when he came to Austria, where his close family was and is still living. In December 1996, when the Administrative Court confirmed the residence ban against him, he had been living in Austria for seven years, he had been working there and had been co-habiting for a little less than three years with the second applicant, who is also a Turkish national but was born in Austria and has lived there all her life. Their daughter, the third applicant, was one year and four months old at the material time. In fact, the Austrian authorities issuing the residence ban acknowledged that the first applicant had reached a high degree of integration in Austria. Nevertheless, the Court considers that, as regards the possible effects of the residence ban on his family life, the authorities failed to establish whether the second applicant could be expected to follow him to Turkey, in particular whether she spoke Turkish and maintained any links, other than her nationality, with that country.

44. It is true that, meanwhile, the applicants' family situation has changed. The first and second applicant divorced in March 2001 and, while the second applicant is residing in Austria, the first applicant lives in Turkey. The third applicant is currently staying with relatives in Turkey although the second applicant, who has sole custody over the child, asserts that she intends to bring her back to Austria. However, the Court has to make its assessment in the light of the position when the residence ban became final (see paragraph 34 above). Its task is to state whether or not the domestic authorities complied with their obligation to respect the applicants' family life at that particular moment and it cannot have regard to circumstances which only came into being after the authorities took their decision. Nor can it be the Court's role to speculate as to whether there is – as claimed by the applicants – a causal link between the contested measure and the subsequent developments, in particular the first and second applicants' divorce.

45. Next, the Court will turn to the offences committed by the first applicant, as their gravity is an essential element for assessing the proportionality of the interference with the applicants' family life. The Court notes that in 1993 the first applicant, who was then still a minor, was convicted twice by the criminal courts, once for shop-lifting with a sentence of three days' imprisonment suspended on probation, and once for theft without a sentence being pronounced. Between 1992 and April 1994 he was convicted seven times of traffic offences, in particular driving without a license and once ignoring a red light and high speeding. The fines imposed on him amounted to a total sum of ATS 28,000 (equivalent to EUR 2,035). In sum, the Court finds that

these offences were not negligible. However, as is shown by the modest penalties imposed, the domestic authorities considered them to be of a minor nature. Moreover, the first applicant did not commit any further offences between April 1994 and December 1996, when the residence ban proceedings were terminated. Thus, in the Court's view the authorities' fear that he constituted a danger to public order and security in that would commit further offences is mitigated by the particular circumstances of the case (see Boultif v. Switzerland, cited above, § 51, with further references).

46. Having regard to all these elements, the Court considers that the authorities failed to strike a fair balance between the different interests involved and that the interference with the applicants' right to respect for their family life was not proportionate to the legitimate aim pursued. Accordingly, there has been a breach of Article 8 of the Convention."

5.2.2.4.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Antwi and others v. Norway (2012)* havde klageren ligeledes opnået sin opholdstilladelse på baggrund af svig. Klageren var i opholdslandet blevet gift og havde fået et barn. Syv år efter indrejsen fik opholdslandet kendskab til hans reelle identitet og året efter blev han udvist fra opholdslandet.

EMD udtalte i præmis 90-105:

"90. In applying the above principles [fra Nunez-dommen, red.] to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Nunez, cited above, § 71, and Darren Omoregie and Others v. Norway, no. 265/07, § 67, 31 July 2008; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Nunez and Darren Omoregie and Others, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Nunez, cited above, § 73).

91. Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country.

92. Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country.

93. Like the first applicant, the second applicant had grown up in Ghana. There she had lived until the age of seventeen when she was reunited with her father and siblings in Norway. Although she had become a Norwegian citizen and had family ties and employment links to Norway and probably would experience some difficulties in resettling in Ghana, there does not seem to be any particular obstacle preventing her from accompanying the first applicant to their country of origin. The Court has also taken note of her claim that, although aware that the first applicant originally had a Ghanaian background and had obtained a Ghanaian passport in connection with their marriage in Ghana on 11 February 2005, she should only have become aware of his true identity in this context. However, the above-mentioned factors cannot in the Court's view outweigh the public interest in sanctioning the first applicant's aggravated offences against the immigration rules with the impugned measure.

94. As to the third applicant, the Court notes that she is a Norwegian national who since birth has spent her entire life in Norway, is fully integrated into Norwegian society and, according to the material submitted to the Court, speaks Norwegian with her parents at home. In comparison, her direct links to Ghana are very limited, having visited the country three times (see paragraph 44 above) and having little knowledge of the languages practiced there.

95. Furthermore, as a result of the first applicant no longer holding a work permit and staying full-time at home and of the second applicant's being particularly occupied by her work, the first applicant assumes an important role in the third applicant's daily care and up-bringing. He is the parent who follows up her homework and parental contacts with her school and who facilitates her participation in sport activities. She is also at an age, ten years, when this kind of support would be valuable and she is strongly attached to her father as she is to her mother.

96. It would most probably be difficult for her to adapt to life in Ghana, were she and her mother to accompany the father to Ghana, and to readapt to Norwegian life later.

97. Against this background, the Court shares the High Court's view that the implementation of the expulsion order would not be beneficial to her.

98. However, the Court sees no reason to call into doubt the High Court's findings to the effect that, both parents having been born and brought up in Ghana and having visited the country three times with their daughter, there were no insurmountable obstacles in the way of the applicants settling together in Ghana or, at the least, to maintaining regular contacts. As to the allegation that the third applicant's rashes had been aggravated by heat during her previous stays in Ghana, the High Court majority found that this had not been sufficiently documented and could not be relied upon. The minority agreed that the evidence submitted in support of this contention had been weak and observed that the information appeared to have originated from the first and the second applicants. In the proceedings before the Court, the applicants submitted no further evidence in support of this argument or placed emphasis on it.

99. As also observed by the High Court, it does not emerge that the third applicant had any special care needs or that her mother would be unable to provide satisfactory care on her own.

100. Moreover, the Court considers that there are certain fundamental differences between the present case and that of Nunez where it found that the impugned expulsion of an applicant mother would give rise to a violation of Article 8 of the Convention. In reaching this finding, the Court attached decisive weight to the exceptional circumstances pertaining to the applicant's children in that case, which were recapitulated in the following terms in its judgment (cited above, § 84): "Having regard to all of the above considerations, notably the children's long lasting and close bonds to their mother, the decision in the custody proceedings [to move the children to the father], the disruption and stress that the children had already experienced and the long period that elapsed before the immigration authorities took their decision to order the applicant's expulsion with a re-entry ban, the Court is not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention."

101. Unlike what had been the situation of the children of Mrs Nunez, the third applicant had not been made vulnerable by previous disruptions and distress in her care situation (compare Nunez, cited above, §§ 79 to 81).

102. Also, the duration of the immigration authorities' processing of the matter was not so long as to give reason to question whether the impugned measure fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures (compare Nunez, cited above, § 82). On the contrary, in October 2005, only a few months after the discovery of the first applicant's fraud in July 2005, he was put on notice that he might be expelled from Norway. In May 2006 the Directorate ordered his expulsion and prohibition on re-entry and gave him until 24 July 2006 to leave the country.

103. There being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion.

104. The above considerations are not altered by the duration of the prohibition on re-entry – five years. In this connection, the Court reiterates that in a comparable case, Darren Omoregie (cited above, §§ 63-68), it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case.

105. In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand.

Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban would not entail a violation of Article 8 of the Convention."

5.2.2.4.4. Ulovligt ophold

I sagen *Darren Omoregie a.o. v. Norway (2008)* var klageren indrejst som 22-årig og havde fået afslag på asyl, men undlod at efterkomme udrejsebeslutningen og arbejdede endvidere ulovligt i opholdslandet. Nogle måneder senere giftede han sig med en statsborger fra opholdslandet og søgte om familiesammenføring, hvilket blev afslået, og klageren blev på ny pålagt at udrejse, hvilket han ikke efterkom. Der blev endvidere truffet afgørelse om at udvise klageren med indrejseforbud i fem år med mulighed for genindrejse efter ansøgning allerede efter to år. Under domstolsbehandlingen af udvisningsafgørelsen blev klagerens ægtefælle gravid med deres fælles barn, som blev født fem år efter klagerens indrejse. Klageren fik på ny afslag på familiesammenføring og efter fem et halvt års ophold blev han udsendt.

I præmis 59-64 udtalte EMD, at:

"59. The first and second applicants met in October 2001 and started cohabiting in March 2002. Already from the beginning of their relationship it must have been clear to them both that their prospects of being able to settle as a couple in Norway were precarious. The first applicant's asylum request was rejected, first by the Directorate of Immigration on 22 May 2002, and then by the Immigration Appeals Board on 11 September 2002, giving him until 30 September 2002 to leave the country. No judicial appeal was lodged against these decisions, which became final. Nevertheless, the first applicant opted to evade his duty to leave and stayed in Norway unlawfully.

60. On 2 February 2003, while the first applicant was staying illegally in Norway, he got married to the second applicant. Because of his lack of residence status the marriage had not been contracted in accordance with domestic law, though this shortcoming did not deprive the marriage of its validity.

61. In the Court's view, at no stage prior to their marriage on 2 February 2003 could the first and the second applicants have reasonably held any expectation that he would be granted leave to remain in Norway.

62. This state of affairs was not changed, but was confirmed rather, by the developments in the case in the ensuing period. On 14 February 2003 the first applicant made a new request on the ground of family reunification with the second applicant, but again his request was rejected and he was ordered to leave the country, in a decision of 26 April 2003, notified to him on 7 May 2003. Therefore the applicant could not reasonably expect a right to reside in Norway based on these proceedings.

63. Moreover, on account of the first applicant's unlawful stay in Norway for four months and a half from September 2002 to February 2003 and for his having worked there unlawfully without a work permit for nine months from September 2002 to July 2003, the Directorate of Immigration decided on 26 August 2003 firstly that he should be expelled pursuant to section 29(1)(a) of the Immigration Act and secondly be prohibited to reenter Norway for five years (with a possibility of re-entry on applicationnormally after two years). To the Court's understanding, the first part of the decision represented hardly anything new but was rather a re-

newed response to the first applicant's failure to comply with previous orders to leave the country. The decision of 26 August 2003 was upheld by the Immigration Appeals Board on 21 July 2004 and by the appellate courts respectively on 27 February and 14 June 2006. At each level (including the City Court which held in his favour on 15 February 2005) it was found established that the basic condition for expelling the first applicant – that he had seriously or repeatedly violated the Immigration Act or had defied implementation of the decision that he should leave the country – had been fulfilled. It is true that the City Court found the measure disproportionate but that finding was not final and was overturned by the High Court and leave to appeal was refused by the Appeals Leave Committee of the Supreme Court.

64. Against this background the Court does not consider that the first and second applicants, by confronting the Norwegian authorities with the first applicant's presence in the country as a fait accompli, were entitled to expect that any right of residence would be conferred upon him (see Roslina Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003; Yash Priya v. Denmark (dec.) 13594/03; 6 July 2006; cf. Rodrigues da Silva and Hoogkamer, cited above, § 43)."

Om tilknytningen til henholdsvis klagerens hjemland og opholdsland samt om indrejseforbuddets varighed udtalte EMD i præmis 66-68, at:

"66. It should further be noted that the first applicant had lived in Nigeria since he was six months old until he left the country at the age of 22, had studied at university for four years and had three brothers with whom he was still in contact. Whereas his links to Nigeria were particularly strong, his links to Norway were comparatively weak, apart from the family bounds he had formed there with the second and third applicants pending the proceedings. The third applicant was still of an adaptable age at the time when the disputed measures were decided and implemented (see Ajayi and Others, cited above; Sarumi, cited above; and Sezai Demir c. France (dec.), no. 33736/03, 30 May 2006). The second applicant would probably experience some difficulties and inconveniences in settling in Nigeria, despite her experience from a period spent in another African country, South Africa, and the fact that English was also the official language of Nigeria. However, the Court does not find that there were insurmountable obstacles in the way of the applicants' developing family life in the first applicant's country of origin. In any event, nothing should prevent the second and third applicants from coming to visit the first applicant for periods in Nigeria.

67. Finally, the Court notes that the decision prohibiting the first applicant re-entry for five years was imposed as an administrative sanction, the purpose of which was to ensure that resilient immigrants do not undermine the effective implementation of rules on immigration control. Moreover, it was open to the first applicant to apply for re-entry already after two years.

68. Against this background, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed their margin of appreciation when deciding to expel the first applicant and to prohibit his re-entry for five years. The Court is not only satisfied that the impugned interference was supported by relevant and sufficient reasons but also that in reaching the disputed decision the domestic authorities struck a fair balance between the personal interests of the applicants on the one hand and the public interest in ensuring an effective implementation of immigration control on the other hand. In view of the first applicant's immigration status, the present case disclosed no exceptional circumstances requiring the respondent State to grant him a right of residence in Norway so as to enable the applicants to maintain and

develop family life in that country. In sum, the Court finds that the national authorities could reasonably consider that the interference was "necessary" within the meaning of Article 8 § 2 of the Convention.

Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Jeunesse v. the Netherlands (2014)* var klageren indrejst i opholdslandet på et visum fra en tidligere hollandsk koloni og havde giftet sig med en statsborger i opholdslandet. Hun blev i landet efter udløbet af sit visum og fik med sin ægtefælle tre børn, som alle var statsborgere i opholdslandet. Klageren søgte flere gange om opholdstilladelse, hvilket hver gang blev afslået, da klageren som udgangspunkt skulle søge fra hjemlandet. Efter 16 års ophold blev klageren forsøgt udsendt fra opholdslandet under henvisning til, at hun ikke havde et lovligt opholdsgrundlag. Børnene var på tidspunktet for Storkammerets afgørelse 14, knap ni og knap fire år.

EMD udtalte i præmis 105, at:

"As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – albeit in the applicant's case after numerous applications for a residence permit and many years of actual residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 cannot be transposed automatically to the situation of the applicant. Rather, the question to be examined in the present case is whether, having regard to the circumstances as a whole, the Netherlands authorities were under a duty pursuant to Article 8 to grant her a residence permit, thus enabling her to exercise family life on their territory. The instant case thus concerns not only family life but also immigration. For this reason, the case at hand is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation under Article 8 of the Convention (see Ahmut v. the Netherlands, 28 November 1996, § 63, Reports of Judgments and Decisions 1996-VI). As regards this issue, the Court will have regard to the following principles as stated most recently in the case of Butt v. Norway (no. 47017/09, § 78 with further references, 4 December 2012)."

EMD udtalte i præmis 115-123, at:

"115. The Court first and foremost takes into consideration the fact that all members of the applicant's family with the exception of herself are Netherlands nationals and that the applicant's spouse and their three children have a right to enjoy their family life with each other in the Netherlands. The Court further notes that the applicant held Netherlands nationality at birth. She subsequently lost her nationality when Suriname became independent. She then became a Surinamese national, not by her own choice but pursuant to Article 3 of the Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality (see paragraph 62 above). Consequently, her position cannot be simply considered to be on a par with that of other potential immigrants who have never held Netherlands nationality.

116. The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for more than sixteen years and that she has no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Netherlands authorities, while she repeatedly submitted residence requests and

awaited the outcome of appeals. The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities.

117. Thirdly, the Court accepts, given the common background of the applicant and her husband and the relatively young age of their children, that there would appear to be no insurmountable obstacles for them to settle in Suriname. However, it is likely that the applicant and her family would experience a degree of hardship if they were forced to do so. When assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family.

118. The Court fourthly considers that the impact of the Netherlands authorities' decision on the applicant's three children is another important feature of this case. The Court observes that the best interests of the applicant's children must be taken into account in this balancing exercise (see above § 109). On this particular point, the Court reiterates 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 (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. For that purpose, in cases concerning family reunification, the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents (see Tuquabo-Tekle and Others v. the Netherlands, cited above, § 44).

119. Noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation. In this connection, the Court observes that the applicant's husband provides for the family by working full-time in a job that includes shift work. He is, consequently, absent from the home on some evenings. The applicant – being the mother and homemaker – is the primary and constant carer of the children who are deeply rooted in the Netherlands of which country – like their father – they are nationals. The materials in the case file do not disclose a direct link between the applicant's children and Suriname, a country where they have never been.

120. In examining whether there were insurmountable obstacles for the applicant and her family to settle in Suriname, the domestic authorities had some regard for the situation of the applicant's children (see paragraphs 23 (under 2.19 and 2.21), 28 and 34 (under 2.4.5) above). However, the Court considers that they fell short of what is required in such cases and it reiterates that national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any such removal in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (see above § 109). The Court is not convinced that actual evidence on such matters was considered and assessed by the domestic authorities. Accordingly, it must conclude that insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit.

121. The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. 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.

122. The Court, whilst confirming the relevant principles set out above (see paragraphs 106-109), finds that, on the basis of the above considerations (see paragraphs 115-120) and viewing the relevant factors cumulatively, the circumstances of the applicant's case must be regarded as exceptional. Accordingly, the Court concludes that a fair balance has not been struck between the competing interests involved. There has thus been a failure by the Netherlands authorities to secure the applicant's right to respect for her family life as protected by Article 8 of the Convention.

123. There has accordingly been a violation of Article 8 of the Convention."

5.2.2.4.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

Sagen *Hasanbasic v. Switzerland (2013)* omhandlede en klager, hvis opholdstilladelse blev annulleret af de nationale myndigheder i opholdslandet, idet klageren over for disse myndigheder havde tilkendegivet, at han ville rejse tilbage til sit hjemland med henblik på permanent at bosætte sig der. Klageren genindrejste dog fire måneder senere i opholdslandet, hvorefter hans ægtefælle, som stadig opholdt sig i opholdslandet, indgav en ansøgning om ny opholdstilladelse på baggrund af familiesammenføring.

EMD har kategoriseret sagen *som refusal to renew residence visa*, hvorfor den er medtaget under dette punkt.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor det komplette *legal summary* er indsat i afnit 5.2.2.1.5. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

Vedrørende vurderingen af, om der med opholdslandets afvisning af at forny klagerens opholdstilladelse var sket indgreb i en af artikel 8 beskyttet rettighed, udtalte EMD i præmis 49 (uofficiel dansk oversættelse):

"Med hensyn til sagens omstændigheder vurderer Domstolen på grund af klagernes langvarige ophold i Schweiz, at afvisningen af at forny klagerens opholdstilladelse udgør et indgreb i retten til respekt for klagers "privatliv" (jf., mutatis mutandis, Gezginci mod Schweiz, nr. 16327/05, præmis 57, 9. december 2010). Såfremt denne afvisning kan medføre adskillelse fra klagers hustru samt fra deres fællesbørn, der bor i Schweiz og alle har opholdstilladelse i landet, vurderer Domstolen, at klagerne ligeledes har været udsat for et indgreb i deres ret til "familieliv"."

Efter i præmis 51 og 52 at have fastslået, at indgrebet var i overensstemmelse med loven og forfulgte et eller flere af de legitime hensyn, gennemgik EMD i præmis 53-56 de generelle principper, som var relevante i den konkrete sag for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund.

I præmis 57-63 udtalte EMD om anvendelsen af disse principper i den konkrete sag (uofficiel dansk oversættelse):

"57. Domstolen bemærker indledningsvist, at de to klagere længe har boet lovligt i Schweiz. Den mandlige klager ankom til Schweiz i 1986, den kvindelige klager ankom allerede i 1969. Varigheden af deres ophold udgør således på det tidspunkt, hvor Forbundsdomstolen afsagde sin dom i 2009, henholdsvis 23 og 40 år. Den kvindelige klager har endvidere haft en etableringstilladelse i Schweiz siden 1979, og dermed en tilladelse af en mere stabil karakter end en almindelig opholdstilladelse. Det er i øvrigt ikke bestridt, at Schweiz i en lang periode har været centrum for klagernes privat- og familieliv.

Domstolen konstaterer ligeledes, at klagerne har opholdt sig uafbrudt i Schweiz, bortset fra i en periode på fire måneder fra mellem august og december 2004, efter at de nationale myndigheder havde afvist den kvindelige klagers anmodning om familiesammenføring (ovenstående præmis 14). Den foreliggende sag adskiller sig på dette punkt væsentligt fra sagen Gezginci (nævnt ovenfor, præmis 69 og 70), hvori klager gentagne gange tog til udlandet i længerevarende perioder.

Domstolen vurderer under disse omstændigheder, at det tilkommer de nationale myndigheder på en overbevisende måde og ved hjælp af relevante og tilstrækkelige årsager at bevise, at der eksisterer et samfundsmæssigt bydende nødvendigt behov for at udvise den pågældende person, og navnlig, at denne foranstaltning står i forhold til det forfulgte legitime mål.

58. Med hensyn til først den mandlige klagers lovstridige adfærd henviser Domstolen til, at klager flere gange mellem 1995 og 2002 er dømt, herunder idømt bøder, der ikke overstiger beløb på 400 CHF, og en fængselsdom på 17 dage (i alt) for overtrædelse af færdselsloven og for krænkelse af husfreden. Domstolen bemærker, lige som klagerne, at disse forseelser ikke vejer tungt, og den konkluderer heraf, at det vil være passende at vurdere forseelserne ud fra en retfærdig afvejning. Domstolen finder det i øvrigt vigtigt, at klager ikke har begået nye forseelser siden 2002. Henset til ovenstående kan klager ikke anses for at udgøre en fare eller trussel for sikkerheden eller den schweiziske offentlige orden.

59. Det, der forekommer at have spillet en væsentlig rolle i de nationale instansers afvejning af interesserne, er opbygningen af den store gæld samt de betydelige beløb, som klagerne har modtaget i offentlig bistand fra 1994 til 2001 samt fra 2003 til 2008 (jf., mutatis mutandis, Gezginci, nævnt ovenfor, præmis 73). Det samlede beløb udgør 333.000 CHF (ca. 277.500 EUR). Idet der henvises til, at ophavsmændene til Konventionen udtrykkeligt har taget højde for landets økonomiske velvære som et legitimt mål for berettigelse af et indgreb i udøvelsen af retten til respekt for privat- og familielivet (jf. f.eks. Miailhe mod Frankrig (nr. 1), 25. februar 1993, præmis 33, serie A nr. 256-C; Hatton m.fl. mod Det Forenede Kongerige [Storkammeret], nr. 36022/97, præmis 121, EMD 2003-VIII; Mubilanzila Mayeka og Kaniki Mitunga mod Belgien, nr. 13178/03, præmis 79, EMD 2006-XI; Mengesha Kimfe mod Schweiz, nr. 24404/05, præmis 66, 29. juli 2010; Agraw mod Schweiz, nr. 3295/06, præmis 49, 29. juli 2010, og Orlić mod Kroatien, nr. 48833/07, præmis 62, 21. juni 2011), i modsætning til de rettigheder, der er beskyttet i medfør af Konventionens artikel 9-11, vurderer Domstolen,

at de schweiziske myndigheder kunne tage højde for klagernes gæld og afhængighed af offentlig bistand, såfremt denne afhængighed måtte have indflydelse på landets økonomiske velvære. Domstolen vurderer ikke desto mindre, at disse forhold kun udgør et aspekt blandt flere, som Domstolen skal tage højde for.

60. Med hensyn til de forskellige berørte personers nationalitet er de to klagere statsborgere fra Bosnien-Hercegovina. Domstolen henviser ligeledes til, at parret har to fællesbørn, der er født i 1982 og 1984, og som bor i Schweiz og har opholdstilladelse i dette land. Desuden bor ét af børnene, der er født i 1979 og stammer fra den mandlige klagers første ægteskab, ligeledes i Schweiz. Idet klagerne ikke over for Domstolen har påvist, at der mellem dem og børnene er supplerende afhængighedsforhold, ud over normale følelsesmæssige bånd, (Ezzouhdi mod Frankrig, nr. 47160/99, præmis 34, 13. februar 2001; og Kwakie-Nti og Dufie mod Nederlandene (dec.), nr. 31519/96, 7. november 2000), kan de naturligvis ikke påberåbe sig disse familieforhold med hensyn til artikel 8, idet børnene er voksne. Domstolen vurderer ikke desto mindre, at forholdene ikke er helt uden relevans for vurderingen af klagernes familiesituation.

61. Domstolen tager endvidere Regeringens argument til efterretning, ifølge hvilket klager, der ikke har indrejseforbud i Schweiz, regelmæssigt kan besøge sine børn og i givet fald sin hustru, hvis hun ikke følger med ham og bosætter sig i Bosnien-Hercegovina. Domstolen er i øvrigt underrettet om, at klager sporadisk kan rejse til Schweiz og opholde sig der i en periode på maksimalt tre måneder (ovenstående præmis 23). Domstolen vurderer i denne henseende, selv om de kompetente myndigheder måtte tage positivt imod sådanne anmodninger i fremtiden, at disse midlertidige foranstaltninger, der i givet fald måtte blive meddelt alene efter anmodning, under ingen omstændigheder ville kunne anses for at erstatte klagernes ret til at udøve rettigheden til at leve sammen, hvilket udgør ét af de grundlæggende aspekter ved retten til respekt for familielivet (jf., mutatis mutandis, dommene Agraw mod Schweiz, nr. 3295/06, præmis 51, og Mengesha Kimfe mod Schweiz, nr. 24404/05, præmis 69-72, begge af 29. juli 2010).

62. Et andet kriterium, der skal tages højde for i afvejningen af interesserne, er fastheden af de sociale, kulturelle og familiemæssige bånd med Schweiz og med Bosnien-Hercegovina. Forbundsdomstolen har selv i den foreliggende sag erkendt, at klagerne har et betydeligt socialt netværk i Schweiz, og at deres tilbagevenden til oprindelseslandet på grund af den betydelige varighed af deres ophold i Schweiz uden tvivl ville stille dem over for visse vanskeligheder (ovenstående præmis 20).

63. De schweiziske myndigheder har ganske vist ligeledes henvist til, at klagerne havde ladet et hus opføre i deres oprindelsesland, og at ét af børnene fra den mandlige klagers første ægteskab samt hans søster bor i oprindelseslandet. Domstolen tager ligeledes til efterretning, at den mandlige klager den 24. august 2003 havde meddelt de schweiziske myndigheder, at han definitivt ville vende tilbage til Bosnien-Hercegovina, hvilket er ét af de nationale myndigheders hovedargumenter for afvisning af en fornyelse af opholdstilladelsen. Domstolen vurderer, at dette argument skal bedømmes i lyset af de efterfølgende indtrufne forhold, dvs. efter Forbundsdomstolens dom af 6. marts 2009."

Herefter gennemgik EMD i præmis 64-65 betydningen af klagerens helbredsmæssige forhold og den risiko for en forværring heraf, en flytning til hjemlandet ville indebære.

EMD udtalte i præmis 66-67 (uofficiel dansk oversættelse):

"66. Domstolen vedgår henset til ovenstående, at landets økonomiske velfærd ganske vist kan tjene som et legitimt mål i forbindelse med en afvisning af at forny en opholdstilladelse. Denne årsag skal ikke desto mindre vurderes ud fra en retfærdig afvejning og i lyset af samtlige omstændigheder i sagen. Domstolen vurderer imidlertid ud fra den betydelige varighed af klagernes ophold i Schweiz og deres ubestridte sociale integration i landet, at den anfægtede foranstaltning ikke var berettiget ud fra et bydende nødvendigt samfundsmæssigt behov og ikke stod i forhold til de påberåbte legitime formål. Den indklagede stat har følgelig overskredet sin skønsmargen i den foreliggende sag.

67. Der er følgelig sket en krænkelse af Konventionens artikel 8."

5.2.2.4.6. Familiesammenføring til udlændinge, der har børn med lovligt ophold i opholdslandet

Der er ved gennemgangen af praksis ikke fundet domme, hvor EMD har taget stilling til betydningen af ægtefællens/samleverens/partnerens personlige, sociale og kulturelle tilknytning til opholdslandet eller klagerens hjemland i sager om familiesammenføring.

5.2.2.5. Karakteren og intensiteten af familielivet mellem klageren og dennes ægtefælle/samlever/partner

EMD har i flere sager taget stilling til betydningen af karakteren og intensiteten af forholdet mellem klageren og dennes ægtefælles/samlever/partner ved vurderingen af, om en udsendelse[36] af klageren vil indebære et indgreb i retten til familieliv, som ikke er proportionalt med det legitime hensyn.

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[9] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

5.2.2.5.1. Alvorlig kriminalitet

I sagen *Üner v. the Netherlands (2006)* blev klageren idømt syv års fængsel for drab og udvist for bestandig. Klageren var indrejst som 12-årig sammen med sin mor og sine søskende som familiesammenført til faren. På tidspunktet, hvor afgørelsen om udvisning blev endelig, havde han opholdt sig 17 år i opholdslandet og havde to mindreårige børn med sin nederlandske partner. Han var flyttet fra partneren efter halvandet års samliv, da det ældste barn var omkring ni måneder gammel, men forblev i tæt kontakt med partneren og

[36] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

barnet i de følgende omkring otte måneder indtil fængslingen. Partneren og det ældste barn besøgte klageren i fængslet mindst en gang om ugen og ofte hyppigere. Mens klageren var fængslet, fik parret endnu et barn, som klageren ligeledes så hver uge. Klageren havde på tidspunktet for EMD´s afgørelse opholdt sig 25 år i opholdslandet. Klagerens børn var henholdsvis seks år og halvandet år gamle på tidspunktet for den nationale afgørelse om udvisning.

EMD fastslog i præmis 61, at der forelå et indgreb både i klagerens ret til respekt for familieliv og hans ret til respekt for privatliv. EMD udtalte imidlertid:

"[...] Even so, having regard to the particular issues at stake in the present case and the positions taken by the parties, the Court will pay special attention to the applicant's right to respect for his family life."

EMD udtalte i præmis 62-65, at:

"62. The Court considers at the outset that the applicant lived for a considerable length of time in the Netherlands, the country that he moved to at the age of 12 together with his mother and brothers in order to join his father, and where he held a permanent residence status. Moreover, he subsequently went on to found a family there. In these circumstances, the Court does not doubt that the applicant had strong ties with the Netherlands. That said, it cannot overlook the fact that the applicant 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. As the Chamber put it in paragraph 46 of its judgment, '... the disruption of their family life would not have the same impact as it would [have had] if they had been living together as a family for a much longer time'. Moreover, while it is true that the applicant came to the Netherlands at a relatively young age, the Court is not prepared to accept that he had spent so little time in Turkey that, at the time he was returned to that country, he no longer had any social or cultural (including linguistic) ties with Turkish society.

63. As to the criminal conviction which led to the impugned measures, the Court is of the view that the offences of manslaughter and assault committed by the applicant were of a very serious nature. While the applicant claimed that he had acted in self-defence – a claim that was in any event rejected by the trial courts (see paragraphs 44 and 50 above) – the fact remained that he had two loaded guns on his person. Taking his previous convictions into account (see paragraphs 14 and 16 above), the Court finds that the applicant may be said to have displayed criminal propensities. Having regard to Netherlands law and practice relating to early release (see paragraph 34 above), the Court is, furthermore, not inclined to attach particular weight to the fact that the applicant was released after serving two-thirds of his sentence.

64. The Court concurs with the Chamber in its finding that at the time the exclusion order became final the applicant's children were still very young – six and one and a half years old respectively – and thus of an adaptable age (see paragraph 46 of the Chamber judgment). Given that they have Netherlands nationality, they would – if they followed their father to Turkey – be able to return to the Netherlands regularly to visit other family members residing there. Even though it would not wish to underestimate the practical difficulties entailed for his Dutch partner in following the applicant to Turkey, the Court considers that in the particular circumstances of the case the family's interests were outweighed by the other considerations set out above (see paragraphs 62 and 63).

65. The Court appreciates that the exclusion order imposed on the applicant has even more far-reaching consequences than the withdrawal of his permanent residence permit, as it renders even short visits to the Netherlands impossible for as long as the order is in place. However, having regard to the nature and the seriousness of the offences committed by the applicant, and bearing in mind that the exclusion order is limited to ten years, the Court cannot find that the respondent State assigned too much weight to its own interests when it decided to impose that measure. In this context, the Court notes that the applicant, provided he complied with a number of requirements, would be able to return to the Netherlands once the exclusion order had been lifted (see paragraphs 32 and 51 above)."

Herefter konkluderede EMD i præmis 67:

"In the light of the above, the Court finds that a fair balance was struck in this case in that the applicant's expulsion and exclusion from the Netherlands were proportionate to the aims pursued and therefore necessary in a democratic society.

Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Sezen v. the Netherlands (2006)* var den første klager indrejst i opholdslandet som 23-årig og havde fået opholdstilladelse som familiesammenført til sin ægtefælle (den anden klager), som havde boet i opholdslandet siden hun var syv år, og deres fælles barn. Tre år efter indrejsen blev den første klager idømt fire års fængsel for narkotikakriminalitet. Efter løsladelsen genoptog han samlivet med ægtefælle og barn, men fraflyttede senere det fælles hjem i en periode på omkring syv måneder. Knap fire måneder efter genoptagelse af samlivet fik klagerne endnu et barn. Den første klagers opholdstilladelse som familiesammenført blev omkring otte måneder senere nægtet forlænget under henvisning til samlivsafbrydelsen og straffedommen.

EMD udtalte i præmis 44-50, at:

"44. At the time the first applicant was arrested, i.e. on 31 July 1992, he had been residing lawfully in the Netherlands for less than one and a half years, having been granted a residence permit in February 1991. Applying the "sliding scale" principle, the authorities of the respondent State attached weight to this undeniably short duration of the first applicant's lawful stay in the Netherlands before he committed the offence. It is nevertheless to be noted that, following his conviction on 20 January 1993, it was not until more than four years later, namely on 5 June 1997, that the decision was taken to refuse the first applicant continued residence. Following his early release from prison in April 1995, the first applicant had thus been allowed to build up even closer ties with the Netherlands for a further two years. In addition, it appears that the first applicant has not re-offended and that he has been gainfully employed ever since his release from prison.

45. As to the first applicant's connections with his country of origin, the Court considers that his situation is not comparable to that of a second-generation immigrant, given that he arrived in the Netherlands at the age of twenty-three. Not having been informed otherwise, the Court assumes that he received his schooling in Turkey and that he is conversant with the Turkish language. Thus, he undoubtedly has ties with Turkey. His ties to the Netherlands are mainly connected to his wife – the second applicant – and their two children.

46. The Court notes with some concern that none of the domestic authorities involved in the decision-making process appear to have paid any attention to the possible effects which the refusal of continued residence

would have on the first applicant's family life (see Yıldız v. Austria, no. 295/97, § 43, 31 October 2002). It is true that the Regional Court of The Hague, sitting in Amsterdam, quashed the decision to impose an exclusion order on the first applicant for the reason that the Deputy Minister had failed to accord insufficient weight to the interests of the applicants and their children (see paragraph 19 above). However, the Regional Court upheld the decision not to prolong the first applicant's residence permit, and its reasoning on the subject did not refer to the consequences of that decision on his family life. In this context it is further to be noted that the Government assume that both the second applicant and the children speak Turkish (see paragraph 38 above). Had this matter been addressed in the course of the domestic proceedings, the authorities would have been aware of the fact that the children speak Dutch and Kurdish, but not Turkish.

47. Unlike the first applicant, his wife – the second applicant – may be considered a second-generation immigrant, having moved to the Netherlands at the age of seven and having lawfully resided there ever since. It is submitted, and has not been disputed, that all her relatives are also living in the Netherlands and that she does not have any family in Turkey. Although the parties disagree as to whether the second applicant was aware of the criminal activities of her husband, the fact remains that he had not yet committed the offence at the time they married and she entered into a family relationship with him, which is the relevant criterion in this context (see Boultif, cited above, § 48). Furthermore, the couple's two children were born in the Netherlands: Adem in 1990 and Mahsun in 1996. These two children have always lived in the Netherlands and its cultural and linguistic environment, and attend school there. Consequently, they can only have minimal ties, if any, to their parents' country of origin (see Şen v. the Netherlands, no. 31465/96, § 40, 21 December 2001) and, as noted above (paragraphs 32 and 46), they do not speak Turkish. In these circumstances, the Court accepts that following the first applicant to Turkey would mean a radical upheaval for the second applicant and in particular for the couple's children (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, p. 1971, § 36; see also Recommendation 1504 (2001) of the Parliamentary Assembly of the Council of Europe on the nonexpulsion of long-term immigrants), and it finds that they cannot realistically be expected to do so.

48. The principal element which strikes the Court in the present case, however, is the fact that the applicants' marriage was deemed to have permanently broken down when the couple had merely ceased cohabiting for some six months in 1995/1996 and despite them making it clear to the authorities of the respondent State that cohabitation had been resumed and that there was no question of their marriage having broken down. Dutch law did not permit the first applicant's residence permit to be revoked or an exclusion order to be imposed at the time of his conviction, since he had held a strong residence status at that time (see Yılmaz v. Germany, no. 52853/99, § 48, 17 April 2003). Yet by ruling – four years after that conviction (paragraph 44 above) and notwithstanding the fact that a child had been conceived during the time the spouses were not living together – that the marriage had permanently broken down, the authorities were able to conclude that the first applicant had lost his indefinite right to remain and, subsequently, to refuse him continued residence on the basis of the criminal conviction. By that time the first applicant had served his sentence and, as illustrated by the fact that he obtained gainful employment and that a second child was born to him and his wife, had begun rebuilding his life.

49. It is true that, in theory at least, the first applicant is entitled to make occasional visits to the Netherlands, due to the fact that the exclusion order that was initially imposed on him was ultimately withdrawn without having been enforced (paragraph 20 above). However, in this context the Court notes that the present case

does not concern a divorced father with an access arrangement, but a functioning family unit where the parents and children are living together. The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 of the Convention and that to split up a family is an interference of a very serious order (see Mehemi v. France (no. 2), no. 53470/99, § 45, ECHR 2003-IV). Having regard to its finding at paragraph 47 above that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same as long as the first applicant continues to be denied the right to reside in the Netherlands. In this context the Court notes the Government's submission that the first applicant's criminal record would normally militate against a new residence permit being issued to him for a period of ten years. Although they also argued that Article 8 of the Convention would be taken into account in assessing whether his conviction would still be held against him, the Government failed to indicate when, and under what conditions, such an assessment would lead to a positive decision being taken on any future request for a residence permit being lodged by the first applicant.

50. In conclusion, the Court is of the opinion that, in the particular circumstances of the present case, the respondent State failed to strike a fair balance between the applicants' interests on the one hand and its own interest in preventing disorder or crime on the other.

There has, accordingly, been a violation of Article 8 of the Convention."

I sagen *A.W. Khan v. the United Kingdom (2010)* var klageren indrejst i opholdslandet som treårig og var meddelt tidsubegrænset opholdstilladelse. Han blev som 28-årig idømt syv års fængsel for narkotikakriminalitet, men blev løsladt efter tre år på grund af god opførsel. Myndighederne traf efterfølgende afgørelse om udvisning på baggrund af den begåede kriminalitet. Klageren havde dels sin mor og sine søskende i opholdslandet, dels en kæreste, som han havde fået et barn med. På tidspunktet for sagens behandling for EMD var klageren 34 år gammel.

I præmis 31-32 gennemgik EMD klagerens forhold til sin mor og sine søskende, som fandtes at udgøre privatliv.

EMD udtalte i præmis 34-35, at:

"*34. It is clear from the Court's case-law that children born either to a married couple or to a co-habiting couple are ipso jure part of that family from the moment of birth and that family life exists between the children and their parents (see L. v. the Netherlands, no. 45582/99, § 35, ECHR 2004-IV). Although co-habitation may be a requirement for such a relationship, however, other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto family ties (Kroon and Others v. the Netherlands, 27 October 1994, § 30, Series A no. 297-C). Such factors include the nature and duration of the parents' relationship, and in particular whether they had planned to have a child; whether the father subsequently recognised the child as his; contributions made to the child's care and upbringing; and the quality and regularity of contact (see Kroon, cited above, §30; Keegan v. Ireland, 26 May 1994, § 45, Series A no. 290; Haas v. the Netherlands, no. 36983/97, § 42 ECHR 2004-I and Camp and Bourimi v. the Netherlands, no. 28369/95, § 36, ECHR 2000-X).*

35. In the present case the Court notes that the applicant and his girlfriend have been in a relationship since August 2005; the applicant has recognised his daughter and is named as the father on her birth certificate;

although the conditions of his bail prevent the applicant from living with his girlfriend and their daughter, he has contact with them on a daily basis. The Court therefore finds that the relationship has sufficient constancy to create de facto family ties."

EMD konkluderede i præmis 36, at der var tale om et indgreb både i klagerens privatliv og hans familieliv.

Herefter gennemgik EMD i præmis 37-42 om indgrebet var i overensstemmelse med loven, om det skete til varetagelse af et af de legitime hensyn og om det var nødvendigt i et demokratisk samfund. EMD henviste i denne forbindelse til de relevante kriterier som sammenfattet i Üner-dommen og udtalte i præmis 40-43:

"40. The Court reiterates that in view of the devastating effects of drugs on people's lives, it understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge (Dalia v France, cited above, § 54; Bhagli v France, cited above, § 48). The applicant's offence was particularly serious as it involved the importation of a significant quantity of heroin. The severity of the offence is reflected in the fact that the applicant was sentenced to seven years' imprisonment, taking account of his decision to plead guilty at a very early stage. The severity of this offence must therefore weigh heavily in the balance.

41. Nevertheless, the Court must also take into account the fact that the applicant had not previously committed any serious criminal offences in the United Kingdom, and has committed no further offences following his release in June 2006. Under the approach taken in the Boultif judgment (cited above, §51), the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has a certain impact on the assessment of the risk which the applicant poses to society.

42. As regards the applicant's private life, the Court accepts that the applicant has lived most of his life in the United Kingdom, having arrived there at the age of three, and no longer has any real social, cultural or family ties to Pakistan. The applicant has not returned to Pakistan, even for a short visit, and he has no immediate family in Pakistan.

43. In the United Kingdom the applicant has established close ties with his mother and two brothers, with whom he has lived for most of his life. The relationship clearly entails an additional degree of dependence which results from the relative ill-health of all of the parties. Although there is no evidence to suggest that the family would not be able to cope without the applicant, his removal would likely cause greater difficulties than would otherwise be the case."

EMD udtalte i præmis 44-47, at:

"44. With regard to the applicant's family life, the Court notes that the applicant has submitted that he and his girlfriend are in a stable relationship, and although they cannot live together as a family unit, the applicant enjoys regular contact with his girlfriend and their daughter. The applicant's girlfriend is a British citizen, who states that she has never lived anywhere other than the United Kingdom. She does not speak Urdu or Punjabi and has no family or friends in Pakistan. The applicant's girlfriend has therefore indicated that she would not be prepared to move to Pakistan if he were to be deported, although no circumstances have been identified which would inherently preclude her from living there.

45. Although the Court has no reason to doubt the applicant's claims, it observes that he has not sought to make fresh representations to the Home Office on the basis of his family life. In particular, the Court notes

that despite making fresh representations to the Home Office in August 2008, the applicant did not mention that he had a pregnant girlfriend even though he must have known of the pregnancy at the time.

46. Moreover, the Court notes that the applicant's relationship with his girlfriend began in August 2005, while he was still serving his prison sentence. She was therefore fully aware of his criminal record at the beginning of the relationship.

47. Accordingly, no decisive weight can be attached to this family relationship."

I præmis 48 udtalte EMD, at der også måtte tages hensyn til varigheden af indrejseforbuddet, som var højst ti år.

Herefter udtalte EMD i præmis 50-51:

"50. In light of the above, having particular regard to the length of time that the applicant has been in the United Kingdom and his very young age at the time of his entry, the lack of any continuing ties to Pakistan, the strength of his ties with the United Kingdom, and the fact that the applicant has not reoffended following his release from prison in 2006, the Court finds that the applicant's deportation from the United Kingdom would not be proportionate to the legitimate aim pursued and would therefore not be necessary in a democratic society.

51. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Pakistan."

I sagen *Assem Hassan Ali v. Denmark (2018)* var klageren idømt fem års fængsel for narkokriminalitet og udvist for bestandig. Han havde på tidspunktet for udvisningen opholdt sig 20 år i opholdslandet og havde under sit ophold fået seks børn i alderen fra syv til 14 år med to forskellige kvinder. Alle børnene var danske statsborgere.

EMD gennemgik klagerens kriminelle forhold i præmis 46-47.

EMD udtalte i præmis 49-64, at:

"49. As to the solidity of social, cultural and family ties with the host country and with the country of destination, the Court observes that during the criminal proceedings leading to the expulsion order, in August 2008 the Immigration Service (Udlændingeservice) stated that the applicant spoke Arabic and only a little Danish. An interpreter had been used during his interview with the Immigration Service. The applicant had never had a job in Denmark. The applicant's parents and siblings remained in Jordan, where the applicant had visited them a couple of years before. However, in the revocation proceedings leading to the High Court's decision of 27 January 2014, the applicant stated that he had broken off contact with his father and his eight siblings in Jordan in 2005. He did not develop this statement further and the Court does not attach any particular weight to this assertion.

50. As to the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life, the Court notes that the applicant's first wife, X, from his marriage in 1997, was a stateless Palestinian woman from Lebanon who had obtained Danish nationality. She and the applicant had three children together, born between 1997 and 2001. They had Danish nationality and their

legal status was not affected by the applicant's expulsion order. After the divorce in 2001, the applicant maintained contact with X and his children. During the revocation proceedings in 2013, before the High Court, the applicant submitted that he and X planned to re-marry, but that it had not been decided whether she would follow him to Jordan in case of expulsion. At the relevant time, however, the applicant was serving his prison sentence and facing the implementation of the expulsion order. Thus, he could not have had a justified expectation that he would be able to exercise his right to a family life in Denmark with X. Moreover, there is no indication that they did remarry either before the applicant was deported on 14 April 2014 or thereafter. Accordingly, the criterion relating to the seriousness of the difficulties which spouse X is likely to encounter in the country to which the applicant is to be expelled does not apply.

51. The applicant's second wife, Y, from his marriage under Islamic law in 2002, was an Iraqi woman of Kurdish origin. They married before the offences at issue were committed. Thus, the criterion of whether the spouse knew about the offence at the time when he or she entered into a family relationship does not come into play in the present case. In respect of their marriage it is noteworthy, though, that they divorced in May 2013, before the District Court's decision of 3 June 2013 to refuse to revoke the expulsion order. Accordingly, the criterion relating to the seriousness of the difficulties which spouse Y is likely to encounter in the country to which the applicant is to be expelled does not apply. Y and the applicant had three children together, born between 2003 and 2009. The children had Danish nationality and their legal status was not affected by the applicant's expulsion order.

52. When in 2009 the applicant was convicted of a serious drug crime, sentenced to five years' imprisonment, and his expulsion ordered, it was a known fact that he had six children. In their judgments of 11 March 2009 and 25 November 2009, respectively, the District Court and the High Court did not expressly state whether they found that the applicant's then wife, Y, and their three children could follow him to Jordan or whether, in any event, a separation of the applicant from his then wife and children could not outweigh the other counterbalancing factors, notably that the applicant had committed a serious drugs crime (see paragraphs 14 and 15 above).

53. In the revocation proceedings, when examining whether material changes had occurred in the applicants' circumstances within the meaning of section 50, subsection 1, of the Aliens Act, the District Court, in its decision of 3 June 2013 stated, among other things, that "as material changes in his circumstances, the applicant has referred to the circumstances that the health of his children has deteriorated .... Since the High Court delivered its judgment [in 2009], the applicant has maintained contact with his wife and his children. However, that circumstance cannot independently lead to the conclusion that there have been material changes in circumstances. In the assessment of the court, the information available does not provide any basis on which to conclude that there have been material changes in the health of his children. ...". The High Court concurred with this finding and added, in its decision of 27 January 2014 "that the information presented to the High Court ... on the intention of the applicant and his ex-wife to remarry cannot lead to a different outcome".

54. The remaining criterion in the case to be examined is "the best interests and well-being of the children, in particular the seriousness of the difficulties which any of the applicant's children are likely to encounter in the country to which the applicant is to be expelled".

55. In its judgment Jeunesse v. the Netherlands [GC], (no. 12738/10, § 109, 3 October 2014), which concerned family reunion, the Court reiterated "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 ... Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it."

56. Whilst this principle applies to all decisions concerning children, the Court notes that in the context of the removal of a non-national parent as a consequence of a criminal conviction, the decision first and foremost concerns the offender. Furthermore, as case-law has shown, in such cases the nature and seriousness of the offence committed or the offending history may outweigh the other criteria to take into account (see, for example, Cömert v. Denmark (dec.), 14474/03, 10 April 2006; Üner v. the Netherlands [GC], cited above, §§ 62-64; and Salem v Denmark, cited above, § 76).

57. In the present case, when the revocation proceedings were pending before the District Court in 2013, the applicant's children were approximately 14, 12, 11, 9, 8 and 7 years old. They would all remain in Denmark, so no question arose as to "the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled". The issue was rather which difficulties they would encounter in Denmark due to the separation from their father. The three eldest children would live with their mother, X, as they had done since their parents divorced in 2001. The eldest son was living part-time in an institution. The three youngest children would live with their mother, Y, as they had done since the applicant was detained in April 2008.

58. Both the District Court and the High Court found unsubstantiated the applicant's allegation that the children's health had deteriorated since the expulsion order was issued in 2009. The applicant's eldest son's medical condition was also known in 2009.

59. The domestic courts also stated that the fact that, while imprisoned, the applicant has maintained contact with his children since 2009, could not independently lead to the conclusion that there have been 'material changes in [the applicant's] circumstances' (see section 50 of the Aliens Act).

60. The domestic courts did not as such comment on X's allegation that 'It would be a disaster if her children were separated permanently from their father. They had lived in a strong hope that they would reunite with their father upon his release. She feared that her children would break down if [the applicant] were to be deported. It would become very difficult to integrate them into Danish society'. Nor did they take a stand on Y's allegation that 'her eldest son had a support person. The reason was that he isolated himself. The reason why he isolated himself was that he missed being part of a whole family. It would help if he could be with [the applicant] ... It would also have a very negative impact on the children if their father were deported.'

61. Apart from observing that such statements cannot be considered established facts, on the basis of the other material before it, the Court is not convinced that the applicant's children's best interests were adversely affected by the applicant's deportation to such an extent that those should outweigh the other criteria to take into account (see, for example, A.H. Khan v. the United Kingdom, no. 6222/10, § 40, 20 December 2011).

62. The Court also notes that apart from financial restraints (see paragraph 17 above), the applicant has not pointed to any obstacles, at least for the five younger children to visit him in Jordan, or for them all to maintain contact with him in other ways.

63. In the light of the above, the Court recognises that the District Court and the High Court carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law, including the applicant's family situation. Moreover, having regard to the gravity of the drugs crime committed by the applicant, the Court finds that the interference was supported by relevant and sufficient reasons, and was proportionate in that a fair balance was struck between the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other hand (see, among many others, Salem v. Denmark, cited above, § 82; Hamesevic v. Denmark (dec.), no. 25748/15, § 43, 16 May 2017; Alam v. Denmark (dec.), no. 33809/15, § 35, 6 June 2017; and Ndidi v. the United Kingdom, no. 41215/14, § 76, 14 September 2017).

64. Accordingly, there has been no violation of Article 8 of the Convention."

Der kan endvidere henvises til følgende sager:

- *Sharifi v. Denmark (2023)*.
- *Al-Masudi v. Denmark (2023)*.

5.2.2.5.2. Mindre alvorlig kriminalitet

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis fem og seks måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden.

EMD gennemgik i præmis 57 Boultif-kriterierne og udtalte i præmis 58:

"In addition, the Court will also take into account the particular ties which these immigrants have developed with the host country where they will have spent most of their life (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, § 36; Radovanovic, cited above, § 33; Üner, cited above, § 40)"

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som f.eks. narkotikahandel.

EMD udtalte i præmis 61-64:

"61. With regard to the applicant's personal and family situation, the Court notes that the applicant, at the time of the expulsion order of 22 January 1999, had been lawfully residing in Germany for 27 years, having moved to that country at the age of ten in order to live there with his parents and brother and where he received his secondary school education. While the parties do not agree on the extent of the applicant's professional work, he had been employed for a certain period of that time. Since 1988 he had been in possession of a permanent residence permit. While it is true that the applicant and his wife had been separated during the first five years of their marriage as the applicant's wife and their first son did not follow the applicant to

Germany until 1989, the family had been living together in Germany for ten years and there is no indication that their marriage and family life was anything less than effective.

62. On the other hand, the Court is not persuaded that the applicant has become so estranged from the country where he spent the first ten years of his life that he would no longer be able to settle in Turkey, having regard to the fact that the applicant married his Turkish wife in Turkey, where their first son was born and that his wife and son did not follow him to Germany until 1989. It follows that the applicant must have entertained certain links to his country of origin at least until 1989. It can further be presumed that the applicant is familiar with the Turkish language, as he married a Turkish wife.

63. With regard to the question of whether the applicant's family could reasonably be expected to follow the applicant to Turkey, the Court notes that the applicant's wife and four children are Turkish nationals. As the applicant's wife entered German territory as an adult and ten years before the issue of the expulsion order, it can be assumed that she has sufficient links which would allow her to re-integrate into Turkish society.

64. The Court notes, however, that the applicant's four sons – who were, at the time the expulsion order had been issued, between six and thirteen years of age – had been born in Germany respectively entered Germany at a very young age where they received all their school education. Even if the children should have knowledge of the Turkish language, they would necessarily have to face major difficulties with regard to the different language of instruction and the different curriculum in Turkish schools."

I præmis 65 gennemgik EMD spørgsmålet om den manglende tidsbegrænsning i klagerens indrejseforbud.

Endelig udtalte EMD i præmis 66:

"The Court considers that the applicant's expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant's children could be expected to face if they followed him to Turkey, the Court considers that an unlimited exclusion from the German territory violates the applicant's rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention."

I sagen *Yildiz v. Austria (2002)* var den første klager indrejst i opholdslandet som 14-årig for at bo sammen med sine forældre og sine søskende. Han indledte et forhold til den anden klager, som var statsborger i den første klagers hjemland, men født og opvokset i opholdslandet. Nogle måneder senere traf opholdslandet afgørelse om udvisning af den første klager med indrejseforbud i fem år på baggrund af flere bødestraffe for tyveri og færdselslovsovertrædelser. Da udvisningsafgørelsen blev endelig, havde klagerne sammen fået et barn, den tredje klager. Klageren udrejste til hjemlandet, da barnet var knap to år gammelt. På tidspunktet for EMD's behandling af sagen boede han fortsat i hjemlandet. Den anden og tredje klager besøgte ham jævnligt, indtil parret blev skilt.

EMD udtalte i præmis 43-46, at:

"43. The Court will first examine the applicants' family situation and the length of their stay in Austria. It observes that the first applicant is not a second generation immigrant, i.e. a person who was born or has lived the main part of his life in the country from which he is going to be removed. He only came to Austria in 1989 at the age of fourteen and must therefore have links with his country of origin and in particular be able to speak Turkish. On the other hand, he was still an adolescent when he came to Austria, where his close family was and is still living. In December 1996, when the Administrative Court confirmed the residence ban against him, he had been living in Austria for seven years, he had been working there and had been co-habiting for a little less than three years with the second applicant, who is also a Turkish national but was born in Austria and has lived there all her life. Their daughter, the third applicant, was one year and four months old at the material time. In fact, the Austrian authorities issuing the residence ban acknowledged that the first applicant had reached a high degree of integration in Austria. Nevertheless, the Court considers that, as regards the possible effects of the residence ban on his family life, the authorities failed to establish whether the second applicant could be expected to follow him to Turkey, in particular whether she spoke Turkish and maintained any links, other than her nationality, with that country.

44. It is true that, meanwhile, the applicants' family situation has changed. The first and second applicant divorced in March 2001 and, while the second applicant is residing in Austria, the first applicant lives in Turkey. The third applicant is currently staying with relatives in Turkey although the second applicant, who has sole custody over the child, asserts that she intends to bring her back to Austria. However, the Court has to make its assessment in the light of the position when the residence ban became final (see paragraph 34 above). Its task is to state whether or not the domestic authorities complied with their obligation to respect the applicants' family life at that particular moment and it cannot have regard to circumstances which only came into being after the authorities took their decision. Nor can it be the Court's role to speculate as to whether there is – as claimed by the applicants – a causal link between the contested measure and the subsequent developments, in particular the first and second applicants' divorce.

45. Next, the Court will turn to the offences committed by the first applicant, as their gravity is an essential element for assessing the proportionality of the interference with the applicants' family life. The Court notes that in 1993 the first applicant, who was then still a minor, was convicted twice by the criminal courts, once for shop-lifting with a sentence of three days' imprisonment suspended on probation, and once for theft without a sentence being pronounced. Between 1992 and April 1994 he was convicted seven times of traffic offences, in particular driving without a license and once ignoring a red light and high speeding. The fines imposed on him amounted to a total sum of ATS 28,000 (equivalent to EUR 2,035). In sum, the Court finds that these offences were not negligible. However, as is shown by the modest penalties imposed, the domestic authorities considered them to be of a minor nature. Moreover, the first applicant did not commit any further offences between April 1994 and December 1996, when the residence ban proceedings were terminated. Thus, in the Court's view the authorities' fear that he constituted a danger to public order and security in that would commit further offences is mitigated by the particular circumstances of the case (see Boultif v. Switzerland, cited above, § 51, with further references).

46. Having regard to all these elements, the Court considers that the authorities failed to strike a fair balance between the different interests involved and that the interference with the applicants' right to respect for their family life was not proportionate to the legitimate aim pursued.

Accordingly, there has been a breach of Article 8 of the Convention."

5.2.2.5.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Eze v. Sweden (2019)* havde klageren i forbindelse med en ansøgning om asyl opgivet et navn og fødedato. Han blev meddelt afslag på asyl, da de nationale myndigheder fandt, at han ikke havde sandsynliggjort sin identitet. Klageren giftede sig efterfølgende med en statsborger fra opholdslandet og søgte på ny om opholdstilladelse på baggrund af ægteskabet. Han opgav her et andet navn og fødedato. Klageren blev meddelt en midlertidig opholdstilladelse, da han havde fremvist en fødselsattest, hvoraf navnet fremgik. Klageren søgte to år efter om forlængelse af sin opholdstilladelse og indleverede i den forbindelse et forfalsket pas. Året efter indgivelsen af ansøgningen om forlængelse fik parret et barn. Klageren blev meddelt afslag på forlængelse af sin opholdstilladelse, da denne var opnået på baggrund af svig.

EMD udtalte i præmis 52-56, at:

"52. The Court acknowledges that the decision to refuse the applicant a permit to reside in Sweden will have a considerable impact on his family life, as his wife is a Swedish citizen and she and their common child are living in Sweden. However, there does not seem to be any insurmountable obstacles for them to move to the applicant in Nigeria. In any event, they have been visiting him there and could continue to do so.

53. Furthermore, an important factor in the present case is that the applicant and his wife created their family life at a time when the applicant had no residence permit. They started a relationship in mid-2011 when the applicant's asylum application had been rejected at first instance and married a year later when that application had been dismissed by a final decision and there was an enforceable deportation order against the applicant. Their son was born in June 2015, more than a year after the expiry of the applicant's temporary residence permit and following the Migration Agency's conclusion that the passport submitted in support of his application for an extension was a forgery. Thus, the applicant's family life was both established and extended at times when his immigration status was such that the persistence of that family life in Sweden was precarious. The applicant therefore had no reasonable expectation that he would be able to remain in the country and maintain his family life there.

54. In the above circumstances, the refused residence permit for the applicant could be incompatible with Article 8 only in exceptional circumstances. As the applicant and his wife have a four-year-old son, regard must be had to his best interests. In this respect, the Court notes that the Swedish authorities have carefully considered the issue, both under domestic law and under the Convention. In particular, the Migration Agency took into account that the applicant's wife and son should have no difficulties to visit the applicant in Nigeria. Furthermore, regard must be had to the fact that the son lived together with the applicant in Sweden only for a period of little more than a year, until the autumn of 2016. There are therefore no exceptional circumstances at issue in the present case. Instead, the Court is satisfied that sufficient weight was attached to the best interests of the child in refusing the applicant a residence permit.

55. Having regard to the above considerations, the Court finds that the Swedish authorities, acting within their margin of appreciation, did not fail to strike a fair balance between the applicant's interests, on the one hand, and the State's interest in ensuring effective immigration control, on the other. Nor was their assessment disproportionate in pursuance of the legitimate aim under Article 8 of the Convention.

56. It follows that the application is manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention."

5.2.2.5.4. Ulovligt ophold

I sagen *Priya v. Denmark (2006)* (afvisningsbeslutning) var klageren indrejst fra Indien i opholdslandet på et forretningsvisum. Hun var på indrejsetidspunktet 27 år. Efter to måneders ophold indgik hun ægteskab med en derboende statsborger fra Indien, der var indrejst i en alder af 28 år og tidligere havde været gift med en dansk kvinde. Klageren fik afslag på familiesammenføring og udrejste. Hun havde på daværende tidspunkt opholdt sig omkring 14 måneder i opholdslandet. Parret fik ca. tre måneder efter klagerens udrejse en søn. Året efter genindrejste klageren og søgte to gange om opholdstilladelse. Begge ansøgninger blev afslået, da parrets tilknytning til Indien blev vurderet større end parrets tilknytning til Danmark. Parret fik i mellemtiden endnu et barn. Begge børn fik opholdstilladelse i opholdslandet. Parret valgte at lade sig skille, og klageren forsøgte herefter at søge om opholdstilladelse under henvisning til herboende børn. På tidspunktet, hvor de nationale myndigheder traf den seneste afgørelse, havde klagerens ægtefælle opholdt sig ti år i opholdslandet.

EMD udtalte indledningsvis at:

"Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Solomon v. the Netherlands (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998, and Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999).Thus, a distinction must be drawn between those seeking entry into a country to pursue their newly established family life; those who had an established family life before one of the spouses obtained settlement in another country; and those who seek to remain in a country where they have already established close family life and other ties for a reasonable period of time (cf. e.g. Khannam v. United Kingdom (dec.) no 14112/88, DR 59, pp. 265- 273)"

EMD udtalte endvidere om den konkrete sag, at:

"Furthermore, the Court considers that the present case discloses no exceptional circumstances. It observes in this context that the applicant entered Denmark in January 1999, when she was twenty-seven years old. At the relevant time she had no ties to Denmark. Less than two months later, she married PK, an Indian national, who had entered Denmark illegally in October 1993, when he was twenty-eight years old. At the relevant time he had no ties to Denmark either. Both spouses were born and raised in India, where their family lived, and the applicant and her husband communicated in Punjabi and Hindi.

The applicant alleges that the legal separation of the spouses in November 2002 and the following agreement on custody and access to the children were realities. Consequently, she maintained, since the children have been granted a residence permit in Denmark until they become of age (at the age of eighteen) and they are to stay with their father, it will be impossible for her to exercise her family life with her children in India.

In this connection the Court observes firstly that the Ministry of Refugee, Immigration and Integration Affairs in its decision of 7 March 2003 stated that according to the applicant's counsel the reason for the legal separation had merely been an attempt to enhance the applicant's chances to stay in Denmark. Moreover, on 24 March 2003 the applicant's counsel informed the police that the applicant wished to obtain a divorce from PK since allegedly such would be the only possible way of her staying in Denmark.

Secondly, the Court observes that several elements in the case indicate that the spouses still live together.

Finally, more than three years and six month after the legal separation the applicant has still not submitted any documents or information substantiating that the separation have been followed up by a divorce or a real wish by the spouses to so.

In these circumstances the Court cannot but assume that the applicant and PK are still married.

Thus, there are no obstacles to the applicant, her husband and children enjoying their family life in their home country India, and the respondent State cannot be said to have failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention."

5.2.2.5.5. Bortfald/inddragelse/nægtelse af forlængelse hvor ingen kriminalitet

Der er ved gennemgangen af praksis ikke fundet domme, hvor EMD har taget stilling til betydningen af karakteren og intensiteten af familielivet mellem klageren og dennes ægtefælle/samlever/partner i sager, hvor der ikke foreligger kriminalitet.

5.2.2.5.6. Familiesammenføring til udlændinge, der har børn med lovligt ophold i opholdslandet.

Der er ved gennemgangen af praksis ikke fundet domme, hvor EMD har taget stilling til betydningen af karakteren og intensiteten af familielivet mellem klageren og dennes ægtefælle/samlever/partner i sager om familiesammenføring.

5.3. Familieliv med børn

5.3.1. Forskellige former for familieliv med børn

I nedenstående afsnit gennemgås situationer, hvor klageren har børn i opholdslandet, og hvilken betydning dette har i forbindelse med vurderingen af, hvorvidt der mellem klageren og barnet foreligger et familieliv, som dette er defineret i EMRK artikel 8.

I *"Guide on Article 8 of the Convention – Right to respect for private and family life",* udgivet af European Court of Human Rights (senest opdateret den 31. august 2021) (herefter betegnet Guiden) defineres – med udgangspunkt i EMD´s praksis – hvad familieliv og familie er.

Af Guiden, punkterne 292-293, fremgår det, at:

"292. The essential ingredient of family life is the right to live together so that family relationships may develop normally (Marckx v. Belgium, § 31) and members of the family may enjoy each other's company (Olsson v. Sweden (no. 1), § 59). Regard for family unity and for family reunification in the event of separation are inherent considerations in the right to respect for family life under Article 8. (Strand Lobben and Others v. Norway [GC], § 204).

293. The notion of family life is an autonomous concept (Marckx v. Belgium, § 31). Consequently, whether or not "family life" exists is essentially a question of fact depending upon the real existence in practice of close personal ties (Paradiso and Campanelli v. Italy [GC], § 140). The Court will therefore look at de facto family ties, such as applicants living together, in the absence of any legal recognition of family life (Johnston and Others v. Ireland, § 56). Other factors will include the length of the relationship and, in the case of couples, whether they have demonstrated their commitment to each other by having children together (X, Y and Z v. the United Kingdom, § 36). Therefore, the notion of "family" in Article 8 concerns marriage-based relationships, and also other de facto "family ties", including between same-sex couples, where the parties are living together outside marriage or where other factors demonstrated that the relationship had sufficient constancy (Paradiso and Campanelli v. Italy [GC], § 140 and Oliari and Others v. Italy, § 130)."

Af Guiden, punkt 295, fremgår det, at:

"A child born of a marital relationship is ipso jure part of that "family" unit from the moment and by the very fact of his or her birth (Berrehab v. the Netherlands, § 21). Thus, there exists between the child and its parents a bond amounting to family life. The existence or non-existence of "family life" within the meaning of Article 8 is a question of fact depending upon the real existence in practice of close personal ties, for instance the demonstrable interest and commitment by the father to the child both before and after birth (L. v. the Netherlands, § 36)."

Af Guiden, punkt 299, fremgår det, at:

"*Article 8 does not guarantee either the right to found a family or the right to adopt. The right to respect for "family life" does not safeguard the mere desire to found a family; it presupposes the existence of a family, or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father, or the relationship that arises from a genuine marriage, even if family life has not yet been fully established, or the relationship between a father and his legitimate child even if it proves, years later, to have had no biological basis (Paradiso and Campanelli v. Italy [GC], § 141). An applicant's intention to develop a previously non-existent "family life" with her nephew by becoming his legal tutor lies outside the scope of "family life" as protected by Article 8 (Lazoriva v. Ukraine, § 65)."*

Af Guiden, punkt 324, fremgår det, at:

"324. Regard for family unity and for family reunification in the event of separation are inherent con-siderations in the right to respect for family life under Article 8 (Strand Lobben and Others v. Norway [GC], § 204). The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life within the meaning of Article 8 of the Convention (even if the relationship between the parents has broken down), and domestic measures hindering such enjoyment amount to an interference with the right

protected by Article 8 of the Convention (Monory v. Romania and Hungary, § 70; Zorica Jovanović v. Serbia, § 68; Kutzner v. Germany, § 58; Elsholz v. Germany [GC], § 43; K. and T. v. Finland [GC], § 151)."

Af Guiden, punkt 333, fremgår det, at:

"Where the existence or non-existence of family life concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth (Nylund v. Finland (dec.)). Mere biological kinship, without any further legal or factual elements indicating the existence of a close personal relationship, is not sufficient to attract the protection of Article 8 (L. v. the Netherlands, §§ 37-40). On the other hand, the complete and automatic exclusion of the applicant from his child's life after the termination of his paternity, without properly considering the child's best interests, amounted to a failure to respect the applicant's family life (Nazarenko v. Russia, §§ 65-66; compare Mandet v. France, § 58). The Court has also found a violation of Article 8 where the applicants were unable to establish their paternity due to a strict statute of limitations (Călin and Others v. Romania, §§ 96-99)."

5.3.1.1. Forholdet mellem forældre og børn

Nedenfor gennemgås først i afsnittene 5.3.1.1.1 den situation, hvor der mellem barnets forældre allerede foreligger et familieliv, og de situationer, hvor forældrene enten har afbrudt familielivet, hvor der aldrig har været et familieliv mellem forældrene eller hvor der har været et de facto familieliv mellem forældrene uden samliv. Derefter gennemgås i afsnit 5.3.1.1.5 forholdet mellem forældre og myndige børn, herunder unge voksne (young adults). Endelig gennemgås i afsnit 5.3.1.1.6 forholdet mellem forældre og adoptivbørn, plejebørn og særbørn.

5.3.1.1.1. Børn født under forældrenes familieliv, uanset om forældrene efter barnets fødsel går fra hinanden

Af Guiden, punkt 295, fremgår det, at:

"A child born of a marital relationship is ipso jure part of that "family" unit from the moment and by the very fact of his or her birth (Berrehab v. the Netherlands, § 21). Thus, there exists between the child and its parents a bond amounting to family life. The existence or non-existence of "family life" within the meaning of Article 8 is a question of fact depending upon the real existence in practice of close personal ties, for instance the demonstrable interest and commitment by the father to the child both before and after birth (L. v. the Netherlands, § 36)."

I sagen *A.W. Khan v. the United Kingdom (2010)* var klageren indrejst i opholdslandet som treårig og var meddelt tidsubegrænset opholdstilladelse. Han blev som 28-årig idømt syv års fængsel for narkotikakriminalitet, men blev løsladt efter tre år på grund af god opførsel. Myndighederne traf efterfølgende afgørelse om udvisning på baggrund af den begåede kriminalitet. Klageren havde dels sin mor og sine søskende i opholdslandet, dels en kæreste, som han havde fået et barn med. På tidspunktet for sagens behandling for EMD var klageren 34 år gammel.

EMD udtalte i præmis 34 -35:

"34. It is clear from the Court's case-law that children born either to a married couple or to a co-habiting couple are ipso jure part of that family from the moment of birth and that family life exists between the children and their parents (see L. v. the Netherlands, no. 45582/99, § 35, ECHR 2004-IV). Although co-habitation may be a requirement for such a relationship, however, other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto family ties (Kroon and Others v. the Netherlands, 27 October 1994, § 30, Series A no. 297-C). Such factors include the nature and duration of the parents' relationship, and in particular whether they had planned to have a child; whether the father subsequently recognised the child as his; contributions made to the child's care and upbringing; and the quality and regularity of contact (see Kroon, cited above, §30; Keegan v. Ireland, 26 May 1994, § 45, Series A no. 290; Haas v. the Netherlands, no. 36983/97, § 42 ECHR 2004-I and Camp and Bourimi v. the Netherlands, no. 28369/95, § 36, ECHR 2000-X).

35. In the present case the Court notes that the applicant and his girlfriend have been in a relationship since August 2005; the applicant has recognised his daughter and is named as the father on her birth certificate; although the conditions of his bail prevent the applicant from living with his girlfriend and their daughter, he has contact with them on a daily basis. The Court therefore finds that the relationship has sufficient constancy to create de facto family ties."

I sagen *Kroon and others v. The Netherlands (1994)* var den første klager født i opholdslandet og den anden klager var marokkansk statsborger, som senere opnåede statsborgerskab i opholdslandet. Klagerne boede ikke sammen, men de havde sammen fået et barn. Den første klager var på daværende tidspunkt fortsat gift med en anden mand og søgte først om skilsmisse efter barnets fødsel, uanset hun ikke havde boet sammen med sin ægtefælle i mange år. Barnet blev derfor ved fødslen registreret som fællesbarn af den første klager og dennes ægtefælle. Skilsmissen gik igennem året efter barnets fødsel. Barnet kunne dog efter national ret fortsat ikke blive registreret som barn af den anden klager, idet dette krævede, at den første klagers tidligere ægtefælle bestred faderskabet.

EMD udtalte i præmis 30, at:

"Throughout the domestic proceedings it was assumed by all concerned, including the registrar of births, deaths and marriages, that the relationship in question constituted "family life" and that Article 8 (art. 8) was applicable; this was also accepted by the Netherlands courts.

In any case, the Court recalls that the notion of "family life" in Article 8 (art. 8) is not confined solely to marriage-based relationships and may encompass other de facto "family ties" where parties are living together outside marriage (see as the most recent authority, the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, pp. 17-18, para. 44). Although, as a rule, living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto "family ties"; such is the case here, as since 1987 four children have been born to Mrs Kroon and Mr Zerrouk. A child born of such a relationship is ipso jure part of that "family unit" from the moment of its birth and by the very fact of it (see the Keegan judgment, ibid.). There thus exists between Samir and Mr Zerrouk a bond amounting to family life, whatever the contribution of the latter to his son's care and upbringing. Article 8 (art. 8) is therefore applicable."

I sagen *Bierski v. Poland (2022)* forholdt EMD sig til, om der forelå "familieliv" i artikel 8's forstand mellem en far og hans voksne søn, der havde et mentalt handicap. EMD udtalte i præmis 47:

"*In this respect, the Court notes that the applicant is D.B.'s biological father with whom he lived for the first two years of his life. Following that, they had regular contact throughout D.B.'s childhood and youth and enjoyed a father-son relationship. Moreover, before D.B. turned 18 years of age, the applicant took the necessary steps to have contact with him secured by way of interim measure (see paragraph 7 above). On the basis of this measure, he continued to have contact with his son until A.R. was appointed as D.B.'s guardian and the measure was lifted (see paragraphs 9 and 12 above). Already against this background, the Court finds that even after he had reached the age of 18, D.B. was part of the applicant's core family. In addition, D.B. suffers from Down syndrome and is fully incapacitated. Indeed, according to the findings of the Wrocław Regional Court in its decision of 18 January 2019 (see paragraph 14 above) D.B. did not react to questions posed to him and communication between him and people not known to him was impossible. In view of this, it is clear to the Court that there existed "additional factors of dependence" between the applicant and his son, as the applicant was one of the close persons who could communicate with D.B. Taking into account the above considerations, the Court finds that, even though D.B. was no longer a minor at the relevant time, there existed "family life" between the applicant and his son within the meaning of Article 8 of the Convention and that, therefore, Article 8 is applicable to the present case.*"

5.3.1.1.2. Børn født efter at forældrenes familieliv er afbrudt

Som anført ovenfor, fremgår det af Guiden, punkt 324, at:

"324. Regard for family unity and for family reunification in the event of separation are inherent con-siderations in the right to respect for family life under Article 8 (Strand Lobben and Others v. Norway [GC], § 204). The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life within the meaning of Article 8 of the Convention (even if the relationship between the parents has broken down), and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention (Monory v. Romania and Hungary, § 70; Zorica Jovanović v. Serbia, § 68; Kutzner v. Germany, § 58; Elsholz v. Germany [GC], § 43; K. and T. v. Finland [GC], § 151)."

Af Guiden, punkt 333, fremgår det, at:

"Where the existence or non-existence of family life concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth (Nylund v. Finland (dec.)). Mere biological kinship, without any further legal or factual elements indicating the existence of a close personal relationship, is not sufficient to attract the protection of Article 8 (L. v. the Netherlands, §§ 37-40). On the other hand, the complete and automatic exclusion of the applicant from his child's life after the termination of his paternity, without properly considering the child's best interests, amounted to a failure to respect the applicant's family life (Nazarenko v. Russia, §§ 65-66; compare Mandet v. France, § 58). The Court has also found a violation of Article 8 where the applicants were unable to establish their paternity due to a strict statute of limitations (Călin and Others v. Romania, §§ 96-99)."

Det fremgår endelig af Guiden, punkt 337*, at:*

"There exists between the child and his or her parents a bond amounting to family life even if at the time of his or her birth the parents are no longer cohabiting or if their relationship has then ended (Berrehab v. the Netherlands, § 21). Where the relationship between the applicant and the child's mother had lasted for two years, during one of which they cohabited and planned to get married, and the conception of their child was the result of a deliberate decision, it followed that from the moment of the child's birth there existed between the applicant and his daughter a bond amounting to family life, regardless of the status of the relationship between the applicant and the child's mother (Keegan v. Ireland, §§ 42-45). Thus, permitting the applicant's child to have been placed for adoption shortly after the child's birth without the father's knowledge or consent constituted an Article 8 violation (ibid., § 55)."

Det fremgår af Jon Fridrik Kjølbros bog *"Den Europæiske Menneskerettighedskonvention for praktikere" (2020)*, side 876, at*:*

"En biologisk far kan have et familieliv med et barn født uden for ægteskab, selv om samlivet mellem de ugifte samlevende er ophævet på tidspunktet for barnets fødsel. Ved vurderingen lægges der bl.a. vægt på karakteren og varigheden af forholdet mellem de biologiske forældre og den interesse og den forpligtelse, som den biologiske far har udvist."

I sagen *Berrehab. v. the Netherlands (1988)* opnåede klageren en opholdstilladelse på baggrund af ægteskab med en hollandsk statsborger. Parret fik en datter. Da klageren efterfølgende blev skilt fra sin ægtefælle, nægtede de nationale myndigheder at forlænge hans opholdstilladelse, da denne var betinget af et bestående ægteskab. Klageren havde opholdt sig i hjemlandet de første 25 år af sit liv og havde derefter opholdt sig 11 år i opholdslandet. Klagerens datter var på tidspunktet for EMD's afgørelse ni år gammel.

EMD udtalte i præmis 20-21, at:

"20. The applicants asserted that the applicability of Article 8 (art. 8) in respect of the words 'right to respect for ... private and family life' did not presuppose permanent cohabitation. The exercise of a father's right of access to his child and his contributing to the cost of education were also factors sufficient to constitute family life. The Government challenged that analysis, whereas the Commission agreed with it.

21. The Court likewise does not see cohabitation as a sine qua non of family life between parents and minor children. It has held that the relationship created between the spouses by a lawful and genuine marriage - such as that contracted by Mr. and Mrs. Berrehab - has to be regarded as 'family life' (see the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 32, § 62). It follows from the concept of family on which Article 8 (art. 8) is based that a child born of such a union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to 'family life', even if the parents are not then living together.

Subsequent events, of course, may break that tie, but this was not so in the instant case. Certainly Mr. Berrehab and Mrs. Koster, who had divorced, were no longer living together at the time of Rebecca's birth and did not resume cohabitation afterwards. That does not alter the fact that, until his expulsion from the Nether-

lands, Mr. Berrehab saw his daughter four times a week for several hours at a time; the frequency and regularity of his meetings with her (see paragraph 9 in fine above) prove that he valued them very greatly. It cannot therefore be maintained that the ties of 'family life' between them had been broken."

I sagen *Nylund v. Finland (1999)* ventede et forlovet par barn. Parret gik fra hinanden, inden de blev gift, og inden barnet blev født. Ligeledes inden barnet blev født, blev kvinden gift med en anden mand, og kvindens ægtefælle blev på baggrund af national lovgivning registreret som far til barnet. Klageren gjorde gældende, at han derved var afskåret fra at kunne blive anerkendt som barnets biologisk far og fra muligheden for at etablere en kontakt til sit barn, og at dette var i strid med retten til familieliv. Klageren havde på tidspunktet for EMD's behandling af sagen aldrig set barnet.

EMD udtalte, at:

"The Court recalls that the notion of 'family life' in Article 8 is not confined solely to marriage-based relationships and may encompass other de facto 'family' ties where the parties are living together outside marriage (see the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, pp. 17-18, § 44 and the Kroon and Others v. the Netherlands judgment of 20 September 1994, Series A no. 297-C, pp. 55-56, § 30). The application of this principle has been found to extend equally to the relationship between natural fathers and their children born out of wedlock. Further, the Court considers that Article 8 cannot be interpreted as only protecting 'family life' which has already been established but, where the circumstances warrant it, must extend to the potential relationship which may develop between a natural father and a child born out of wedlock. Relevant factors in this regard include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the natural father to the child both before and after the birth (see no. 22920/93, dec. 6.4.1994, D.R.77-A, p. 115).

In the present case, the Court is aware that the applicant cohabited with the mother and was engaged to her at the time she became pregnant. Furthermore, the Court is also aware that the mother has not agreed that the applicant create any ties with the child. However, the Court cannot overlook that the applicant has not, in fact, seen the child or formed any emotional bond with her. In this respect, the case now at issue differs from the cases of Keegan (see above) and of Kroon and Others (see above), where the applicants had emotional bonds with the children in question. Moreover, unlike in the last-mentioned cases, the mother of the child has denied the applicant's paternity.

The Court finds that, in the circumstances of this case, the applicant's link with the child has an insufficient basis in law and fact to bring the alleged relationship within the scope of family life within the meaning of Article 8 § 1 of the Convention."

EMD afviste derefter sagen som *inadmissible*.

I sagen *Keegan v. Ireland (1994)* havde klageren fået et barn med sin tidligere forlovede og samlever. Parret gik fra hinanden, før barnet var født, og moren, som havde forældremyndigheden alene, valgte at bortadoptere barnet. Klageren var ikke enig i denne beslutning og ønskede på egne og barnets vegne at opponere herimod med henblik på, at han blev tildelt forældremyndigheden.

EMD udtalte i præmis 42-45, at:

"42. The Government maintained that the sporadic and unstable relationship between the applicant and the mother had come to an end before the birth of the child and did not have the minimal levels of seriousness, depth and commitment to cross the threshold into family life within the meaning of Article 8 (art. 8). Moreover, there was no period during the life of the child in which a recognised family life involving her had been in existence. In their view neither a mere blood link nor a sincere and heartfelt desire for family life were enough to create it.

43. For both the applicant and the Commission, on the other hand, his links with the child were sufficient to establish family life. They stressed that his daughter was the fruit of a planned decision taken in the context of a loving relationship.

44. The Court recalls that the notion of the 'family' in this provision is not confined solely to marriage-based relationships and may encompass other de facto 'family' ties where the parties are living together outside of marriage (see, inter alia, the Johnston and Others v. Ireland judgment of 18 December 1986, Series A no. 112, p. 25, para. 55). A child born out of such a relationship is ipso iure part of that 'family' unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer co-habiting or if their relationship has then ended (see, mutatis mutandis, the Berrehab v. the Netherlands judgment of 21 June 1988, Series A no. 138, p. 14, para. 21).

45. In the present case, the relationship between the applicant and the child's mother lasted for two years during one of which they co-habited. Moreover, the conception of their child was the result of a deliberate decision and they had also planned to get married (see paragraph 6 above). Their relationship at this time had thus the hallmark of family life for the purposes of Article 8 (art. 8). The fact that it subsequently broke down does not alter this conclusion any more than it would for a couple who were lawfully married and in a similar situation. It follows that from the moment of the child's birth there existed between the applicant and his daughter a bond amounting to family life."

I sagen *Nuutinen v. Finland (2000)* var klageren dømt for vold mod sit barns mor. Barnet bliver født under klagerens afsoning. Mor og barn flyttede til en anden by og fik hemmelig adresse. Klageren anerkendte faderskabet, men dette blev ikke accepteret af myndighederne, da barnets mor ikke ville give samtykke hertil. Klageren søgte delt forældremyndighed og samvær med barnet. Klagerens anerkendelse af faderskabet blev senere registreret, og han blev tildelt samvær to timer hver måned. Moren ville imidlertid ikke komme med barnet. Samværssagen verserede ved myndighederne i mere end tre år, da barnets mor fortsatte med at tilbageholde barnet.

EMD udtalte i præmis 125-126, at:

"125. The Commission considered that the applicant might have contributed to the delays at the enforcement stage, in particular by not cooperating sufficiently with the social authorities during the preparations of their opinions to the Helsinki District Court in the second set of the main proceedings in 1997. While prepared to make certain allowances for the frustration which the applicant must have experienced after several unsuccessful enforcement attempts, the Commission noted that he had repeatedly behaved in an inappropriate

and even aggressive manner towards social welfare officials and conciliators. However, the Government's allusion to the applicant's criminal past and his mental health which could have endangered the child's development had already been examined in the initial custody and access proceedings resulting in very limited access. Moreover, in April 1997 the District Court had found that the fresh evidence regarding the applicant's mental state did not show that enforcement of the access arrangements would be contrary to the child's interests, bearing in mind the limited access and the meeting premises. The Commission concluded, however, that in the continuous reassessment of the child's best interests the District Court could reasonably consider it justified to revoke the access rights in April 1998. The national authorities having taken all the steps to enforce the access rights which could reasonably be required in the very difficult conflict they had to deal with, Article 8 had not been violated.

126. The Court finds it undisputed that the relationship between the applicant and his daughter amounted to 'family life' within the meaning of Article 8 § 1 of the Convention and the Court sees no reason to differ."

I sagen *Katsikeros v. Greece (2022)* var klageren og barnets mor gået fra hinanden, inden barnet blev født. Klageren havde aldrig boet sammen med barnet og havde kun mødt hende en gang i tre og et halvt år på trods af yderligere samværsrettigheder i protest mod den begrænsede samværsordning. EMD udtalte om forholdet mellem klageren og barnet i præmis 46-48:

"*46. In the present case, the Court must first determine whether the decision of the Court of Appeal, upheld by the Court of Cassation, to put certain restrictions on the applicant's contact with M. disregarded the applicant's existing "family life" with his child within the meaning of Article 8. It notes at the outset that, despite K.P.'s initial refusal to acknowledge that the applicant was the biological father of M., it was then established that that was indeed the case; the applicant's paternity is now uncontested between the parties. In examining whether there is, in addition, a close personal relationship between him and the child which must be regarded as an established "family life" for the purposes of Article 8, the Court observes on the one hand, that the applicant cohabited with M.'s mother for a short period of time and they intended to get married; on the other hand, the applicant has never cohabited with M. and, despite the contact rights granted by the domestic decisions, he had only met M. once on 7 March 2015 until the end of the domestic proceedings in question, when M. was around three and a half years old. There are no signs of any commitment on the part of the applicant towards M. before she was born. In these circumstances, their relationship does not have sufficient constancy to be characterised as an existing "family life".*

47. However, the Court has found that intended family life may, exceptionally, fall within the ambit of Article 8 in cases in which the fact that family life has not been established is not attributable to the applicant (see the references in paragraph 44 above). This applies, in particular, to the relationship between a child born out of wedlock and the child's biological father, who are inalterably linked by a natural bond while their actual relationship may be determined, for practical and legal reasons, by the child's mother and, if married, by her husband (see Anayo v. Germany, no. 20578/07, § 60, 21 December 2010). In the present case, the Court notes that the applicant expressed his wish to be recognised as M.'s father, to share parental responsibility with K.P. and to have regular contact with M. through his applications to the domestic courts. However, after his paternity was established and his contact rights were granted by the domestic courts, the applicant refused to exercise his rights under the conditions that had been set out in the decisions and, as a result, he only saw M. once during the period covered by the domestic decisions in question. In the Court's view, that conduct was not sufficient to demonstrate the applicant's interest in his child. Thus, the present case should be distinguished from Anayo (cited above), in which the applicant had not had any contact with his biological children because their mother and their legal father had refused his requests to allow contact with them. It follows that in the circumstances of the present case, the fact that there was not any established family relationship between the applicant and M. can be attributed to the applicant.

48. Having regard to the foregoing, the Court considers that the applicant's intended relationship with his biological child does not attract the protection of "family life" under Article 8. It notes, however, that in any event, the issue of whether the applicant's contact schedule with M. was excessively restrictive, even if it fell short of falling within "family life", concerned an important part of the applicant's identity and thus his "private life" within the meaning of Article 8 § 1 (see paragraph 45 above)."

I sagen *Ciliz v. the Netherlands (2000)* havde klageren boet sammen med sit barn i 15 måneder før sin skilsmisse fra barnets mor. I en periode umiddelbart efter separationen tog han ikke skridt til at se sin søn, men senere søgte han om samværsret. Klagerens tidligere ægtefælle ønskede til at begynde med ikke at samarbejde om klagerens samvær med deres søn, men var senere gået med til, at klageren ved flere lejligheder havde kunnet se sin søn hos hendes forældre. Myndighederne fandt imidlertid ikke anledning til at etablere en formel samværsordning. Klageren havde på dette tidspunkt opholdstilladelse på baggrund af arbejdstilladelse, men da han i en periode var uden beskæftigelse, blev tilladelsen ikke forlænget. Myndighederne henviste i den forbindelse til, at klageren ikke havde regelmæssigt samvær med sin søn, hvorfor der ikke bestod et familieliv i artikel 8's forstand, og at det i den sammenhæng var uden betydning, at den manglende regelmæssige kontakt ikke skyldtes klageren.

EMD udtalte i præmis 59-60, at:

"59. Having regard to its previous case-law the Court observes that there can be no doubt that a bond amounting to family life within the meaning of Article 8 § 1 of the Convention exists between the parents and the child born from their marriage-based relationship, as was the case in the present application. Such natural family relationship is not terminated by reason of the fact that the parents separate or divorce as a result of which the child ceases to live with one of its parents (see the Berrehab judgment cited above, p. 14, § 21, and the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 19, § 50; see also Irlen v. Germany, application no. 12246/86, Commission decision of 13 July 1987, Decisions and Reports 53, p. 225).

60. Clearly, in the present case the relationship between the parents following their separation was not as harmonious with respect to the matter of the father's access to his child as in the case of Berrehab. Neither can it be said that the applicant demonstrated at all times to what extent he valued meetings with his son. It thus appears that during the period immediately following the separation, the applicant made no attempt to see his son and that, when he did express a desire to meet with him, he failed to keep appointments with the relevant authorities (see paragraphs 11-12 above).

Nevertheless, contact was re-established from February 1993 and there then followed a period during which meetings took place between the applicant and his son, if not on a regular basis, then at least with some frequency.

The applicant also applied to the courts on a number of occasions in order to have the matter of access determined, and in its decision of 24 January 1995 the Utrecht Regional Court indicated that it assumed that the existing contacts between the applicant and his son would continue (see paragraph 21 above).

In view of the above, the Court considers that the events subsequent to the separation of the applicant from his wife did not constitute exceptional circumstances capable of breaking the ties of 'family life' between the

applicant and his son (see, amongst other authorities, the Ahmut v. the Netherlands judgment of 28 November 1996, Reports of Judgments and Decisions 1996-VI, p. 2030, § 60). Indeed, no argument to that effect has been put forward."

I sagen *Onur v. the United Kingdom (2009)* blev klageren udvist fra opholdslandet på grund af alvorlig kriminalitet. Mens klageren var fængslet for et tidligere forhold, fødte hans tidligere partner deres fællesbarn, men klageren fremgik ikke som far til hende på fødselsattesten. Efter sin afsoning var klageren sammen med sin datter to-tre dage om ugen. Han fik efterfølgende to børn med sin nye partner. Klageren anførte i sin klage til EMD, at en udvisning ville være i strid med EMRK artikel 8 på grund af et eksisterende familieliv med hans datter fra et tidligere forhold og med hans børn fra hans nuværende forhold.

EMD udtalte i præmis 44, at:

"The applicant's oldest child, however, is in a different position as his relationship with her mother had broken down before she was born and the child has never lived with the applicant. The Court has previously indicated that in the absence of co-habitation, other factors may serve to demonstrate that a relationship has sufficient constancy to create de facto family ties (Kroon and Others v. the Netherlands, 27 October 1994, § 30, Series A no. 297-C). Such factors include the nature and duration of the parents' relationship, and in particular whether they had planned to have a child; whether the father subsequently recognised the child as his; contributions made to the child's care and upbringing; and the quality and regularity of contact (see Kroon, cited above, §30; Keegan v. Ireland, 26 May 1994, § 45, Series A no. 290; Haas v. the Netherlands, no. 36983/97, § 42 ECHR 2004-I and Camp and Bourimi v. the Netherlands, no. 28369/95, § 36, ECHR 2000-X). In the present case, the applicant had been in a six-year relationship with the child's mother. Although the relationship ended shortly before the child's birth, she knew the applicant as her father, and following his release from prison she spent two to three days a week with him. The Court therefore accepts that this relationship had sufficient constancy to amount to family life."

I sagen *Rozanski v. Poland (2006)* lod klagerens tidligere samlever et fiktivt navn registrere som far til sit barn. Da barnet var omkring 20 måneder, forsvandt klagerens tidligere samlever og mor til barnet. Klageren ansøgte om at blive registreret som barnets far, da han ellers ikke kunne søge om samvær med barnet. De nationale myndigheder afslog, da moren skulle give samtykke hertil. Da barnet var knap fire år, blev den tidligere samlevers nye partner registreret som far til barnet.

EMD udtalte i præmis 64-67, at:

"64. The Court reiterates in this respect that D. had been born out of a relationship between the applicant and Ms B. F. that had lasted for about four years. It is also worth noting that immediately after their relationship ended in April 1994, the applicant, as early as 18 April 1994, lodged a motion with the Gdańsk District Court, claiming that the paternity of D. be established and submitting that he was his biological father. Afterwards, after the applicant had lost all contact with the child in May 1994 (§ 11 above), he repeatedly took various steps in order to have his putative biological paternity recognised in law. Hence, it is relevant for the assessment of the case that the applicant has shown, in the Court's opinion, demonstrable interest in and commitment to the child both before and after the birth (see no. 22920/93, dec. 6.4.1994, D.R.77-A, p. 115; Nylund v. Finland (dec.), no. 27110/95, ECHR 1999-VI).

65. The Court reiterates that where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible, as from the moment of birth, the child's integration into his or her family (see Keegan, cited above, p. 19, § 50, and Kroon, cited above, p. 56, § 32).

66. The Court observes in this connection that in the present case the situation which existed from May 1994 when the applicant lost contact with D. until July 1996 when J.M. recognised his paternity in respect of the boy, differed from the situation which it examined in the Kroon judgment. In the latter case it was impossible for the mother to institute proceedings to deny paternity of her husband because the Dutch law imposed restrictions on her in order to protect legal certainty as to the legal paternity of a child born in wedlock. The Court emphasises that in the present case such a consideration was not involved as there was no presumption of paternity to the benefit of another man until the paternity of D. was recognised by J.M.

67. The Court further recalls that in the Kroon case referred to above, it established a principle that respect for family life required that biological and social reality prevail over a legal presumption which in that case flew in the face of both established fact and the wishes of those concerned without actually benefiting anyone (Kroon, cited above, § 40).

The Court emphasises that the present case differs in this respect from the situation examined in Kroon also in that in the latter the parents' wishes were in agreement, while in the present case it has not been shown that such an agreement existed between the applicant and D's mother since at least April 1994. Consequently, the Court is of the view that the principle that the biological reality must prevail cannot be said to be fully applicable to the circumstances of the present case."

EMD udtalte videre i præmis 79-80, at:

"79. To sum up, when making the assessment of the case the Court had regard to the circumstances of the case seen as a whole. Hence, it has taken into consideration, firstly, the lack of any directly accessible procedure by which the applicant could claim to have his legal paternity established (see § 73 above). Secondly, the Court noted the absence, in the domestic law, of any guidance as to the manner in which discretionary powers vested on the authorities in deciding whether to challenge legal paternity established by way of a declaration made by another man should be exercised (see § 76 above). Thirdly, the Court considered the perfunctory manner in which the authorities exercised their powers when dealing with the applicant's requests to challenge this paternity (see § 77 above). Having examined the manner in which all these elements taken together affected the applicant's situation, the Court concludes that, even having regard to the margin of appreciation left to the State, it failed to secure to the applicant the respect for his family life to which he is entitled under the Convention (Mizzi v. Malta, no. 26111/02 § 114, mutatis mutandis).

80. There has therefore been a violation of Article 8 of the Convention."

Der kan endvidere henvises til sagen Marzouki and others mod Bulgarien (2025) om forholdet mellem far og datter.

5.3.1.1.3. Der har aldrig været familieliv mellem forældrene

I dette afsnit gennemgås relationer mellem forældre, hvor forældrene aldrig har boet sammen, samt enlige forældre.

Som anført ovenfor fremgår det af Guiden, punkt 295, om begrebet familieliv:

"(…) The existence or non-existence of "family life" within the meaning of Article 8 is a question of fact depending upon the real existence in practice of close personal ties, for instance the demonstrable interest and commitment by the father to the child both before and after birth (L. v. the Netherlands, § 36)."

Videre fremgår det af af Guiden, punkterne 332-333, at:

"332. The Court observes that the notion of family life in Article 8 is not confined solely to marriagebased relationships and may encompass other de facto "family" ties where the parties are living together outside marriage (Keegan v. Ireland, § 44; Kroon and Others v. the Netherlands, § 30). The application of this principle has been found to extend equally to the relationship between natural fathers and their children born out of wedlock. Further, the Court considers that Article 8 cannot be interpreted as only protecting family life which has already been established but, where the circumstances warrant it, must extend to the potential relationship which may develop between a natural father and a child born out of wedlock (Nylund v. Finland (dec.); Shavdarov v. Bulgaria, § 40). In the latter case, the Court accepted that the presumption of paternity meant that the applicant was not able to establish paternal affiliation by law, but that he could have taken other steps to establish a parental link, hence finding no violation of Article 8.

333. Where the existence or non-existence of family life concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth (Nylund v. Finland (dec.)). Mere biological kinship, without any further legal or factual elements indicating the existence of a close personal relationship, is not sufficient to attract the protection of Article 8 (L. v. the Netherlands, §§ 37-40). On the other hand, the complete and automatic exclusion of the applicant from his child's life after the termination of his paternity, without properly considering the child's best interests, amounted to a failure to respect the applicant's family life (Nazarenko v. Russia, §§ 65-66; compare Mandet v. France, § 58). The Court has also found a violation of Article 8 where the applicants were unable to establish their paternity due to a strict statute of limitations (Călin and Others v. Romania, §§ 96-99)."

Det fremgår af Jon Fridrik Kjølbros bog *"Den Europæiske Menneskerettighedskonvention for praktikere" (2020)*, side 876, at*:*

"En biologisk far kan også have et beskyttet familiebånd til et barn født af en kvinde, som han aldrig har boet sammen med, og ved vurderingen lægges der bl.a. vægt på karakteren og varigheden af relationen og kontakten mellem parterne både før og efter fødslen."

I sagen *Marckx v. Belgium (1979)* var klageren ugift og fødte en datter. Efter national ret opnåede et barn født uden for ægteskabet ikke automatisk samme rettigheder som børn født i et ægteskab. En ugift mor

kunne således ikke sikre sit barn samme arverettigheder. Klageren blev først anerkendt som datterens værge, og efterfølgende adopterede klageren datteren.

I præmis 31 udtalte EMD:

"The first question for decision is whether the natural tie between Paula and Alexandra Marckx gave rise to a family life protected by Article 8 (art. 8).

By guaranteeing the right to respect for family life, Article 8 (art. 8) presupposes the existence of a family. The Court concurs entirely with the Commission's established case-law on a crucial point, namely that Article 8 (art. 8) makes no distinction between the "legitimate" and the "illegitimate" family. Such a distinction would not be consonant with the word "everyone", and this is confirmed by Article 14 (art. 14) with its prohibition, in the enjoyment of the rights and freedoms enshrined in the Convention, of discrimination grounded on "birth". In addition, the Court notes that the Committee of Ministers of the Council of Europe regards the single woman and her child as one form of family no less than others (Resolution (70) 15 of 15 May 1970 on the social protection of unmarried mothers and their children, para. I-10, para. II-5, etc.).

Article 8 (art. 8) thus applies to the "family life" of the "illegitimate" family as it does to that of the "legitimate" family. Besides, it is not disputed that Paula Marckx assumed responsibility for her daughter Alexandra from the moment of her birth and has continuously cared for her, with the result that a real family life existed and still exists between them.

It remains to be ascertained what the "respect" for this family life required of the Belgian legislature in each of the areas covered by the application.

By proclaiming in paragraph 1 the right to respect for family life, Article 8 (art. 8-1) signifies firstly that the State cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 2 (art. 8-2). As the Court stated in the "Belgian Linguistic" case, the object of the Article is "essentially" that of protecting the individual against arbitrary interference by the public authorities (judgment of 23 July 1968, Series A no. 6, p. 33, para. 7). Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life.

This means, amongst other things, that when the State determines in its domestic legal system the régime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8 (art. 8), respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 (art. 8-1) without there being any call to examine it under paragraph 2 (art. 8-2). […]"

Sagen *L. v. the Netherlands (2004)* omhandlede et par, der hverken var gift eller samlevende, men havde fået et barn sammen.

EMD udtalte i præmis 36-40, at:

"36. Although, as a rule, cohabitation may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto 'family ties'. The existence or non-existence of 'family life' for the purposes of Article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties. Where it concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth.

37. The Court does not agree with the applicant that a mere biological kinship, without any further legal or factual elements indicating the existence of a close personal relationship, should be regarded as sufficient to attract the protection of Article 8.

38. However, in the instant case the Court notes that A. was born from a genuine relationship between the applicant and Ms B. that lasted for about three years and that, until this function was abolished when A. was about 7 months old, the applicant was A.'s auxiliary guardian. It observes that the applicant's relationship with Ms B. ended in August 1996, when A. was about 16 months old.

39. The Court further notes that, although the applicant never cohabited with Ms B. and A., he was present when A. was born, that –from A.'s birth until August 1996, when his relationship with A.'s mother ended – he visited Ms B. and A. at unspecified regular intervals, that he changed A.'s nappy a few times and babysat her once or twice, and that on several occasions he had contact with Ms B. about A.'s impaired hearing.

40. In these circumstances the Court concludes that, when the applicant's relationship with Ms B. ended, there existed – in addition to biological kinship – certain ties between the applicant and A. which were sufficient to attract the protection of Article 8 of the Convention."

I sagen *Anayo v. Germany (2010)* havde klageren fået tvillinger med en kvinde, som han havde været i et forhold med, men som var gift med en anden mand. Forholdet endte, før børnene blev født, og parret havde aldrig boet sammen. Ægtemanden blev efter den nationale lovgivning tvillingernes juridiske far, og klageren blev på den baggrund nægtet samvær med tvillingerne.

EMD udtalte om den biologiske fars rettigheder efter EMRK artikel 8 i præmis 59-62, at:

"59. In the present case, the Court must determine in the first place whether the decision of the Court of Appeal, upheld by the Federal Constitutional Court, to refuse the applicant access to the twins disregarded the applicant's existing 'family life' with his children within the meaning of Article 8. It notes at the outset that (as, for instance, in the cases of Yousef v. the Netherlands, no. 33711/96, § 51, ECHR 2002-VIII, and L., cited above, §§ 12, 37, but other than, for instance, in the cases of Nylund, cited above, and Hülsmann, cited above) it is uncontested that the applicant is the biological father of the twins. In examining whether there is, in addition, a close personal relationship between him and the children which must be regarded as an established 'family life' for the purposes of Article 8, the Court observes that the applicant has never cohabited with the twins or with their mother and has to date never met the children. In these circumstances, their relationship does not have sufficient constancy to be qualified as existing 'family life'.

60. However, the Court has found that intended family life may, exceptionally, fall within the ambit of Article 8 in cases in which the fact that family life has not been established is not attributable to the applicant (see

paragraph 57 above). This applies, in particular, to the relationship between a child born out of wedlock and the child's biological father, who are inalterably linked by a natural bond while their actual relationship may be determined, for practical and legal reasons, by the child's mother and, if married, by her husband. In the present case, the applicant did not yet have any contact with his biological children because their mother and their legal father, who were entitled to decide on the twins' contacts with other persons (Article 1632 § 2 of the Civil Code, see paragraph 25 above), refused his requests to allow contact with them. Moreover, under the provisions of German law (Article 1594 § 2 and Article 1600 § 2 of the Civil Code, see paragraphs 16, 29 and 30 above), the applicant could neither acknowledge paternity nor contest Mr B.'s paternity so as to become the twins' legal father. Therefore, the fact that there was not yet any established family relationship between him and his children cannot be held against him.

61. In determining whether, in addition, there were close personal ties in practice between the applicant and his children for their relationship to attract the protection of Article 8 (see paragraph 57 above), the Court must have regard, in the first place, to the interest in and commitment by the father to the children concerned. It notes that the applicant expressed his wish to have contacts with his children even before their birth and repeatedly asked Mr and Mrs B. to be allowed access afterwards. He further pursued his attempt to have contacts with the twins by bringing access proceedings in the domestic courts speedily after their birth. In the circumstances of the case, in which the applicant was prevented from taking any further steps to assume responsibility for the twins, the Court considers that this conduct was sufficient to demonstrate the applicant's interest in his children. As a result, the Court, in particular, does not consider it established that the applicant lacked genuine interest in his offspring and wanted to have contact with the twins exclusively in order to obtain a residence permit. Furthermore, as to the nature of the relationship between the twins' natural parents, the Court notes that, even though the applicant and Mrs B. never cohabited, the children emanated from a relationship which lasted some two years and was, therefore, not merely haphazard.

62. Having regard to the foregoing, the Court does not exclude that the applicant's intended relationship with his biological children attracts the protection of 'family life' under Article 8. In any event, the determination of the legal relations between the applicant and his biological children here at issue – namely the question whether the applicant had a right of access to his children – even if they fell short of family life, concerned an important part of the applicant's identity and thus his 'private life' within the meaning of Article 8 § 1. The domestic courts' decision to refuse him contact with his children thus interfered with his right to respect, at least, for his private life."

I sagen *Ahrens v. Germany (2012)* havde klageren i et par måneder haft et seksuelt forhold til en kvinde i opholdslandet, der boede sammen med en anden mand. Da kvinden fødte et barn, blev hendes samlever registreret som far til barnet. Klageren anlagde en faderskabssag, og en DNA-test fandt, at det med 99.99 % sikkerhed var klageren, som var far til barnet. Kvindens samlever fungerede som far for barnet, og klageren havde aldrig haft kontakt til barnet. De nationale myndigheder ville ikke omregistrere faderskabet.

EMD udtalte i præmis 58-59, at:

"58. The Court reiterates that the notion of 'family life' under Article 8 of the Convention is not confined to marriage-based relationships and may encompass other de facto 'family' ties where the parties are living together out of wedlock. The Court has further considered that intended family life may, exceptionally, fall within the ambit of Article 8, notably in cases where the fact that family life has not yet fully been established

is not attributable to the applicant (compare Pini and Others v. Romania, nos. 78028/01 and 78030/01, §§ 143 and 146, ECHR 2004-V). In particular, where the circumstances warrant it, 'family life' must extend to the potential relationship which may develop between a child born out of wedlock and the natural father. Relevant factors which may determine the real existence in practice of close personal ties in these cases include the nature of the relationship between the natural parents and a demonstrable interest in and commitment by the father to the child both before and after the birth (see Nylund v. Finland (dec.), no. 27110/95, ECHR 1999 VI; Nekvedavicius v. Germany (dec.), no. 46165/99, 19 June 2003; L. v. the Netherlands, no. 45582/99, § 36, ECHR 2004 IV; and Anayo v. Germany, no. 20578/07, § 57, 21 December 2010).

59. Turning to the instant case, the Court observes that the relationship between Ms P. and the applicant had ended approximately one year before the child R. was conceived. According to the applicant's own submissions, the ensuing relations between himself and Ms P. were of a purely sexual nature. There is no indication that the applicant and Ms P., who cohabitated at the time with Mr M., envisaged founding a family together. There are no signs of any commitment of the applicant towards the child before it was born. Under these circumstances, the Court is not convinced that the applicant's decision to demand a paternity test and to bring an action aimed at establishing his paternity were sufficient to bring the relationship between himself and R. within the scope of family life."

5.3.1.1.4. Der er de facto familieliv uden samliv mellem forældrene

I sagen *Kroon and others v. the Netherlands (1994)* havde forældrene kendt hinanden i 15 år, hvorunder de havde fået fire fællesbørn uden på noget tidspunkt at have været samboende.

EMD udtalte i præmis 30:

"Throughout the domestic proceedings it was assumed by all concerned, including the registrar of births, deaths and marriages, that the relationship in question constituted 'family life' and that Article 8 (art. 8) was applicable; this was also accepted by the Netherlands courts.
In any case, the Court recalls that the notion of 'family life' in Article 8 (art. 8) is not confined solely to marriage-based relationships and may encompass other de facto 'family ties' where parties are living together outside marriage (see as the most recent authority, the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, pp. 17-18, para. 44). Although, as a rule, living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto 'family ties'; such is the case here, as since 1987 four children have been born to Mrs. Kroon and Mr. Zerrouk.
A child born of such a relationship is ipso jure part of that 'family unit' from the moment of its birth and by the very fact of it (see the Keegan judgment, ibid.). There thus exists between Samir and Mr Zerrouk a bond amounting to family life, whatever the contribution of the latter to his son's care and upbringing.
Article 8 (art. 8) is therefore applicable."

Sagen *X, Y and Z v. the United Kingdom (1997)* omhandlede et par, hvor manden i forholdet var født som kvinde, men havde fået foretaget en kønsskifteoperation. Parret fik et barn sammen, som var undfanget ved kunstig befrugtning. De nationale myndigheder ville ikke anerkende mandens registrering som far til barnet, idet han ikke biologisk var af hankøn.

EMD udtalte i præmis 36-37, at:

"36. The Court recalls that the notion of 'family life' in Article 8 (art. 8) is not confined solely to families based on marriage and may encompass other de facto relationships (see the Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, p. 14, para. 31; the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 17, para. 44; and the Kroon and Others v. the Netherlands judgment of 27 October 1994, Series A no. 297-C, pp. 55-56, para. 30). When deciding whether a relationship can be said to amount to 'family life', a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means (see, for example, the above-mentioned Kroon and Others judgment, loc. cit.).

37. In the present case, the Court notes that X is a transsexual who has undergone gender reassignment surgery. He has lived with Y, to all appearances as her male partner, since 1979. The couple applied jointly for, and were granted, treatment by AID to allow Y to have a child. X was involved throughout that process and has acted as Z's 'father' in every respect since the birth (see paragraphs 14-16 above). In these circumstances, the Court considers that de facto family ties link the three applicants."

Der kan endvidere henvises til sagen *Loukili v. the Netherlands (2023).*

5.3.1.1.5. Forholdet mellem forældre og myndige børn, herunder unge voksne (young adults)

EMD har i flere sager forholdt sig til, om forholdet mellem myndige børn og deres forældre og søskende udgjorde familieliv og/eller privatliv.

I sagen *Pormes v. the Netherlands (2020)*, præmis 47, har EMD sammenfattet sin praksis således:

"*The Court has further laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties. However, it has not insisted on such further elements of dependency in a number of cases concerning young adults who were still living with their parents and had not yet started a family of their own*".

I sagen *Azerkane v. The Netherlands (2020)* var klageren født og opvokset i opholdslandet, hvor hans forældre og fem af hans søskende havde statsborgerskab. Klageren havde begået alvorlig personfarlig kriminalitet både før og efter det fyldte 18. år og havde efter at være blevet udvist med indrejseforbud i 10 år begået ny alvorlig kriminalitet. Klageren var 22 år og stadig hjemmeboende uden selvstændig familie, da han modtog den endelige nationale afgørelse.

EMD udtalte i præmis 64, at:

"In its case-law in immigration cases, the Court has laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, for instance, Konstatinov v. the Netherlands, no. 16351/03, § 52, 26 April 2007, and Z. and T. v. the United Kingdom (dec.), no. 27034/05, ECHR 2006-III). However, it has not insisted on such further elements of dependency in a number of cases concerning young

adults who were still living with their parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; Osman v. Denmark, no. 38058/09, §§ 55-56, 14 June 2011; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019). Indeed, domestic law currently reflects that case-law (see paragraph 45 above). Since those were also the circumstances in which the applicant found himself at the relevant time, the Court sees no reason to address the parties' submissions as regards the existence or not of further elements of dependency. The Court is therefore satisfied that the applicant's relationship with his parents constituted family life within the meaning of Article 8 of the Convention."

Der kan for så vidt angår spørgsmålet om "afhængighed" mellem familiemedlemmer henvises til domme i sagerne *Savran v. Denmark (2021)*, hvor EMD fandt, at der ikke forelå afhængighed mellem familiemedlemmerne, *I.M. v. Switzerland (2019)*, hvor EMD fandt, at der forelå afhængighed mellem klageren og hans voksne børn og og *Bierski v. Polen (2022)*, hvor EMD fandt, at der forelå familieliv mellem en far og hans voksne søn, der havde et mentalt handicap.

For så vidt angår "unge voksne" henvises til dommene i sagerne *El Boujaïdi v. France (1997), Moustaquim v. Belgium (1991)*, *Maslov v. Austria (2008), A.A. v. the United Kingdom (2011), Levakovic v. Denmark (2018), Osman v. Denmark (2011), Butt v. Norway (2012), Nacic and others v. Sweden (2012), I.M. v. Switzerland (2019), Zakharchuk v. Russia (2019)*, *Savran v. Denmark (2021) og Bierski v. Polen (2022)*, hvor EMD fandt, at der forelå familieliv mellem en far og hans voks-ne søn, der havde et mentalt handicap. Dommene er for så vidt angår dette spørgsmål gennemgået i kapitel 4 i afsnittene 4.1.1. og 4.2.5.

5.3.1.1.6. Forholdet mellem forældre og adoptivbørn, plejebørn og særbørn

Det fremgår af Jon Fridrik Kjølbros bog *"Den Europæiske Menneskerettighedskonvention for praktikere"* (2020), afsnit 16.1.2 om EMRK artikel 8, side 878, at:

"Forholdet mellem adoptivforældre og adoptivbørn nyder beskyttelse. Forholdet mellem adoptivforældre og adoptivbørn kan udgøre et familieliv, selv om de ikke har levet sammen og kun i begrænset omfang har haft kontakt med hinanden. Det samme gælder, selvom myndighederne ikke anerkender adoptionen."

EMD har i sagen *Kurochkin v. Ukraine (2010)*, præmis 37, udtalt:

"The Court recalls that the relations between an adoptive parent and an adopted child are as a rule of the same nature as the family relations protected by Article 8 of the Convention and such a relationship, arising from a lawful and genuine adoption, may be deemed sufficient to attract such respect as may be due for family life under Article 8 of the Convention (see Pini and Others v. Romania, nos. 78028/01 and 78030/01, §§ 140 and 148, ECHR 2004-V (extracts))."

I denne sag ville en adoptivmor have annulleret adoptionen af et barn, da adoptivforældrene skulle skilles. Adoptivfaren modsatte sig annullering af adoptionen for sit eget vedkommende. De nationale myndigheder annullerede adoptionen for både klageren (adoptivfaren) og adoptivmoren og fjernede barnet. Klageren

havde for EMD anført, at annulleringen af det juridiske adoptionsforhold mellem ham og adoptivsønnen var en krænkelse af hans familieliv.

EMD har endvidere i sagen *Zaiet v. Romania (2015)* , præmis 34, udtalt:

"The Court reiterates that the relations between an adoptive parent and an adopted child are as a rule of the same nature as the family relations protected by Article 8 of the Convention, and that such a relationship, arising from a lawful and genuine adoption, may be deemed sufficient to attract such respect as may be due for family life under Article 8 of the Convention (see Pini and Others v. Romania, nos. 78028/01 and 78030/01, §§ 140 and 148, ECHR 2004-V (extracts))."

I denne sag havde klageren og hendes søster, der begge var adopteret, arvet noget jord efter deres adoptivmor. Søsteren søgte derefter at få adoptionen mellem moren og klageren annulleret under henvisning til, at denne adoption oprindelig kun var indgået med henblik på, at klageren havde en juridisk mor, men at det aldrig havde været hensigten, at klageren ligeledes skulle beriges i form af en arv. De nationale myndigheder ophævede derefter adoptionen. Klageren anførte for EMD, at annulleringen af adoptionen var en krænkelse af artikel 8, da forholdet mellem hende og hendes adoptivmor udgjorde et familieliv.

EMD udtalte endvidere i præmis 35, at:

"In the instant case, the Court considers that the annulment of the adoption order, thirty-one years after it had been issued, at the request of the applicant's sister, amounted to an interference with the applicant's right to respect for her family life as guaranteed by Article 8 § 1 of the Convention."

Om beskyttelsen i forhold til plejebørn fremgår det af Guiden, punkterne 297-298, at:

"297. In spite of the absence of a biological tie and of a parental relationship legally recognised by the respondent State, the Court found that there existed family life between the foster parents who had cared for a child on a temporary basis and the child in question, on account of the close personal ties between them, the role played by the adults vis-à-vis the child, and the time spent together (Moretti and Benedetti v. Italy, § 48; Kopf and Liberda v. Austria, § 37 - compare Jessica Marchi v. Italy, where the Court found that family life did not exist between a foster mother who had obtained pre-adoption approval and the child that had lived with her for one year in the context of a "legal risk" placement, §§ 49-59 and the references therein).

298. In addition, in the case of Wagner and J.M.W.L. v. Luxembourg – which concerned the inability to obtain legal recognition in Luxembourg of a Peruvian judicial decision pronouncing the second applicant's full adoption by the first applicant – the Court recognised the existence of family life in the absence of legal recognition of the adoption. It took into consideration that de facto family ties had existed for more than ten years between the applicants and that the first applicant had acted as the minor child's mother in every respect. In these cases, the child's placement with the applicants was respectively recognised or tolerated by the authorities. On the contrary, in Paradiso and Campanelli v. Italy [GC], having regard to the absence of any biological tie between the child and the intended parents, the short duration of the relationship with the child (about

eight months) and the uncertainty of the ties from a legal perspective, and in spite of the existence of a parental project and the quality of the emotional bonds, the Court considered that the conditions enabling it to conclude that there had existed a de facto family life had not been met (§§ 156-157) (compare and contrast, D. and Others v. Belgium (dec.), and Valdís Fjölnisdóttir and Others v. Iceland, §§ 59-62 applying the test for the applicability of "family life" as laid down in Paradiso and Campanelli)."

Videre fremgår det af Guidens, punkt 364, at:

"The Court may recognise the existence of de facto family life between foster parents and a child placed with them, having regard to the time spent together, the quality of the relationship and the role played by the adult vis-à-vis the child (see Moretti and Benedetti v. Italy, §§ 48-52). In this case, the Court found a violation of the State's positive obligation as the applicants' request for a special adoption order in respect of the fosterchild, who had been placed with their family immediately after her birth for a period of five months, had not been examined carefully before the baby had been declared free for adoption and another couple had been selected (see also Jolie and Others v. Belgium, Commission decision, for examination of the relationship between foster parents and children for whom they have been caring; and V.D. and Others v. Russia, in which a foster family complained about the decisions of the national authorities to return a child in their care to his biological parents, terminate guardianship and to refuse them contact with him)."

Det fremgår endelig af Jon Fridrik Kjølbros bog, *"Den Europæiske Menneskerettighedskonvention for praktikere"* 2020, side 878, at:

"Forholdet mellem plejeforældre og plejebørn kan efter omstændighederne udgøre et de facto familieliv. Ved vurderingen indgår den tid, plejeforældrene og barnet har levet sammen, karakteren af forholdet og den rolle, som plejeforældrene har spillet i forhold til barnet."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fireårig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Da klageren var 17 år gammel, fandt man ud af, at han ikke havde opholdstilladelse. Han blev efterfølgende nægtet opholdstilladelse under henvisning til gentagen kriminalitet.

EMD udtalte i præmis 48-50, at:

"48. Even if a person of 26 years of age could still be considered a "young adult", the Court notes that at least in 2011 the applicant was not living full-time with his foster parents anymore (see paragraph 21 above). Moreover, it has not been argued and there is no indication that there are any further elements of dependency between the applicant and his foster parents.

49. The above notwithstanding, the Court deems it not necessary to decide on the question whether or not the ties between the applicant and his foster parents constituted family life within the meaning of Article 8.

It reiterates that, in practice, the factors to be examined in order to assess the compatibility with Article 8 of a denial of a right of residence – in so far as those factors are relevant in a particular case – are the same regardless of whether family or private life is engaged (see, mutatis mutandis, A.A. v. the United Kingdom, no. 8000/08, §§ 49 and 57, 20 September 2011).

50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

I sagen *Amrollahi v. Denmark (2002)* var klageren, en statsborger fra Iran, der var indrejst i opholdslandet i en alder af 23 år, i byretten blevet idømt fængselsstraf for narkotikakriminalitet og udvist for bestandig. Klageren havde på daværende tidspunkt opholdt sig i Danmark i otte år og havde fire år forinden indledt et forhold til en dansk statsborger, som han blev gift med under sin afsoning. Parret fik to børn, som på tidspunktet for EMD´s behandling af sagen var henholdsvis et og seks år gamle. Klagerens ægtefælle havde tillige et mindreårigt særbarn fra et tidligere forhold, der boede hos parret.

I præmis 41- 44 udtalte EMD, at:

"41. The applicant's wife, A, is a Danish national. She has never been to Iran, she does not know Farsi and she is not a Muslim. Besides being married to an Iranian man, she has no ties with the country. In these circumstances the Court accepts even if it is not impossible for the spouse and the applicant's children to live in Iran that it would, nevertheless, cause them obvious and serious difficulties. In addition, the Court recalls that A's daughter from a previous relationship, who has lived with A since her birth in 1989, refuses to move to Iran. Taking this fact into account as well, A cannot, in the Court's opinion, be expected to follow the applicant to Iran.

42. The question of establishing family life elsewhere must also be examined. In this connection the Court notes that during the period from April 1987 until August 1989 the applicant stayed in Turkey and Greece respectively. Nevertheless, the applicant was apparently residing there illegally and it has not been established that he or A has any attachment to either of those countries. In the Court's opinion there is therefore no indication that both spouses can obtain authorisation to reside lawfully in either of the said countries or in any other country but Iran.

43. Accordingly, as a consequence of the applicant's permanent exclusion from Denmark the family will be separated, since it is de facto impossible for them to continue their family life outside Denmark.

44. In the light of the above elements, the Court considers that the expulsion of the applicant to Iran would be disproportionate to the aims pursued. The implementation of the expulsion would accordingly be in breach of Article 8 of the Convention."

5.3.2. Afvejningen i praksis (barnets forhold)

Når en udlænding har udøvet familieliv i opholdslandet, skal det i forbindelse med en beslutning om udsendelse[37] af den pågældende vurderes, hvilke konsekvenser en sådan udsendelse vil have, ikke blot for den person, som skal forlade landet, men også for dennes barn/børn.

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[38] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

I sager, hvor barnet/børnene og deres anden forælder har opholdstilladelse i opholdslandet, og hvor forældrene ikke længere er sammen, har EMD i sin praksis lagt til grund, at børnene skal forblive i opholdslandet sammen med den anden forælder, og EMD har derfor i disse sager alene taget stilling til, om en udsendelse af klageren vil indebære en krænkelse af klagerens og barnets/børnenes ret til respekt for familieliv med hinanden efter artikel 8, mens EMD ikke har taget stilling til barnets/børnenes forhold, såfremt de måtte vælge at udrejse sammen med klageren til dennes hjemland.

Sagen *Alleleh a.o. v. Norway (2022)* vedrørte afvejningen i en sag, hvor udvisning af klageren ville indebære en betydelig påvirkning af hendes børn. I sagen havde klageren opnået sin opholdstilladelse på baggrund af svig. Klagerens ægtefælle (anden klager) og deres fire børn, som på tidspunktet for dommen var 12, syv, syv og fire år gamle (tredje – sjette klagere), var alle statsborgere i opholdslandet, ligesom hun selv havde opnået statsborgerskab i opholdslandet. 13 år efter indrejsen i opholdslandet blev myndighederne bekendt med klagerens rette identitet, hvorefter hendes statsborgerskab blev inddraget, og hun blev udvist med indrejseforbud i to år.

Efter i præmis 95 at have konstateret, at hele familien i princippet kunne tage ophold i klagerens hjemland, udtalte EMD i præmis 99-100:

"*99. Regarding the Supreme Court's legal starting points under Article 8 of the Convention, the Court notes that the first applicant was not a "settled migrant" in Norway in so far as her stay there was based on repeatedly giving incorrect information over a long period and therefore had never had a valid legal basis. It was for that reason the Supreme Court proceeded on the basis that the expulsion was valid unless "exceptional circumstances" could be identified[39]. Although the Court does not disagree with the Supreme Court regarding*

[37] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

[38] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

[39] Præmis 98: "[…], the Supreme Court considered that the proportionality analysis, unlike what had been done by the High Court […], had to be conducted in the light of the Court's case-law according to which an expulsion of a person whose grounds for residence were precarious at the outset would only be disproportionate in "exceptional" circumstances […]. Moreover, the Supreme Court concluded that the facts of the

this being the starting point,¿ the Court also notes the very particular aspect of the instant case that the sanction imposed on the first applicant impacted as much, if not more, on her family members, notably her children, all being Norwegian nationals who had been born and lived all their lives in Norway. Even if the other family members would follow the first applicant to Djibouti during the period when the ban on re-entry would be in force in order to preserve "family life", they would have to experience a considerable unwanted change in their "private life" in moving to a country with which they had no connection, including as concerned language. This contrasted with the first applicant's own situation, coming from Djibouti, speaking the language, having family there and even having visited there after she had arrived in Norway (see, inter alia, paragraph 26 above). The expulsion imposed on the first applicant to sanction her behaviour could thus, somewhat paradoxically, put an equally heavy if not heavier strain on the other family members. The Court observes in this context – as did the Supreme Court – that the Norwegian Parliament has requested that the Government consider an amendment of the Immigration Act to "make it possible for the immigration administration to supplement the use of expulsion and prohibition of entry with a broader set of sanctions where warranted by special circumstances such as the child's best interests" […].

100. Furthermore, the Court understands the Supreme Court's role in being limited to correcting what had been an erroneous understanding of the law by the Borgarting High Court. Nonetheless, even an examination of whether any "exceptional circumstances" existed also required a concrete and broad examination of the whole case and how the whole family would be affected by the expulsion of one of them. […]"

Hvad angår den konkrete proportionalitetsvurdering i sagen noterede EMD sig i præmis 101:

"*101. Turning, then, to the concrete proportionality assessment, the Court notes that the facts with regard to what impact an expulsion would have on the children had been established by way of a thorough process where an expert had been engaged and the children's views obtained in so far as possible based on their age and maturity […]. The factual findings on that point had also been set out in detail by the Borgarting High Court in its judgment, providing a basis for the Supreme Court in its application of the law (see paragraph 98 above)*."

Hvis barnets/børnenes forældre fortsat er i et forhold med hinanden, har EMD i sin praksis i forbindelse med artikel 8-vurderingen i flere sager foretaget en vurdering af, i hvilket omfang det ville være muligt for og rimeligt at forvente af klagerens børn at udrejse med klageren til dennes hjemland med henblik på at udøve familielivet dér. Det skal for en god ordens skyld bemærkes, at det i disse tilfælde selvfølgelig ikke påhviler børnene rent faktisk at udrejse med klageren til dennes hjemland.

Nedenfor gennemgås de forskellige elementer, der ifølge den udfundne praksis har indgået i EMDs proportionalitetsvurdering af, om en udsendelse[10] af klageren vil udgøre en krænkelse af klagerens og dennes barns/børns ret til respekt for familieliv for så vidt angår den del, der vedrører den pågældendes familieliv med sit barn/sine børn i opholdslandet, herunder barnets/børnene forhold.

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case as established by the Borgarting High Court did not support the finding that such "exceptional circumstances" existed. In this connection the Supreme Court emphasised that there was nothing in the lower instances' findings of fact that stood out from what had generally to be assumed to follow from expulsion of one of the parents for a relatively short period […]."

EMD har i sin praksis udtalt, at vægtningen af de enkelte elementer i proportionalitetsafvejningen afhænger af de konkrete omstændigheder i hver enkelt sag, se f.eks. Maslov v. Austria (2008), hvor EMD i præmis 70 udtalte, at:

"The Court would stress that while the criteria which emerge from its case-law and are spelled out in the Boultif and Üner judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Moreover, it has to be borne in mind that where, as in the present case, the interference with the applicant's rights under Article 8 pursues, as a legitimate aim, the "prevention of disorder or crime" (see paragraph 67 above), the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities."

5.3.2.1. Barnets/børnenes alder ved indrejse/længden af barnets/børnenes ophold i opholdslandet, barnets/børnenes formative år, samt betydningen af klagerens barns/børns adaptable age i forhold til, om familien kan henvises til at udøve familielivet i klagers hjemland

Ved vurderingen af, om en udsendelse[40] af en klager vil indebære et indgreb i retten til familieliv, som ikke er proportionalt med det legitime hensyn, har EMD i flere sager taget stilling til betydningen af klagerens barns/børns alder ved indrejse i opholdslandet og længden af barnets/børnenes ophold i opholdslandet samt betydningen af, at barnet/børnene har opholdt sig i opholdslandet i de år af sit/deres liv, som har været tilfældet i hver enkelt sag. EMD har i den forbindelse vurderet, i hvilket omfang det vil være muligt for og rimeligt at forvente af klagerens barn/børn at udrejse med klageren til dennes hjemland med henblik på at udøve familielivet dér. Det skal for en god ordens skyld bemærkes, at det i sidstnævnte tilfælde selvfølgelig ikke påhviler barnet/børnene rent faktisk at udrejse med klageren til dennes hjemland.

I nogle domme har EMD betegnet de år, som klagerens barn/børn har tilbragt i opholdslandet, som en del af barnets/børnenes "formative år", uden nærmere at angive, hvilken periode af barndommen/ungdommen, der udgør de "formative år".

I sagen *Külekci v. Austria (2017)*, hvor klageren var født i opholdslandet, derefter udrejst til hjemlandet, da han var to år gammel, og endelig vendt tilbage til opholdslandet, da han var syv år, udtalte EMD i præmis 47:

"*The Court notes that the applicant was born in Austria but soon after moved to Turkey. He returned to Austria at the age of seven and lived there until his expulsion at the age of nineteen, in total for about twelve years, which is a considerable amount of time stretching over a major part of the formative years of his childhood and adolescence*."

[40] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

I sagen *Pormes v. the Netherlands (2020)* , hvor klageren var indrejst i opholdslandet som knap fireårig og søgte at legalisere sit ophold, da han var 19 år gammel, udtalte EMD i præmis 62 in fine:

"[…] As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there."

EMD har i flere sager i forbindelse med proportionalitetsvurderingen af indgrebet i retten til familieliv set på, om det ville være muligt for klagerens barn/børn at tilpasse sig livet i klagerens hjemland med blandt andet et nyt miljø, et nyt sprog og en ny kultur, uden at dette strider mod hensynet til barnets tarv (adaptable age), og i hvilket omfang det henset til omstændighederne i den enkelte sag vil være rimeligt at forvente af klagerens barn/børn at udrejse med klageren til dennes hjemland med henblik på at udøve familielivet dér.

EMD har i sin praksis ofte anvendt udtrykket "*insurmountable obstacles*" hvis "alvorligheden af de vanskeligheder som barnet vil møde" indebærer, at det ikke vil være i overensstemmelse med hensynet til barnets tarv at henvise til, at familielivet kan udøves i klagerens hjemland.

Det skal også her for en god ordens skyld bemærkes, at det i sidstnævnte tilfælde selvfølgelig ikke påhviler børnene rent faktisk at udrejse med klageren til dennes hjemland.

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[41] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

I sagen *Nguyen v. Denmark (2024)*, der handlede om udvisning på grund af alvorlig kriminalitet, havde Østre Landsret om klagerens alder på 13 år ved indrejsen i opholdslandet udtalt:

"13. In respect of the expulsion order, the High Court reduced the re-entry ban to twelve years, and found as follows: "[The applicant] entered Denmark at the age of 13 and thus spent her childhood in Vietnam. […]"

Heroverfor udtalte EMD i præmis 28:

"28. […] The Court recognises that the domestic courts examined the relevant criteria thoroughly given that very serious reasons were required to justify the expulsion of the applicant, a settled migrant who had entered Denmark at the age of 13 and had been lawfully resident in the host country for most of her childhood and youth […]"

EMD fandt i den konkrete sag, at der var sket en krænkelse af EMRK artikel 8.

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[41] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

5.3.2.1.1. Alvorlig kriminalitet

I sagen *Özturk and others v. Norway (2000)*, var klageren indrejst fra Tyrkiet i opholdslandet med sin familie som 12-årig. Han blev senere gift med en tyrkisk statsborger, der herefter var indrejst i en alder af 23 år. Parret havde fået tre børn. Omkring ni år efter ægteskabets indgåelse blev han idømt han ti års fængsel og udvist for alvorlig narkotikakriminalitet. Klageren havde på daværende tidspunkt opholdt sig 20 år i opholdslandet, og et af børnene var otte år og de to andre tre år gamle. Parret fik fire år senere et fjerde barn.

EMD udtalte, at:

"The Court observes from the outset that the expulsion order was based on the particularly serious and damaging nature of the offences of which the first applicant was convicted, namely complicity in the importation into Norway of 1 kilo of heroin from Turkey, and the acquisition of approximately 850 grams of the drug. In the Court's view, even though the first applicant had not previously been convicted, this does not detract from the seriousness and gravity of such a crime (see the Bouchelkia v. France judgment of 29 January 1997, Reports of Judgments and Decisions, 1997-I, Vol. 28, p. 65, § 51).

Although the first applicant was 12 years old when he arrived in Norway and had spent 20 years there when he was expelled, his links to this country, as opposed to those of his country of origin, were not comparable to the situation of a second-generation immigrant (cf the Beldjoudi v. France judgment of 26 March 1992, Series A no. 234, p. 28, § 77; the Mehemi v. France judgment of 26 September 1997, Reports 1997-VI, Vol. 51, p. 1971, § 36).

Before leaving Turkey the first applicant had completed 5 years of primary education in Turkish and, after settling in Norway, he and his family had spent holidays in Turkey. His wife, who also originated from Turkey, had spent her first 23 years or so in that country and their children were all of an adaptable age. In the circumstances, it would not appear to have been unreasonable to expect the first applicant's wife and children to join him in Turkey."

EMD afviste derefter sagen som *inadmissible*.

I sagen Katanic v. Switzerland (afvisningsdom 2000) var klageren indrejst i opholdslandet som sæsonarbejder og blev samme år gift med en derboende statsborger fra Bosnien-Herzegovina. Klageren fik opholdstilladelse i opholdsstaten på baggrund af sit ægteskab, og to år senere fik parret en søn. Klageren kom ud for en arbejdsulykke og modtog herefter invalidepension. Efter otte års ophold blev klageren idømt 33 måneders fængsel for forsikringssvindel og våbensmugling og udvist i fem år. Samme år blev hans opholdstilladelse nægtet forlænget under henvisning til den begåede kriminalitet. Da EMD behandlede sagen, havde klagerens ægtefælle og søn, der nu var 11 år, permanent opholdstilladelse i opholdslandet.

EMD udtalte, at:

"The Court recalls that the applicant was sentenced to 33 months' imprisonment on account of, inter alia, insurance fraud and gun-running. Moreover, while in prison the applicant contravened the Narcotics' Act. The Court further notes the Federal Court's judgment of 8 November 1999 according to which the applicant had

shown considerable "criminal energy" when committing the offences. Furthermore, during his stay in Switzerland the applicant occasionally returned to Bosnia-Herzegovina without having experienced any difficulties. The Court notes the Government's submissions, not contested by the applicant, that his invalidity pension will continue to be transferred to him even after his departure from Switzerland.

It is true that that the applicant's wife is professionally established in Switzerland and their son has grown up there. The Court considers, however, that she is also a citizen of Bosnia-Herzegovina, and it has not been sufficiently demonstrated that she would encounter undue difficulties of integration when returning to their home country. The Court further notes that the applicant's son, who is now 11, is still of an adaptable age.

Taking into account the margin of appreciation which is left to Contracting States in such circumstances (see Eur. Court HR, Boughanemi judgment of 24 April 1996, Reports of Judgments and Decisions, 1996-II, p. 610, § 41), the Court considers that the interference with the applicant's rights to respect for his private and family life is justified under Article 8 § 2 of the Convention in that it can reasonably be considered 'necessary in a democratic society ... for the prevention of crime'.

It follows that the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4."

I sagen *Amrollahi v. Denmark (2002)* var klageren, en statsborger fra Iran, der var indrejst i opholdslandet i en alder af 23 år, i byretten blevet idømt fængselsstraf for narkotikakriminalitet og udvist for bestandig. Klageren havde på daværende tidspunkt opholdt sig i Danmark i otte år og havde fire år forinden indledt et forhold til en dansk statsborger, som han blev gift med under sin afsoning. Parret fik to børn, som på tidspunktet for EMD´s behandling af sagen var henholdsvis et og seks år gamle. Klagerens ægtefælle havde tillige et mindreårigt særbarn fra et tidligere forhold, der boede hos parret.

EMD udtalte i præmis 36 og 37, at:

"36. The Court has first considered the nature and seriousness of the offence committed. It notes that the applicant arrived in Denmark in 1989 and was subsequently convicted for drug trafficking committed during 1996. In its judgment of 1 October 1997 the City Court of Hobro found the applicant guilty, inter alia, of drug trafficking with regard to at least 450 grams of heroine contrary to Article 191 of the Criminal Code. The expulsion order was therefore based on a serious offence.

37. In view of the devastating effects drugs have on people's lives, the Court understands why the authorities show great firmness to those who actively contribute to the spread of this scourge (see, inter alia, the Dalia v. France judgment of 19 February 1998, Reports 1998-I, p. 92, §54). In the Court's view, even if the applicant had not previously been convicted, this does not detract from the seriousness and gravity of such a crime (see the Bouchelkia v. France judgment of 29 January 1997, Reports, 1997-I, p. 65, § 51 and Nwosu v. Denmark (dec.), no. 50359/99, 10 July 2001)."

EMD gennemgik klagers tilknytning til henholdsvis hjemland og opholdsland i præmis 38-39.

EMD udtalte i præmis 40-41, at:

"40. The Court has next examined the possibility of the applicant, his wife and his children establishing family life elsewhere. The Court has considered, first, whether the applicant and his wife and their children could live together in Iran.

41. The applicant's wife, A, is a Danish national. She has never been to Iran, she does not know Farsi and she is not a Muslim. Besides being married to an Iranian man, she has no ties with the country. In these circumstances the Court accepts even if it is not impossible for the spouse and the applicant's children to live in Iran that it would, nevertheless, cause them obvious and serious difficulties. In addition, the Court recalls that A's daughter from a previous relationship, who has lived with A since her birth in 1989, refuses to move to Iran. Taking this fact into account as well, A cannot, in the Court's opinion, be expected to follow the applicant to Iran."

EMD udtalte i præmis 43-44:

"43. Accordingly, as a consequence of the applicant's permanent exclusion from Denmark the family will be separated, since it is de facto impossible for them to continue their family life outside Denmark.

44. In the light of the above elements, the Court considers that the expulsion of the applicant to Iran would be disproportionate to the aims pursued. The implementation of the expulsion would accordingly be in breach of Article 8 of the Convention."

I sagen *Sezen v. the Netherlands (2006)* var den første klager indrejst i opholdslandet som 23-årig og havde fået opholdstilladelse som familiesammenført til sin ægtefælle (den anden klager), som havde boet i opholdslandet siden hun var syv år, og deres fælles barn. Tre år efter indrejsen blev den første klager idømt fire års fængsel for narkotikakriminalitet. Efter løsladelsen genoptog han samlivet med ægtefælle og barn, men fraflyttede senere det fælles hjem i en periode på omkring syv måneder. Knap fire måneder efter genoptagelse af samlivet fik klagerne endnu et barn. Den første klagers opholdstilladelse som familiesammenført blev omkring otte måneder senere nægtet forlænget under henvisning til samlivsafbrydelsen og straffedommen. Klagerens børn var henholdsvis otte og to år, da den nationale afgørelse blev truffet, og de var henholdsvis 16 og ti år, da EMD traf afgørelse i sagen.

EMD udtalte i præmis 43-50, at:

"43. The Court will first consider the nature and seriousness of the offence committed by the first applicant in the present case. It observes in this context that in 1993 he was convicted of a drug offence, namely the possession of large quantities of heroin. As the Court has held on previous occasions, it understands – in view of the devastating effects drugs have on people's lives – why the authorities show great firmness to those who actively contribute to the spread of this scourge (see Baghli v. France, no. 34374/94, § 48, ECHR 1999-VIII). The fact that it concerned a first conviction does not, in the Court's view, detract from the seriousness and gravity of the crime (see Bouchelkia v. France, judgment of 29 January 1997, Reports 1997-I, p. 65, § 51, and Amrollahi v. Denmark, no. 56811/00, § 37, 11 July 2002).

44. At the time the first applicant was arrested, i.e. on 31 July 1992, he had been residing lawfully in the Netherlands for less than one and a half years, having been granted a residence permit in February 1991. Applying the "sliding scale" principle, the authorities of the respondent State attached weight to this undeniably short duration of the first applicant's lawful stay in the Netherlands before he committed the offence. It

is nevertheless to be noted that, following his conviction on 20 January 1993, it was not until more than four years later, namely on 5 June 1997, that the decision was taken to refuse the first applicant continued residence. Following his early release from prison in April 1995, the first applicant had thus been allowed to build up even closer ties with the Netherlands for a further two years. In addition, it appears that the first applicant has not re-offended and that he has been gainfully employed ever since his release from prison.

45. As to the first applicant's connections with his country of origin, the Court considers that his situation is not comparable to that of a second-generation immigrant, given that he arrived in the Netherlands at the age of twenty-three. Not having been informed otherwise, the Court assumes that he received his schooling in Turkey and that he is conversant with the Turkish language. Thus, he undoubtedly has ties with Turkey. His ties to the Netherlands are mainly connected to his wife – the second applicant – and their two children.

46. The Court notes with some concern that none of the domestic authorities involved in the decision-making process appear to have paid any attention to the possible effects which the refusal of continued residence would have on the first applicant's family life (see Yıldız v. Austria, no. 295/97, § 43, 31 October 2002). It is true that the Regional Court of The Hague, sitting in Amsterdam, quashed the decision to impose an exclusion order on the first applicant for the reason that the Deputy Minister had failed to accord insufficient weight to the interests of the applicants and their children (see paragraph 19 above). However, the Regional Court upheld the decision not to prolong the first applicant's residence permit, and its reasoning on the subject did not refer to the consequences of that decision on his family life. In this context it is further to be noted that the Government assume that both the second applicant and the children speak Turkish (see paragraph 38 above). Had this matter been addressed in the course of the domestic proceedings, the authorities would have been aware of the fact that the children speak Dutch and Kurdish, but not Turkish.

47. Unlike the first applicant, his wife – the second applicant – may be considered a second-generation immigrant, having moved to the Netherlands at the age of seven and having lawfully resided there ever since. It is submitted, and has not been disputed, that all her relatives are also living in the Netherlands and that she does not have any family in Turkey. Although the parties disagree as to whether the second applicant was aware of the criminal activities of her husband, the fact remains that he had not yet committed the offence at the time they married and she entered into a family relationship with him, which is the relevant criterion in this context (see Boultif, cited above, § 48). Furthermore, the couple's two children were born in the Netherlands: Adem in 1990 and Mahsun in 1996. These two children have always lived in the Netherlands and its cultural and linguistic environment, and attend school there. Consequently, they can only have minimal ties, if any, to their parents' country of origin (see Şen v. the Netherlands, no. 31465/96, § 40, 21 December 2001) and, as noted above (paragraphs 32 and 46), they do not speak Turkish. In these circumstances, the Court accepts that following the first applicant to Turkey would mean a radical upheaval for the second applicant and in particular for the couple's children (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, p. 1971, § 36; see also Recommendation 1504 (2001) of the Parliamentary Assembly of the Council of Europe on the non-expulsion of long-term immigrants), and it finds that they cannot realistically be expected to do so.

48. The principal element which strikes the Court in the present case, however, is the fact that the applicants' marriage was deemed to have permanently broken down when the couple had merely ceased cohabiting for some six months in 1995/1996 and despite them making it clear to the authorities of the respondent State that cohabitation had been resumed and that there was no question of their marriage having broken down.

Dutch law did not permit the first applicant's residence permit to be revoked or an exclusion order to be imposed at the time of his conviction, since he had held a strong residence status at that time (see Yılmaz v. Germany, no. 52853/99, § 48, 17 April 2003). Yet by ruling – four years after that conviction (paragraph 44 above) and notwithstanding the fact that a child had been conceived during the time the spouses were not living together – that the marriage had permanently broken down, the authorities were able to conclude that the first applicant had lost his indefinite right to remain and, subsequently, to refuse him continued residence on the basis of the criminal conviction. By that time the first applicant had served his sentence and, as illustrated by the fact that he obtained gainful employment and that a second child was born to him and his wife, had begun rebuilding his life.

49. It is true that, in theory at least, the first applicant is entitled to make occasional visits to the Netherlands, due to the fact that the exclusion order that was initially imposed on him was ultimately withdrawn without having been enforced (paragraph 20 above). However, in this context the Court notes that the present case does not concern a divorced father with an access arrangement, but a functioning family unit where the parents and children are living together. The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 of the Convention and that to split up a family is an interference of a very serious order (see Mehemi v. France (no. 2), no. 53470/99, § 45, ECHR 2003-IV). Having regard to its finding at paragraph 47 above that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same as long as the first applicant continues to be denied the right to reside in the Netherlands. In this context the Court notes the Government's submission that the first applicant's criminal record would normally militate against a new residence permit being issued to him for a period of ten years. Although they also argued that Article 8 of the Convention would be taken into account in assessing whether his conviction would still be held against him, the Government failed to indicate when, and under what conditions, such an assessment would lead to a positive decision being taken on any future request for a residence permit being lodged by the first applicant.

50. In conclusion, the Court is of the opinion that, in the particular circumstances of the present case, the respondent State failed to strike a fair balance between the applicants' interests on the one hand and its own interest in preventing disorder or crime on the other.

There has, accordingly, been a violation of Article 8 of the Convention."

I sagen *Üner v. the Netherlands (2006)* blev klageren idømt syv års fængsel for drab og udvist for bestandig. Klageren var indrejst som 12-årig sammen med sin mor og sine søskende som familiesammenført til faren. På tidspunktet, hvor afgørelsen om udvisning blev endelig, havde han opholdt sig 17 år i opholdslandet og havde to mindreårige børn med sin nederlandske partner. Han var flyttet fra partneren efter halvandet års samliv, da det ældste barn var omkring ni måneder gammel, men forblev i tæt kontakt med partneren og barnet i de følgende omkring otte måneder indtil fængslingen. Partneren og det ældste barn besøgte klageren i fængslet mindst en gang om ugen og ofte hyppigere. Mens klageren var fængslet, fik parret endnu et barn, som klageren ligeledes så hver uge. Klageren havde på tidspunktet for EMD´s afgørelse opholdt sig 25 år i opholdslandet. Klagerens børn var henholdsvis seks år og halvandet år gamle på tidspunktet for den nationale afgørelse om udvisning.

EMD fastslog i præmis 61, at der forelå et indgreb både i klagerens ret til respekt for familieliv og hans ret til respekt for privatliv. EMD udtalte imidlertid:

"[...] Even so, having regard to the particular issues at stake in the present case and the positions taken by the parties, the Court will pay special attention to the applicant's right to respect for his family life."

EMD udtalte i præmis 62-65, at:

"62. The Court considers at the outset that the applicant lived for a considerable length of time in the Netherlands, the country that he moved to at the age of 12 together with his mother and brothers in order to join his father, and where he held a permanent residence status. Moreover, he subsequently went on to found a family there. In these circumstances, the Court does not doubt that the applicant had strong ties with the Netherlands. That said, it cannot overlook the fact that the applicant 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. As the Chamber put it in paragraph 46 of its judgment, '... the disruption of their family life would not have the same impact as it would [have had] if they had been living together as a family for a much longer time'. Moreover, while it is true that the applicant came to the Netherlands at a relatively young age, the Court is not prepared to accept that he had spent so little time in Turkey that, at the time he was returned to that country, he no longer had any social or cultural (including linguistic) ties with Turkish society.

63. As to the criminal conviction which led to the impugned measures, the Court is of the view that the offences of manslaughter and assault committed by the applicant were of a very serious nature. While the applicant claimed that he had acted in self-defence – a claim that was in any event rejected by the trial courts (see paragraphs 44 and 50 above) – the fact remained that he had two loaded guns on his person. Taking his previous convictions into account (see paragraphs 14 and 16 above), the Court finds that the applicant may be said to have displayed criminal propensities. Having regard to Netherlands law and practice relating to early release (see paragraph 34 above), the Court is, furthermore, not inclined to attach particular weight to the fact that the applicant was released after serving two-thirds of his sentence.

64. The Court concurs with the Chamber in its finding that at the time the exclusion order became final the applicant's children were still very young – six and one and a half years old respectively – and thus of an adaptable age (see paragraph 46 of the Chamber judgment). Given that they have Netherlands nationality, they would – if they followed their father to Turkey – be able to return to the Netherlands regularly to visit other family members residing there. Even though it would not wish to underestimate the practical difficulties entailed for his Dutch partner in following the applicant to Turkey, the Court considers that in the particular circumstances of the case the family's interests were outweighed by the other considerations set out above (see paragraphs 62 and 63).

65. The Court appreciates that the exclusion order imposed on the applicant has even more far-reaching consequences than the withdrawal of his permanent residence permit, as it renders even short visits to the Netherlands impossible for as long as the order is in place. However, having regard to the nature and the seriousness of the offences committed by the applicant, and bearing in mind that the exclusion order is limited to ten years, the Court cannot find that the respondent State assigned too much weight to its own interests when it decided to impose that measure. In this context, the Court notes that the applicant, provided he complied

with a number of requirements, would be able to return to the Netherlands once the exclusion order had been lifted (see paragraphs 32 and 51 above)."

Herefter konkluderede EMD i præmis 67:

"In the light of the above, the Court finds that a fair balance was struck in this case in that the applicant's expulsion and exclusion from the Netherlands were proportionate to the aims pursued and therefore necessary in a democratic society.

Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Onur v. the United Kingdom (2009)* blev klageren udvist fra opholdslandet på grund af alvorlig kriminalitet. Mens klageren var fængslet for et tidligere forhold, fødte hans tidligere partner deres fællesbarn, men klageren fremgik ikke som far til hende på fødselsattesten. Efter sin afsoning var klageren sammen med sin datter to-tre dage om ugen. Han fik efterfølgende to børn med sin nye partner. Klageren anførte i sin klage til EMD, at en udvisning ville være i strid med EMRK artikel 8 på grund af et eksisterende familieliv med hans datter fra et tidligere forhold og med hans børn fra hans nuværende forhold.

EMD udtalte i præmis 55-63, at:

"55. Although the majority of the applicant's criminal convictions were at the less serious end of the spectrum of criminal activity and were non-violent in nature, the Court cannot ignore the more serious convictions for burglary and robbery. The conviction for robbery was particularly serious: in sentencing the applicant to four and a half years' imprisonment the judge noted that the applicant was one of the ringleaders of the operation and that the use of weapons made it a terrifying ordeal for the victims. Moreover, although the applicant submits that the majority of his offences were committed when he was between seventeen and eighteen years old, he was in fact nineteen years old when he was last convicted of burglary and twenty-two years old when he was convicted of robbery. The present case is therefore readily distinguishable from Maslov v. Austria [GC], no. 1638/03, § 81, 23 June 2008, where the Court found a violation of Article 8. In Maslov, the (mostly non-violent) offences were committed by the applicant when he was between fourteen and fifteen years old and could therefore be regarded as acts of juvenile delinquency.

56. As a result of the Secretary of State's delay in issuing the Notice of Decision to Make a Deportation Order, the applicant enjoyed the benefit of three years at liberty in the United Kingdom following his release from prison. Although he did not commit any serious offences during this period, in May 2005 he was sentenced to twenty-eight days' imprisonment following his conviction for a road traffic offence and failure to surrender to *custody. While the Court would not place much weight on the road traffic offence, the fact remains that the applicant subsequently failed to surrender to custody, and the imposition of a custodial sentence would suggest that he did so without reasonable cause.*

57. The Court accepts that the applicant has spent a significant amount of time in the United Kingdom although it could not be said that he spent the major part of his childhood or youth there. He did not return to Turkey during the nineteen years he lived in the United Kingdom and although he spoke Turkish at the time of his removal from the United Kingdom, he no longer had any social, cultural or family ties to Turkey. His partner and his three children live in the United Kingdom and are British citizens. His mother, his brother and

three of his sisters hold either British citizenship or a permanent right of residency. In the circumstances, the Court does not doubt that the applicant has strong ties to the United Kingdom.

58. The applicant's eldest child is currently eight years old. Although she has never lived with the applicant, the Court has already held that their relationship amounted to family life as she had a close relationship with him prior to his deportation, spending on average two to three days a week with him. Nevertheless, without underestimating the disruptive effect that the applicant's deportation has had, and will continue to have, on her life, it is unlikely to have had the same impact as it would if the applicant and his daughter had been living together as a family. Contact by telephone and e-mail could easily be maintained from Turkey, and there would be nothing to prevent his daughter from travelling to Turkey to visit him.

59. The Court has found that the applicant also enjoyed family life in the United Kingdom with his current partner and their oldest child. The fact remains, however, that he lived for a relatively short period with his partner and their first born child, and he has never lived with their youngest child. Moreover, the applicant's partner was aware of his criminal record and immigration history when they decided to marry and start a family. In particular, she was aware that in 2001 the Secretary of State had advised the applicant that he was considering deportation. Although the Court has some sympathy with the applicant on account of the long and inexplicable delay in the commencement of deportation action, in the circumstances of the present case it does not accept that the delay entitled the applicant and his partner to assume that no further action would be taken. The Home Office had never indicated that it had considered his case and decided against deportation, and in April 2006, just five months before the marriage, the Home Office had announced that there would be a "crackdown" following the much-publicised admission that 1023 foreign national criminals, who should have been considered for deportation or removal, had completed their prison sentences and were released without any consideration of deportation or removal action.

60. Although the Court would not wish to underestimate the practical difficulties entailed for the applicant or his partner in relocating to Turkey, no evidence has been adduced which would indicate that it would be either impossible or exceptionally difficult for them to do so. Although the applicant was, prior to his deportation, diagnosed as suffering from mild to moderate depression, panic disorder, mild mental retardation, borderline intellectual functioning and dyslexia, there is no evidence to suggest that he could not receive treatment or counselling in Turkey should the need arise. Furthermore, although the applicant's partner is British, there are no circumstances that would inherently preclude her from living in Turkey. The couple's children are still very young – the eldest is just under two years old and the youngest just under one – and thus of an adaptable age. Given that they have British citizenship, if the applicant's partner and children followed him to Turkey they would be able to return to the United Kingdom regularly to visit other family members residing there.

61. Finally, the Court has had regard to the duration of the deportation order. Although the Immigration Rules do not set a specific period after which revocation would be appropriate, it would appear that at the very latest the applicant would be able to apply to have the deportation order revoked ten years after his deportation.

62. In light of the above, the Court finds that a fair balance was struck in this case in that the applicant's expulsion and exclusion from the United Kingdom was proportionate to the aims pursued and therefore necessary in a democratic society.

63. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Zuluaga and others v. The United Kingdom (2011)* indrejste klageren, klagerens ægtefælle og parrets to børn på henholdsvis to og seks år i opholdslandet og fik asyl. Efter fem et halvt års ophold blev klageren idømt ti års fængsel for alvorlig narkotikakriminalitet. Under afsoningen havde han meget begrænset kontakt til sin familie. Efterfølgende blev klagerens opholdstilladelse inddraget. Familien havde på dette tidspunkt boet i opholdslandet i ti år. Klagerens ægtefælle var i beskæftigelse og klagerens børn havde gået i skole og havde haft størstedelen af deres barndom i opholdslandet. Familien talte alle flydende spansk og havde fortsat øvrig familie i hjemlandet.

EMD udtalte i præmis 29-34, at:

"29. With regard to the severity of the offence, the Court reiterates that in view of the devastating effects of drugs on people's lives, it understands why the authorities show great firmness towards those who actively contribute to the spread of this scourge (Dalia v. France, 19 February 1998, § 48, Reports of Judgments and Decisions 1998-I). It notes that the applicant's offence was particularly serious as it involved the importation of a significant quantity of cocaine, which resulted in a sentence of ten years' imprisonment. The severity of this offence must therefore weigh heavily in the balance.

30. Moreover, the Court observes that the first and second applicants were in their late twenties when they left Colombia to come to the United Kingdom. Although they lived together in the United Kingdom for more than ten years, they have not contested the Government's assertion that they maintained strong cultural ties to Colombia and have close family members there who could help them to resettle. Moreover, while the third and fourth applicants have spent the formative years of their lives in the United Kingdom, they would also appear to have maintained social and cultural ties to Colombia. In particular, the Court notes that the applicants have not challenged the Government's assertion that the third and fourth applicants speak Spanish fluently.

31. On these facts alone, the Court finds no evidence to suggest that there would be any insurmountable obstacles to prevent the second, third and fourth applicants from relocating to Colombia, should they wish to do so. However, the Court was somewhat concerned by the allegation, made by the first applicant in the course of the asylum proceedings, that the second applicant had been raped by four men in Colombia. Although the first applicant did not mention this fact in the course of his original application for asylum, it formed part of the account given to the Asylum and Immigration Tribunal on reconsideration, an account which the Tribunal found to be "credible". If the second applicant was indeed the victim of such an attack, it could well impact upon her willingness to return to Colombia with the first applicant.

32. However, the Court observes that the applicants did not, at any stage of the domestic proceedings, seek to challenge the deportation on the ground that the second applicant would be unwilling to return to Colombia following the rape. Likewise, in their submissions to the Court, the applicants' complaints under Article 8 were founded entirely on the length of time that the family had been in the United Kingdom, the age at which the third and fourth applicants arrived in the United Kingdom, and the strength of the family ties and private life established there. Consequently, there is no evidence before the Court to suggest that the second applicant

would be unwilling or unable to return to Colombia on account of her past experiences and the Court is therefore unable to weigh this factor in the balance in assessing the proportionality of the first applicant's deportation.

33. Therefore, in view of the nature and severity of the offence committed by the first applicant, the relatively short time that the family has been living in the United Kingdom, and the strength of their remaining social, cultural and family ties to Colombia, the Court finds that, if considered against the criteria set down in Boultif v. Switzerland, no. 54273/00, ECHR 2001-IX and Üner v. the Netherlands [GC], no. 46410/99, ECHR 2006-..., the interference with the applicants' family life was proportionate to the legitimate aims pursued, namely the maintenance of an effective system of immigration control, the prevention of disorder and crime and the protection of health and morals.

34. It follows that the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible."

I sagen *Bajsultanov v. Austria (2012)* var klageren meddelt asyl i opholdslandet. Han blev idømt i alt 20 måneders fængsel for bl.a. flere tilfælde af vold samt udvist. EMD fastsatte længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen. Klagerens ægtefælle var meddelt asyl afledt af klagerens forhold og de havde to børn, der på tidspunktet for EMD's behandling af sagen var otte og fem år gamle.

Efter i præmis 79-82 at have konstateret, at udvisningen af klageren udgjorde et indgreb i hans ret til respekt for familieliv, og at dette indgreb var i overensstemmelse med loven og forfulgte et af de legitime hensyn, gennemgik EMD i præmis 83 de generelle principper, som indgår i afvejningen af, om indgrebet var nødvendigt i et demokratisk samfund, jf. kriterierne som sammenfattet i Boultif- og Üner-dommene.

Om karakteren og alvorligheden af den begåede kriminalitet udtalte EMD i præmis 84:

"Turning to the first set of criteria relating to the criminal offences committed by the applicant, the Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks' imprisonment, suspended with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half

years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions."

I præmis 85-87 udtalte EMD:

"85. As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there.

86. On the other hand, the applicant lived in Chechnya for almost twenty-three years, went to school there and subsequently worked occasionally in different jobs. The applicant's parents and siblings still live in Chechnya, and the applicant has maintained regular contact with his father.

87. The Court therefore considers, in line with the Austrian authorities, that the applicant still has stronger social and cultural ties to his country of origin than to his host country."

I præmis 88-92 udtalte EMD:

"88. As regards the applicant's family ties the Court notes that the applicant and his wife are Russian nationals, who arrived in Austria together in July 2003. The couple have two children, who were both born in Austria but who are also Russian nationals. The family lived together, apart from when the applicant was in prison, during which time however, the applicant's wife visited him regularly. After his release from prison the applicant went back to live with his family.

89. The Court further notes that the applicant's wife and the children are recognised refugees in Austria, with asylum status which has been awarded to them in separate decisions. However, the Court acknowledges that at the time the applicant's wife was considered to be at risk of persecution in Chechnya due to her husband being at risk. The applicant's wife herself never claimed a risk of ill-treatment because of her own conduct or her own role in any of the armed conflicts. Consequently, in view of the Court's finding with regard to the applicant's complaint under Article 3 of the Convention above, the applicant's wife can also not be considered as being at a real risk of being subjected to treatment contrary to Article 3 of the Convention if she returned to Chechnya.
90. The applicant's wife was born in Grozny and spent all her life in Chechnya until she left for Austria with her husband. The couple's children are still of an adaptable age (see Darren Omoregie and Others, cited above, § 66). The applicant's wife, who has resident status in Austria for herself and the children based on their asylum status, might have a considerable interest in not returning to Chechnya. But although the Court does not underestimate the difficulties of a relocation of the family, there is no indication that there are any insurmountable obstacles in the way of the applicant's wife and the children following the applicant to Chechnya and developing a family life there (see Gül v. Switzerland, 19 February 1996, § 42, Reports 1996-I, and Darren Omoregie and Others, cited above, ibid.).

91. Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention."

I sagen *Salem v. Denmark (2016)* blev klageren dømt for narkotikakriminalitet og andre alvorlige forhold og idømt fem års fængsel samt udvist betinget med indrejseforbud gældende i to år. Klageren var indrejst i opholdslandet i en alder af 23 år og var først blevet meddelt opholdstilladelse som familiesammenført til sin tidligere ægtefælle, hvorefter han efterfølgende blev meddelt opholdstilladelse på baggrund af asyl. På tidspunktet, hvor de nationale myndigheder afsagde endelig dom om udvisning (2011), havde klageren og hans tidligere ægtefælle otte børn, som var i alderen fra fem til 16 år, og som alle var danske statsborgere. EMD afgjorde sagen fem år efter de nationale myndigheder (2016).

EMD udtalte i præmis 77-83, at:

"77. In the present case, the applicant's eight children were between 5 and 16 years old when the deportation order became final. Before the Supreme Court the applicant's then wife stated that she would be unable to follow the applicant if he were deported from Denmark, and that the children would not manage outside Denmark. During the domestic proceedings, statements were obtained from the Children's Department at the municipality and the children's schools and day-care institutions, which recounted that several of the eight children had serious problems, including of a psychological and educational nature (see paragraph 25 above). Four of the children received special education and several of the children needed extra support and supervision in their schools and institutions. Massive public support measures had been provided due to a significant need to teach them normal social behaviour. Finally, the placement of some of the sons in public care was under consideration.

78. In the Court's view it is doubtful whether, on the basis of those statements, or on the material before it, the applicant has substantiated that he had a central role in the family (see paragraph 63 above) and that his children's best interests were adversely affected by his deportation (see, for example, A.W. Khan v. the United Kingdom, cited above, § 40).

79. The Supreme Court did not expressly state whether it found that there were no insurmountable obstacles for the applicant's wife and children to follow him. It rather appears that the majority found that in any event the separation of the applicant from his wife and children could not outweigh the other counterbalancing factors, notably that the applicant had a leading and central role in the commission of persistent, organised and aggravated drug crimes (see paragraph 39 above).

80. The Court notes in addition that it transpired from the statements mentioned above (see paragraphs 25 and 77) that several of the applicant's eight children had serious problems and therefore were being supported by various Danish authorities.

81. Finally, the Court notes that the applicant has not pointed to any obstacles for the children to visit him in Lebanon or for the family to maintain contact via the telephone or the internet.

82. In the light of the above, the Court recognises that the Supreme Court carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law, including the applicant's family situation. Moreover, having regard to the gravity of the drug crimes committed by the applicant, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court finds that the interference was supported by relevant and sufficient reasons, and was proportionate in that a fair balance was struck between the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other hand.

83. Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (*homicide with indirect intent*) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

EMD udtalte i præmis 45-55, at:

"45. As regards the length of the applicant's stay in Switzerland, the Court observes that he arrived in Switzerland in 1989 at the age of nine and lived in Switzerland for more than twenty years. His stay in Switzerland was, thus, of a considerable length of time.

46. With regard to the time elapsed since the offence was committed and the applicant's conduct during that period, the Court notes that he committed both the embezzlement and the homicide in 2000, even though he was only convicted for those offences in 2003 and 2004, respectively. Noting that the applicant commenced the service of his prison sentence only in 2006, six years after the commission of the offence and that he was released on parole in October 2009 after having served two thirds of his sentence, the Court observes that he has, apart from a fine in the amount of 120 CHF for the purchase and consumption of marihuana in 2007, not reoffended after his criminal conviction.

47. The Court notes that the expulsion order was served in July 2009, shortly before the applicant's release on parole. It became final in July 2010, following the exhaustion of remedies against it. Observing that roughly ten years passed between the commission of the offence and the conclusion of the court proceedings concerning the applicant's expulsion, the Court considers that this considerable length of time cannot be imputed to the respondent State, for the applicant commenced serving his prison sentence only in 2006, following the exhaustion of remedies against his criminal conviction, and his expulsion was not possible before he had

served at least two thirds of his sentence, in 2009. Therefore, the Court finds that the proceedings were conducted with reasonable expedition.

48. As regards the applicant's family situation, he has been married to his wife since 1999 and it has, explicitly, not been contested by the respondent Government that real and effective family existed between the applicant, his wife and their two children. It has to be noted that the applicant's wife could not know about the offences at issue at the time when she entered into a family relationship with the applicant, as the couple married in 1999 and thus prior to the commission of the offences in 2000. It has to be noted that the applicant, with the exception of the purchase and consumption of marihuana, for which he was fined in 2007, committed the criminal offences prior to the birth of his children.

49. The Court observes that the applicant's wife is a national of "the former Yugoslav Republic of Macedonia", i.e. of the country to which the applicant was expelled. The applicant's wife, who was born in 1978, lived there until 1990 and knows Albanian and the country's culture. She has relatives there and visits the country every year. The domestic courts considered that she could reintegrate in "the former Yugoslav Republic of Macedonia" without encountering serious difficulties, despite having lived in Switzerland for the past twenty years. The Court notes that the applicant's wife chose to follow him to Macedonia in 2011 and lived with him there until 2015, despite the fact that she could have remained in Switzerland as a holder of a permanent residence permit and maintained contact with the applicant through visits and means of telecommunication.

50. The Court observes that the couple's children, born in 2001 and in 2005, are likewise the nationals of "the former Yugoslav Republic of Macedonia". At the time the expulsion order became binding, the elder child was in primary school, whereas the younger one was in kindergarten. They were, thus, still of an adaptable age. While the Court accepts that the economic living conditions in "the former Yugoslav Republic of Macedonia" are less favourable than in Switzerland, it also notes that the former is a Contracting State of the Council of Europe. It further accepts that the children knew the country's culture to a certain extent due to visits they had made together with their mother. While it is not clear to what extent the children knew Albanian, it does not appear arbitrary to accept that the presence of their parents, who both originate from the country, as well as further relatives from their mother's side, would alleviate their difficulties in integrating in "the former Yugoslav Republic of Macedonia". Moreover, it has to be noted that the children were not forced to move there, but could have remained in Switzerland with their mother as holders of permanent residence permits and maintained contact with the applicant through visits and means of telecommunication.

51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in "the former Yugoslav Republic of Macedonia" and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to "the former Yugoslav Republic of Macedonia".

53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

5.3.2.1.2. Mindre alvorlig kriminalitet

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis fem og seks måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden.

EMD gennemgik i præmis 57 Boultif-kriterierne og udtalte i præmis 58:

"In addition, the Court will also take into account the particular ties which these immigrants have developed with the host country where they will have spent most of their life (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, § 36; Radovanovic, cited above, § 33; Üner, cited above, § 40)"

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som f.eks. narkotikahandel.

Vedrørende tilknytningen til opholdslandet udtalte EMD i præmis 61:

"With regard to the applicant's personal and family situation, the Court notes that the applicant, at the time of the expulsion order of 22 January 1999, had been lawfully residing in Germany for 27 years, having moved to that country at the age of ten in order to live there with his parents and brother and where he received his secondary school education. While the parties do not agree on the extent of the applicant's professional work, he had been employed for a certain period of that time. Since 1988 he had been in possession of a permanent residence permit. While it is true that the applicant and his wife had been separated during the first five years of their marriage as the applicant's wife and their first son did not follow the applicant to Germany until 1989, the family had been living together in Germany for ten years and there is no indication that their marriage and family life was anything less than effective."

I præmis 62 udtalte EMD om klagerens tilknytning til hjemlandet, at:

"On the other hand, the Court is not persuaded that the applicant has become so estranged from the country where he spent the first ten years of his life that he would no longer be able to settle in Turkey, having regard to the fact that the applicant married his Turkish wife in Turkey, where their first son was born and that his wife and son did not follow him to Germany until 1989. It follows that the applicant must have entertained certain links to his country of origin at least until 1989. It can further be presumed that the applicant is familiar with the Turkish language, as he married a Turkish wife."

EMD udtalte i præmis 63-64, at:

"63. With regard to the question of whether the applicant's family could reasonably be expected to follow the applicant to Turkey, the Court notes that the applicant's wife and four children are Turkish nationals. As the applicant's wife entered German territory as an adult and ten years before the issue of the expulsion order, it can be assumed that she has sufficient links which would allow her to re-integrate into Turkish society.

64. The Court notes, however, that the applicant's four sons – who were, at the time the expulsion order had been issued, between six and thirteen years of age – had been born in Germany respectively entered Germany at a very young age where they received all their school education. Even if the children should have knowledge of the Turkish language, they would necessarily have to face major difficulties with regard to the different language of instruction and the different curriculum in Turkish schools."

I præmis 65 gennemgik EMD spørgsmålet om den manglende tidsbegrænsning i klagerens indrejseforbud.

Endelig udtalte EMD i præmis 66:

"The Court considers that the applicant's expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant's children could be expected to face if they followed him to Turkey, the Court considers that an unlimited exclusion from the German territory violates the applicant's rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention."

I sagen P.J. AND R.J. v. SWITZERLAND (2024) var klageren idømt 20 måneders betinget fængsel for narkotikakriminalitet og udvist med indrejseforbud i fem år. Han havde ægtefælle og to børn på ti og otte år i opholdslandet. EMD udtalte blandt andet:

"50. Having identified the relevant factors, the domestic courts focused their assessment of the first applicant's situation on the nature and gravity of the offence committed. In this regard, the Court notes that, although the first applicant's offence was serious, it was not punished by actual imprisonment but by a suspended conditional sentence (see, by contrast, Veljkovic-Jukic v. Switzerland, no. 59534/14, §§ 6-7, 21 July 2020; K.A. v. Switzerland, no. 62130/15, § 49, 7 July 2020; and Ukaj v. Switzerland, no. 32493/08, § 37, 24 June 2014).

51. However, having established that the degree of culpability was low, the domestic courts merely referred to the fact that the first applicant had confessed from the outset, that he had cooperated with the police and that there was a favourable prognosis as to the risk of recidivism (see, by contrast, Z v. Switzerland, cited above, § 24, where there was a proven risk of recidivism as the applicant had committed an offence of illegal surveillance shortly after completing his probationary period, and Vasquez v. Switzerland, no. 1785/08, § 46, 26 November 2013, where there was a proven risk of recidivism given the applicant's record of difficulties controlling his sexual instincts after his conviction).

52. Moreover, the domestic courts merely mentioned that shortly after the expulsion decision was issued in July 2018, the first applicant found a full-time job, which he kept until he was expelled from Switzerland two years later, and that he had shown good behaviour throughout the period (see paragraph 16 above). The Government implied that such behaviour was to be expected from the first applicant, given that he had received a suspended prison sentence (see paragraph 37 above). However, in their assessment, the domestic courts failed to consider that, while the fear of a suspended sentence turning into an actual prison term might have played a role, the first applicant's overall good behaviour, his ability to secure stable employment shortly after his conviction, and the absence of any subsequent administrative or criminal offenses demonstrated his genuine intention to prove that he was not a danger to public safety. This oversight neglected evidence of the first applicant's rehabilitation and commitment to lawful conduct.

53. The principle of proportionality requires, inter alia, that account be taken of personal conduct and the impact on family life (see paragraph 28 above). The domestic courts did not question the genuineness of his family life or the negative impact that the five-year expulsion would have on it. They argued that the second applicant could either follow him to Bosnia and Herzegovina, where she had good prospects, or remain in Switzerland, making the separation a matter of choice (see paragraphs 10 and 16 above).

54. As for the applicants' daughters, the courts concluded that given their age they could adapt to a new environment in Bosnia and Herzegovina and that their relocation would depend on the second applicant's choice to follow her husband (see Jeunesse v. the Netherlands ([GC], no. 12738/10, § 109, 3 October 2014).

55. In the light of the foregoing, the Court finds that, in imposing and upholding the five-year expulsion, the domestic courts did not satisfactorily apply the Court's case-law mandating a careful balancing of the individual and public interests. The courts failed to give due weight to certain aspects. These include the first applicant's low level of culpability, the fact that his sentence was suspended, his lack of a criminal record, the fact that he no longer posed a threat to public safety, his status as a long-term immigrant and the adverse effect of the expulsion on the members of his family.

56. In the light of the above, the Court considers that there has been a violation of Article 8 of the Convention."

5.3.2.1.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Antwi and others v. Norway (2012)* havde klageren opnået sin opholdstilladelse på baggrund af svig. Klageren var i opholdslandet blevet gift og havde fået et barn. Syv år efter indrejsen fik opholdslandet kendskab til hans reelle identitet og året efter blev han udvist fra opholdslandet.

EMD udtalte i præmis 90-105:

"90. In applying the above principles [fra Nunez-dommen, red.] to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Nunez, cited above, § 71, and Darren Omoregie and Others v. Norway, no. 265/07, § 67, 31 July 2008; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Nunez and Darren Omoregie and Others, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Nunez, cited above, § 73).

91. Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country.

92. Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country."

93. Like the first applicant, the second applicant had grown up in Ghana. There she had lived until the age of seventeen when she was reunited with her father and siblings in Norway. Although she had become a Norwegian citizen and had family ties and employment links to Norway and probably would experience some difficulties in resettling in Ghana, there does not seem to be any particular obstacle preventing her from accompanying the first applicant to their country of origin. The Court has also taken note of her claim that, although aware that the first applicant originally had a Ghanaian background and had obtained a Ghanaian passport in connection with their marriage in Ghana on 11 February 2005, she should only have become aware of his true identity in this context. However, the above-mentioned factors cannot in the Court's view outweigh the public interest in sanctioning the first applicant's aggravated offences against the immigration rules with the impugned measure.

94. As to the third applicant, the Court notes that she is a Norwegian national who since birth has spent her entire life in Norway, is fully integrated into Norwegian society and, according to the material submitted to the Court, speaks Norwegian with her parents at home. In comparison, her direct links to Ghana are very limited, having visited the country three times (see paragraph 44 above) and having little knowledge of the languages practiced there.

95. Furthermore, as a result of the first applicant no longer holding a work permit and staying full-time at home and of the second applicant's being particularly occupied by her work, the first applicant assumes an important role in the third applicant's daily care and up-bringing. He is the parent who follows up her homework and parental contacts with her school and who facilitates her participation in sport activities. She is also at an age, ten years, when this kind of support would be valuable and she is strongly attached to her father as she is to her mother.

96. It would most probably be difficult for her to adapt to life in Ghana, were she and her mother to accompany the father to Ghana, and to readapt to Norwegian life later.

97. Against this background, the Court shares the High Court's view that the implementation of the expulsion order would not be beneficial to her.

98. However, the Court sees no reason to call into doubt the High Court's findings to the effect that, both parents having been born and brought up in Ghana and having visited the country three times with their daughter, there were no insurmountable obstacles in the way of the applicants settling together in Ghana or, at the least, to maintaining regular contacts. As to the allegation that the third applicant's rashes had been aggravated by heat during her previous stays in Ghana, the High Court majority found that this had not been sufficiently documented and could not be relied upon. The minority agreed that the evidence submitted in support of this contention had been weak and observed that the information appeared to have originated from the first and the second applicants. In the proceedings before the Court, the applicants submitted no further evidence in support of this argument or placed emphasis on it.

99. As also observed by the High Court, it does not emerge that the third applicant had any special care needs or that her mother would be unable to provide satisfactory care on her own.

100. Moreover, the Court considers that there are certain fundamental differences between the present case and that of Nunez where it found that the impugned expulsion of an applicant mother would give rise to a violation of Article 8 of the Convention. In reaching this finding, the Court attached decisive weight to the

exceptional circumstances pertaining to the applicant's children in that case, which were recapitulated in the following terms in its judgment (cited above, § 84): [citat af præmis 84 i Nunez-dommen, red.]

101. Unlike what had been the situation of the children of Mrs Nunez, the third applicant had not been made vulnerable by previous disruptions and distress in her care situation (compare Nunez, cited above, §§ 79 to 81).

102. Also, the duration of the immigration authorities' processing of the matter was not so long as to give reason to question whether the impugned measure fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures (compare Nunez, cited above, § 82). On the contrary, in October 2005, only a few months after the discovery of the first applicant's fraud in July 2005, he was put on notice that he might be expelled from Norway. In May 2006 the Directorate ordered his expulsion and prohibition on re-entry and gave him until 24 July 2006 to leave the country.

103. There being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion.

104. The above considerations are not altered by the duration of the prohibition on re-entry – five years. In this connection, the Court reiterates that in a comparable case, Darren Omoregie (cited above, §§ 63-68), it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case.

105. In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand.

Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban would not entail a violation of Article 8 of the Convention."

I sagen *Eze v. Sweden (2019)* havde klageren i forbindelse med en ansøgning om asyl opgivet et navn og fødedato. Han blev meddelt afslag på asyl, da de nationale myndigheder fandt, at han ikke havde sandsynliggjort sin identitet. Klageren giftede sig efterfølgende med en statsborger fra opholdslandet og søgte på ny om opholdstilladelse på baggrund af ægteskabet. Han opgav her et andet navn og fødedato. Klageren blev meddelt en midlertidig opholdstilladelse, da han havde fremvist en fødselsattest, hvoraf navnet fremgik. Klageren søgte to år efter om forlængelse af sin opholdstilladelse og indleverede i den forbindelse et forfalsket pas. Året efter indgivelsen af ansøgningen om forlængelse fik parret et barn. Klageren blev meddelt afslag på forlængelse af sin opholdstilladelse, da denne var opnået på baggrund af svig.

EMD udtalte i præmis 52-56, at:

"52. The Court acknowledges that the decision to refuse the applicant a permit to reside in Sweden will have a considerable impact on his family life, as his wife is a Swedish citizen and she and their common child are living in Sweden. However, there does not seem to be any insurmountable obstacles for them to move to the applicant in Nigeria. In any event, they have been visiting him there and could continue to do so.

53. Furthermore, an important factor in the present case is that the applicant and his wife created their family life at a time when the applicant had no residence permit. They started a relationship in mid-2011 when the applicant's asylum application had been rejected at first instance and married a year later when that application had been dismissed by a final decision and there was an enforceable deportation order against the applicant. Their son was born in June 2015, more than a year after the expiry of the applicant's temporary residence permit and following the Migration Agency's conclusion that the passport submitted in support of his application for an extension was a forgery. Thus, the applicant's family life was both established and extended at times when his immigration status was such that the persistence of that family life in Sweden was precarious. The applicant therefore had no reasonable expectation that he would be able to remain in the country and maintain his family life there.

54. In the above circumstances, the refused residence permit for the applicant could be incompatible with Article 8 only in exceptional circumstances. As the applicant and his wife have a four-year-old son, regard must be had to his best interests. In this respect, the Court notes that the Swedish authorities have carefully considered the issue, both under domestic law and under the Convention. In particular, the Migration Agency took into account that the applicant's wife and son should have no difficulties to visit the applicant in Nigeria. Furthermore, regard must be had to the fact that the son lived together with the applicant in Sweden only for a period of little more than a year, until the autumn of 2016. There are therefore no exceptional circumstances at issue in the present case. Instead, the Court is satisfied that sufficient weight was attached to the best interests of the child in refusing the applicant a residence permit.

55. Having regard to the above considerations, the Court finds that the Swedish authorities, acting within their margin of appreciation, did not fail to strike a fair balance between the applicant's interests, on the one hand, and the State's interest in ensuring effective immigration control, on the other. Nor was their assessment disproportionate in pursuance of the legitimate aim under Article 8 of the Convention.

56. It follows that the application is manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention."

I sagen *Alleleh a.o. v. Norway (2022)* havde den første klager opnået sin opholdstilladelse på baggrund af svig. Klagerens ægtefælle (anden klager) og deres fire børn, som på tidspunktet for dommen var 12, syv, syv og fire år gamle, (tredje – sjette klagere) var alle statsborgere i opholdslandet, ligesom hun selv havde opnået statsborgerskab i opholdslandet. 13 år efter indrejsen i opholdslandet blev myndighederne bekendt med klagerens rette identitet, hvorefter hendes statsborgerskab blev inddraget, og hun blev udvist med indrejseforbud i to år.

EMD udtalte i præmis 94-107:

"*94. The Court first notes that the decision to expel the first applicant and issue a two-year ban on re-entry was first taken by the Directorate of Immigration, and thereafter examined on appeal by the Immigration*

Appeals Board. Subsequently, a judicial review was carried out by three levels of court. During those proceedings, a psychologist was appointed to protect the best interests of the children, several witnesses were heard, and other pieces of evidence examined (see, in particular, paragraphs 22, 24 and 34 above). There is nothing to suggest that the expulsion case of the first applicant was not dealt with thoroughly and swiftly, enabling the decision makers to take into account all relevant circumstances, including those directly related to the situation of the four children.

95. As one additional initial observation the Court observes that the Supreme Court's conclusion that there were no insurmountable obstacles to the family moving as a whole to Djibouti – which relates to an aspect that under the Court's case-law is highly relevant to the proportionality assessment under Article 8 § 2 of the Convention (see paragraph 90 above) – did not touch on the applicants' argument before the Court concerning the risk of genital mutilation. Based on the materials provided to the Court, that appears to have been connected to how the applicants had structured their pleadings before the Supreme Court. Given the applicants' own limited focus on and their apparent lack of attempts to substantiate that argument before the domestic authorities, and observing that the Supreme Court in any event, in its assessment of the proportionality of the expulsion, included the assumption that the family would decide that the father and the children would remain in Norway during the ban on re-entry imposed on the first applicant, the Court does not in the circumstances of the case find it appropriate to analyse the situation in Djibouti on the basis of new material or replace the assessment of the national courts by its own on that point. It is sufficient to observe that the applicants have not shown convincingly that the Supreme Court's finding that the second to sixth applicants could also in principle go to Djibouti – either to stay (see paragraph 63 above) or at least to visit the first applicant (see paragraph 70 above) – was arbitrary or otherwise manifestly deficient.

96. The Court moreover notes the Supreme Court's meticulous examination of the Court's case-law in order to infer relevant legal standards under Article 8 of the Convention and to apply them in a Convention–compliant manner when deciding the first applicant's expulsion case. Such an approach is crucial for the distribution of responsibility between the Court and the domestic courts, in order to ensure that the proper standards have been applied at domestic level (see, as a recent authority, Savran, cited above, §§ 188-89).

97. The Court also attaches importance to the Supreme Court's detailed reasoning with regard to its explanation of the weighty immigration policy arguments in favour of the expulsion of the first applicant. The Supreme Court made particular reference to the seriousness of her offences and that a sanction – as had also been emphasised by the legislature in the preparatory work to the Immigration Act (see, in particular, paragraphs 46-48 above) – in the form of expulsion was considered necessary in order to uphold respect for the immigration regulations and deter from future contraventions, that is to say for reasons of general deterrence (see, inter alia, paragraph 60 above). Indeed, as already found by the Court in a number of cases, a scheme of implementation of national immigration law which is based on administrative sanctions in the form of expulsion and a ban on re-entry does not as such raise an issue of failure to comply with Article 8 of the Convention (see, for example, Antwi and Others, cited above, § 90). Thus, the Court has in principle no objections to the Supreme Court's approach in this respect, bearing in mind, at the same time, that any such scheme must be construed and applied in a manner that is compatible with the Convention rights of all involved.

98. The Court furthermore observes that the Oslo City Court and the Borgarting High Court each examined the facts of the case with regard to what an expulsion would entail for each of the applicants, including the children (see paragraphs 26-33 and 36-42 above, respectively). The Borgarting High Court's findings as to the facts of the case, the children's situation included, formed the basis for the Supreme Court's assessment of the case within the scope of the appeal, the appeal having been limited to the High Court's application of the law. In this respect the Supreme Court considered that the proportionality analysis, unlike what had been done by the High Court (see paragraph 35 above), had to be conducted in the light of the Court's case-law according to which an expulsion of a person whose grounds for residence were precarious at the outset would only be disproportionate in "exceptional" circumstances (see, for example, paragraphs 52, 54 and 64 above).

Moreover, the Supreme Court concluded that the facts of the case as established by the Borgarting High Court did not support the finding that such "exceptional circumstances" existed. In this connection the Supreme Court emphasised that there was nothing in the lower instances' findings of fact that stood out from what had generally to be assumed to follow from expulsion of one of the parents for a relatively short period (see paragraphs 66 and 71 above).

99. Regarding the Supreme Court's legal starting points under Article 8 of the Convention, the Court notes that the first applicant was not a "settled migrant" in Norway in so far as her stay there was based on repeatedly giving incorrect information over a long period and therefore had never had a valid legal basis. It was for that reason the Supreme Court proceeded on the basis that the expulsion was valid unless "exceptional circumstances" could be identified. Although the Court does not disagree with the Supreme Court regarding this being the starting point, the Court also notes the very particular aspect of the instant case that the sanction imposed on the first applicant impacted as much, if not more, on her family members, notably her children, all being Norwegian nationals who had been born and lived all their lives in Norway. Even if the other family members would follow the first applicant to Djibouti during the period when the ban on re-entry would be in force in order to preserve "family life", they would have to experience a considerable unwanted change in their "private life" in moving to a country with which they had no connection, including as concerned language. This contrasted with the first applicant's own situation, coming from Djibouti, speaking the language, having family there and even having visited there after she had arrived in Norway (see, inter alia, paragraph 26 above). The expulsion imposed on the first applicant to sanction her behaviour could thus, somewhat paradoxically, put an equally heavy if not heavier strain on the other family members. The Court observes in this context – as did the Supreme Court – that the Norwegian Parliament has requested that the Government consider an amendment of the Immigration Act to "make it possible for the immigration administration to supplement the use of expulsion and prohibition of entry with a broader set of sanctions where warranted by special circumstances such as the child's best interests" (see paragraph 57 above).

100. Furthermore, the Court understands the Supreme Court's role in being limited to correcting what had been an erroneous understanding of the law by the Borgarting High Court. Nonetheless, even an examination of whether any "exceptional circumstances" existed also required a concrete and broad examination of the whole case and how the whole family would be affected by the expulsion of one of them. It might even be particularly important that the Supreme Court demonstrate that concrete assessment in a situation where the lower court had, regardless of its misunderstanding of the law, given a detailed explanation of why it, based on evidence that had been presented to it directly during its hearing, considered the expulsion to contradict the children's best interests, which in its assessment made the expulsion disproportionate vis-à-vis them (see paragraphs 36-42 above).

101. Turning, then, to the concrete proportionality assessment, the Court notes that the facts with regard to what impact an expulsion would have on the children had been established by way of a thorough process where an expert had been engaged and the children's views obtained in so far as possible based on their age and maturity (see, inter alia, paragraph 37 above). The factual findings on that point had also been set out in detail by the Borgarting High Court in its judgment, providing a basis for the Supreme Court in its application of the law (see paragraph 98 above).

102. Against that background, the Court does not consider that it has a basis for concluding that the Supreme Court erred in its assessment that there were no concrete facts in the case before it that gave grounds for characterising the children's situation as different from what would essentially always follow with the expulsion of a parent. The Court therefore understands the Supreme Court's reluctance to qualify the circumstances as "exceptional" within the meaning of the Court's case-law. The Court notes that the case differed from those of Nunez and Kaplan and Others (both cited above), where the Court found violations of Article 8 of the Convention. It refers to Antwi and Others (cited above, §§ 101-02), where a five-year re-entry ban was accepted by the Court with reference to the fact that the child in question, also a Norwegian national who since birth

had spent her entire life in Norway, had not been made vulnerable by previous disruption and that the duration of the immigration authorities' processing of the matter had not been so long as to give reasons to question whether the impugned measure fulfilled the requirements of swiftness and efficiency, in contrast to what had been the situation in the case of Nunez. The applicant children in the instant case had not either been exposed to the same degree of disruption and stress as in the case of Nunez (cited above). Neither can the authorities be blamed for not having dealt with the expulsion case in a timely manner. The facts of the current case also clearly differ from those in the case of Butt (cited above).

103. Moreover, the Court observes that the Supreme Court stressed various aspects that mitigated the effects of the expulsion on the children. First of all, the Supreme Court emphasised that it was only out of consideration for the children that the ban on re-entry imposed on the first applicant had been limited to two years in the first place (see paragraph 70 above). The duration of the exclusion order is an important element in the proportionality assessment (see Savran, cited above, § 182), and the Court must take into account that it did not find re-entry bans of five years imposed on parents disproportionate in cases such as Antwi and Others (cited above, § 104) and Darren Omoregie and Others (cited above, § 67).

104. Furthermore, the Supreme Court emphasised the first applicant's possibility to apply to have the ban from re-entry revised (see paragraphs 57 and 71 above). Such a revision of the re-entry ban according to the second paragraph of section 71 of the Immigration Act (see paragraph 75 above) would enable the domestic authorities to take into account any subsequent negative development, such as the second applicant not being able to take adequately care of the four children, or any unforeseen change related to the children's health or overall situation. The Supreme Court also emphasised the first applicant's possibility to apply for access to Norway for brief visits during the two-year ban from re-entry (see paragraph 57 above). Lastly, the Court finds reasons to stress not only the importance of the fact that the ban from re-entry had been limited to two years (see paragraph 103 above), but that it proceeds on the basis that she will be allowed to resume her family life in Norway when the two years have passed.

105. Considering all of the above, the Court accepts that the present case disclosed no exceptional circumstances as such requiring the respondent State to withdraw the expulsion order so as to enable the applicants to maintain and continue to develop family life in Norway. Moreover, the Court accepts that the domestic authorities were faced with a balancing of interests that had to be done in a situation where particularly weighty interests in immigration control supported the first applicant's expulsion while at the same time an expulsion would impose considerable difficulties on the other applicants. The Court also accepts that the domestic authorities, including the Supreme Court, sought to attend to the children's interests in so far they could be reconciled with the public interest reasons in sanctioning the first applicant's behaviour.

106. Therefore, as to the final conclusion that the expulsion was not disproportionate because it did not exceed the standards indicated by the Court in its case-law relevant to the case, the Court does not find that the authorities of the respondent State transgressed their margin of appreciation when, having carefully examined the facts and adequately balanced the interests in issue (see paragraphs 92-93 above), they decided to expel the first applicant and to prohibit her re-entry for two years. Neither are there any other reasons for the Court to substitute its own assessment for that of the competent national authorities, bearing in mind in particular the domestic courts' careful examination.

107. On the basis of the above, the Court concludes that there has been no violation of Article 8 of the Convention."

5.3.2.1.4. Ulovligt ophold

I sagen *Konstatinov v. the Netherlands (2007)* havde klageren fået opholdstilladelse i opholdslandet på baggrund af ægteskab med en derboende mand med ukendt statsborgerskab, men blev efterfølgende udvist fra

opholdslandet. Parret fik et barn, og tre år efter sin udrejse indgav klageren på ny en ansøgning om opholdstilladelse, men blev meddelt afslag på denne, da hendes derboende ægtefælle ikke opfyldte et indkomstkrav, og da det var uvist, om parret havde været samboende. Det efterfølgende år indrejste klageren på ny og indgik på ny ægteskab med sin ægtefælle i opholdslandet. Klageren søgte endnu engang om familiesammenføring med sin ægtefælle. Denne ansøgning lå de næste syv år hen, mens klageren opholdt sig uden opholdstilladelse i opholdslandet. Klageren blev i mellemtiden dømt for seks tilfælde af tyveri og røveri og idømt fængselsstraffe på mellem seks uger til 12 måneder. Klageren bliver herefter udvist. Da EMD behandlede sagen, havde klagerens ægtefælle opholdt sig cirka 30 år i opholdslandet.

EMD udtalte i præmis 49-53:

"49. Turning to the circumstances of the present case, the Court notes that the applicant has never held a Netherlands provisional admission or residence title and that the relationships relied on by her were created at a time and developed during a period when the persons involved were aware that the applicant's immigration status was precarious and that, until Mr G. complied with the minimum income requirement under the domestic immigration rules, the persistence of that family life within the Netherlands would remain precarious. This is not altered by the fact that the applicant's second request for a residence permit for stay with Mr G. filed on 1 November 1991 was left undetermined for a period of more than seven years because her file had been mislaid by the responsible immigration authorities, as – like in 1990 in respect of her first request for a residence permit for stay with Mr G. – one of the main reasons why this second request was rejected on 27 November 1998 by the Deputy Minister was because Mr G. failed to meet the minimum income requirement.

50. In principle, the Court does not consider unreasonable a requirement that an alien having achieved a settled status in a Contracting State and who seeks family reunion there must demonstrate that he/she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought. As to the question whether such a requirement was reasonable in the instant case, the Court considers that it has not been demonstrated that, between 1990 and 1998, Mr G. has in fact ever complied with the minimum income requirement or at least made any efforts to comply with this requirement whereas the applicant's claim that he is incapacitated for work has remained wholly unsubstantiated.

51. The Court further notes that, between 4 September 1992 and 8 November 2005, the applicant has amassed various convictions of criminal offences attracting a prison sentence of three years or more, thus rendering her immigration status in the Netherlands even more precarious as this entailed the risk of an exclusion order being imposed, which risk eventually materialised. On this point the Court reiterates that, where the admission of aliens is concerned, Contracting States are in principle entitled to expel an alien convicted of criminal offences (see Üner v. the Netherlands [GC], no. 46410/99, § 54, ECHR 2006-...).

52. As regards the question whether there are any insurmountable obstacles for the exercise of the family life at issue outside of the Netherlands, the Court notes that the applicant's son will come of age in April 2007 whereas, according to its well-established case-law under Article 8, relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see Ezzouhdi v. France, no. 47160/99, § 34, 13 February 2001). The Court considers

the fact that the applicant's son is suffering from asthma does not constitute such a further element of dependency. The Court further notes that the applicant was born in Serbia where she lived until the age of seven, that she held a valid passport issued in Pančevo (Serbia) by the authorities of the former Socialist Federal Republic of Yugoslavia when she filed her second request for a Netherlands residence permit in 1991, and that her claim of having become stateless after the dissolution of this Federal Republic is no more than conjecture. The same applies to her claim that Mr G. is stateless and might be denied admission to her country of origin. In any event, the decision to declare the applicant an undesirable alien does not entail a permanent exclusion order, but an exclusion order of a temporary validity in the sense that – at the applicant's request – it can be lifted after a limited number of years of residency outside of the Netherlands.

53. The foregoing considerations are sufficient to enable the Court to conclude that it cannot be said that the Netherlands authorities have failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration and public expenditure and in the prevention of disorder or crime on the other. Consequently, there has been no violation of the applicant's right to respect for her rights guaranteed by Article 8 of the Convention."

I sagen *Darren Omoregie a.o. v. Norway (2008)* var klageren indrejst som 22-årig og havde fået afslag på asyl, men undlod at efterkomme udrejsebeslutningen og arbejdede endvidere ulovligt i opholdslandet. Nogle måneder senere giftede han sig med en statsborger fra opholdslandet og søgte om familiesammenføring, hvilket blev afslået, og klageren blev på ny pålagt at udrejse, hvilket han ikke efterkom. Der blev endvidere truffet afgørelse om at udvise klageren med indrejseforbud i fem år med mulighed for genindrejse efter ansøgning allerede efter to år. Under domstolsbehandlingen af udvisningsafgørelsen blev klagerens ægtefælle gravid med deres fælles barn, som blev født fem år efter klagerens indrejse. Klageren fik på ny afslag på familiesammenføring og efter fem et halvt års ophold blev han udsendt.

EMD udtalte i præmis 58 -62, at:

"58. In this regard the Court first observes that when the first applicant arrived and applied for asylum in Norway on 25 August 2001, he was an adult and had no links to the country. His family links to the second and third applicants were formed at different stages during his stay in the country.

59. The first and second applicants met in October 2001 and started co-habiting in March 2002. Already from the beginning of their relationship it must have been clear to them both that their prospects of being able to settle as a couple in Norway were precarious. The first applicant's asylum request was rejected, first by the Directorate of Immigration on 22 May 2002, and then by the Immigration Appeals Board on 11 September 2002, giving him until 30 September 2002 to leave the country. No judicial appeal was lodged against these decisions, which became final. Nevertheless, the first applicant opted to evade his duty to leave and stayed in Norway unlawfully.

60. On 2 February 2003, while the first applicant was staying illegally in Norway, he got married to the second applicant. Because of his lack of residence status the marriage had not been contracted in accordance with domestic law, though this shortcoming did not deprive the marriage of its validity.

61. In the Court's view, at no stage prior to their marriage on 2 February 2003 could the first and the second applicants have reasonably held any expectation that he would be granted leave to remain in Norway.

62. This state of affairs was not changed, but was confirmed rather, by the developments in the case in the ensuing period. On 14 February 2003 the first applicant made a new request on the ground of family reunification with the second applicant, but again his request was rejected and he was ordered to leave the country, in a decision of 26 April 2003, notified to him on 7 May 2003. Therefore the applicant could not reasonably expect a right to reside in Norway based on these proceedings."

EMD gennemgik i præmis 63-65 udvisningsafgørelsen.

EMD udtalte i præmis 66, at:

"It should further be noted that the first applicant had lived in Nigeria since he was six months old until he left the country at the age of 22, had studied at university for four years and had three brothers with whom he was still in contact. Whereas his links to Nigeria were particularly strong, his links to Norway were comparatively weak, apart from the family bounds he had formed there with the second and third applicants pending the proceedings. The third applicant was still of an adaptable age at the time when the disputed measures were decided and implemented (see Ajayi and Others, cited above; Sarumi, cited above; and Sezai Demir c. France (dec.), no. 33736/03, 30 May 2006). The second applicant would probably experience some difficulties and inconveniences in settling in Nigeria, despite her experience from a period spent in another African country, South Africa, and the fact that English was also the official language of Nigeria. However, the Court does not find that there were insurmountable obstacles in the way of the applicants' developing family life in the first applicant's country of origin. In any event, nothing should prevent the second and third applicants from coming to visit the first applicant for periods in Nigeria."

EMD fandt i den konkrete sag, at der ikke var sket en krænkelse af artikel 8.

Sagen *Gezginci v. Switzerland (2010)* omhandlede såvel ulovligt ophold som nægtelse af forlængelse af opholdstilladelse.

EMD har i deres *legal summary* karakteriseret sagen som *long term illegal immigration*, hvorfor den er placeret i dette afsnit. Dommen foreligger ikke på engelsk i en officiel oversættelse, hvorfor hele EMD´s *legal summary* er citeret herunder:

"Judgment 9.12.2010 [Section I]

Article 8

Expulsion

Deportation order against long-term illegal immigrant: deportation would not constitute a violation

Facts – The applicant is a Turkish national who has lived in Switzerland since 1978, on the basis of residence permits from 1980 to 1998 and unlawfully during the remaining periods. In 1997 the national authorities decided not to renew his residence permit. A few months later they set March 1999 as the deadline for his deportation from Switzerland. However, the applicant did not leave the country. In 2003, after a serious work-related accident, he applied for a residence permit on humanitarian grounds. The authorities refused the application. Shortly afterwards his wife disappeared without trace, leaving him to care for their eleven-year-old

daughter. The applicant lodged several unsuccessful appeals against the deportation order, which is still in force.

Law – Article 8: In view of the applicant's very long-standing residence in Switzerland, the refusal to grant him a residence permit on humanitarian grounds amounted to interference with his right to respect for his private life. That interference had been in accordance with the law and had pursued the legitimate aims of ensuring the economic well-being of the country, preventing disorder or crime and protecting the rights and freedoms of others. In order to determine whether it had been necessary in a democratic society, a number of factors had to be taken into consideration. First of all, the applicant's convictions between 1982 and 1992 had not been very serious and since 1993 his conduct did not appear to have been open to criticism from a purely criminal-law standpoint. Next, the applicant had lived in Switzerland for approximately thirty years, not counting periods spent abroad, thanks to the considerable tolerance shown by the authorities since 1999. Furthermore, some members of the applicant's family still lived in Turkey and would be able to help him resettle there and find work; he also spoke Turkish fluently. Similar considerations would apply were he to opt for Romania, a country which he knew from visits, where his wife lived and his daughter had spent much of her life, and where he appeared to have been in gainful employment. Furthermore, it was clear from his attitude that he was unable and unwilling to find employment in Switzerland. As to his daughter, given that she had spent most of her life in Romania and Turkey, was a citizen of both countries and probably spoke both languages, she could reasonably be expected to be able to adjust if she returned there. Lastly, the applicant's health was not liable to significantly hinder his integration in Turkey, given that he would have access there to the necessary medicines and treatment and would undoubtedly receive an invalidity pension. Accordingly, regard being had in particular to the fact that the applicant had been residing unlawfully in Switzerland since 1997, his lack of willingness to integrate there, his failure to abide by the rules of the country and the fact that his ties with his country of origin did not appear to have been completely severed, the respondent State could be said to have struck a fair balance between the interests of the applicant and his daughter on the one hand and its own interest in controlling immigration on the other.

Conclusion: the applicant's deportation would not amount to a violation (five votes to two)." [Understreget her, red.]

I sagen *Arvelo Aponte v. the Netherlands (2011)* var klageren indrejst som turist i opholdslandet, hvor hun indledte et forhold til en derboende statsborger. Klageren var fem år tidlige dømt og udvist for medvirken til kokainsmugling mellem sit hjemland og et andet europæisk land. Klageren oplyste ikke dette, da hun ansøgte om opholdstilladelse i opholdslandet på baggrund af sit samliv med en derboende statsborger. Mens myndighederne stadig behandlede hendes sag om opholdstilladelse, indgik parret ægteskab, og året efter fik de en søn. Klagerens ansøgning om opholdstilladelse blev afslået, da de nationale myndigheder blev bekendt med klagerens tidligere dom. På tidspunktet for EMD's afgørelse i sagen var klagerens søn syv år gammel.

EMD udtalte om klagerens tidligere kriminalitet og ulovlige ophold i opholdslandet i præmis 56-59, at:

"56. Turning to the facts of the case, the Court notes that the applicant had resided – with the exception of the time she was imprisoned in Germany – all her life in Venezuela when she arrived as a tourist in 2000 in the Netherlands where she met and started a relationship with Mr T. She was subsequently granted permission – in the form of a provisional residence visa – to enter the Netherlands and apply for a residence permit for the purpose of family formation with Mr T. It appears that, in the procedure on her request for a provisional

residence visa, it was erroneously not brought to the applicant's explicit attention that, if she were to file a subsequent request for a residence permit, she would be questioned about any possible criminal antecedents. Her request for a residence permit was actually rejected and a ten-year exclusion order was imposed on her after it had appeared – in the context of her request for a residence permit filed in 2001 – that in 1996 she had been sentenced to imprisonment for a narcotics offence in Germany. It also appears that she had not been convicted of any crime since 1996.

57. The Courts considers that the fact that a significant period of good conduct elapses between the date on which a person has served his or her sentence imposed for a criminal offence and the date on which immigration is sought by the person concerned necessarily has a certain impact on the assessment of the risk which that person poses to society. As regards the severity of the offence at issue, the Court reiterates that, in view of the devastating effects of drugs on people's lives, it understands why the authorities show great firmness towards those who actively contribute to the spread of this scourge (see, for instance, Dalia v. France, 19 February 1998, § 54, Reports 1998-I; and Baghli v. France, no. 34374/97, § 48, ECHR 1999-VIII).

58. The Court notes that the applicant's offence was quite serious as it involved the participation in the importation of a not negligible quantity of cocaine, which resulted in a prison sentence of two years and six months (see § 6 above). The severity of this offence must therefore weigh heavily in the balance. In so far as the applicant raises arguments based on sentencing guidelines used in the Netherlands by the Haarlem Regional Court in relation to the decision to impose an exclusion order on her, the Court does not find it necessary to determine these arguments as these guidelines did not exist at the time when the offences of which the applicant was convicted in Germany were committed.

59. The Court also notes that the family life at issue was developed further during a period when the applicant and Mr T. were aware that the applicant's immigration status was precarious. The applicant must beconsidered as having become aware as early as 15 August 2001 – thus well before her marriage to Mr T. and the birth of their child – that there was a serious possibility that an exclusion order would be imposed on her. Although she has continued to reside in the Netherlands, she did not do so on the basis of a residence. Although she has continued to reside in the Netherlands, she did not do so on the basis of a residence permit issued to her by the Dutch authorities. Moreover, the applicant's presence in the Netherlands – as from the date on which she was notified of the decision to impose an exclusion order on her – constituted a criminal offence, even if no criminal proceedings for that offence have been taken against her. It therefore appears that her presence in the Netherlands as from that date was tolerated while she awaited the outcome of the administrative appeal proceedings taken by her. This cannot, however, be equated with lawful stay where the authorities explicitly grant an alien permission to settle in their country (see Useinov, cited above; and Narenji Haghighi v. the Netherlands (dec.), no. 38165/07, 14 April 2009). Accordingly, the total length of her stay in the Netherlands cannot be given the weight attributed to it by the applicant."

EMD udtalte i præmis 60-62, at:

"60. As regards the question whether there are any insurmountable obstacles for the exercise of the family life at issue outside of the Netherlands, the Court notes that the applicant has been born and raised in Venezuela where she has resided for most of her life and where she has relatives who could help the applicant and her family to resettle there. Further noting that her husband stated on 31 March 2004, when heard before the official board of enquiry, that he had a reasonable command of Spanish and also noting that their child is

of a young and adaptable age, the Court finds that it may reasonably be assumed that they can make the transition to Venezuelan culture and society, although the Court appreciates that this transition might entail a certain degree of social and economic hardship.

61. Having regard to all the above considerations, the Court concludes that it cannot be said that the Netherlands authorities have failed to strike a fair balance between the competing interests. Consequently, there has been no violation of the applicant's right to respect for her rights guaranteed by Article 8 of the Convention.

62. Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Kaplan and others v. Norway (2014)* var klageren, der var af kurdisk oprindelse, udrejst fra Tyrkiet i 1993 og havde herefter søgt asyl i flere nordeuropæiske lande, senest i 1998 i Norge. Klageren havde i sit hjemland en ægtefælle og to børn, der alle boede hos hans forældre. Klageren fik afslag på asyl og forblev i landet uden opholdsgrundlag. I december 1999 blev klageren idømt 90 dages fængsel for et voldeligt overfald. I maj 2003 indrejste klagerens ægtefælle og børn i Norge og søgte asyl. Klagerens ægtefælle og børn blev alle meddelt afslag på asyl. I 2003 og 2005 blev klageren dømt for at have kørt for stærkt og uden kørekort og udvist af opholdslandet med indrejseforbud i fem år. Hverken klageren eller familien udrejste, og parret fik endnu et barn, der led af alvorlig autisme. Det var i sagen oplyst, at klageren var den af forældrene, der var bedst til at varetage det yngste barns særlige behov. På baggrund af det yngste barns diagnose valgte de nationale myndigheder i 2008 at give klagerens ægtefælle og alle tre børn opholdstilladelse. De nationale myndigheder lagde i den forbindelse vægt på, at ægtefællen og børnene på daværende tidspunkt havde haft et længerevarende ophold i opholdslandet. De nationale myndigheder fastholdt dog fortsat beslutningen om ikke at meddele klageren opholdstilladelse. Sagen blev behandlet ved tre nationale domstole, hvor den nationale højesteret fandt, at et afslag på opholdstilladelse til klageren ikke var en krænkelse af artikel 8, da han kunne udøve sit familieliv ved besøgsophold.

EMD udtalte i præmis 81-99, at:

"81. On the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012): [citat af præmis 68-70 i Nunez-dommen, red.]

82. The Court observes that the Immigration Appeals Board, upholding on 2 March 2007 the Directorate of Immigration's decision of 2 November 2006, had imposed the disputed expulsion and the prohibition on re-entry on the first applicant in view of the gravity of his violations of the Immigration Act (see paragraph 17 above). Thereafter, on 28 February 2008, the Board had granted the second applicant, with the children, a residence- and work permit under section 8(2) of the Immigration Act 1988, attaching decisive weight on new information concerning the daughter's health together with the length of the children's residence in Norway (four years and nine months in the case of the sons, see paragraph 23 above). On 7 April 2008, as a consequence of these residence permits to the remainder of the family, the Board altered its decision of 2 March 2007 prohibiting the first applicant to return to Norway indefinitely so as to limit the duration of the prohibition to five years (see paragraphs 27 to 28 above). The question arises whether the first applicant's expulsion with a prohibition on re-entry for five years failed to strike a proper balance between the applicants' right to

respect for family life, on the one hand, and the public interest in ensuring efficient immigration control, on the other hand.

83. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act (see paragraphs 26, 32 and 42 above). Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Antwi, cited above, § 90; Nunez, cited above, § 71, and Darren Omoregie and Others, cited above, § 67; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Antwi, Nunez and Darren Omoregie and Others, cited above, ibid.). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Antwi, cited above, § 90; Nunez, cited above, § 73).

84. Furthermore, the first applicant had grown up in Turkey, where he had spent his formative years and many years of adulthood before leaving in 1995 at the age of twenty-nine. He had no links to Norway when he arrived in 1998. The links that he had established there since could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country.

85. Like the first applicant, the second applicant had grown up in Turkey, where she had founded a family with the first applicant in the early 1990s before arriving in Norway in May 2003 at the age of twenty-seven. Although she had obtained a residence permit in Norway in January 2008, there was no particular obstacle preventing her from accompanying the first applicant and resettling in their country of origin.

86. Also their two sons, the third and fourth applicants, were born in Turkey, respectively in 1993 and 1995. They had spent most of their childhood years in that country before they arrived with their mother in Norway in May 2003. Weighty immigration policy considerations in any event militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that the parents exploit the situation of their children in order to secure a residence permit for themselves and for the children (see Butt v. Norway, no. 47017/09, § 79, 4 December 2012). Their family life had continued in Norway at a time when both their parents were aware that their immigration status in the country was such that the persistence of that family life would be precarious. Although their links to Norway appear to have been stronger than those to Turkey and they might have faced certain difficulties in integrating into normal life in Turkey, there were no insurmountable obstacles in the way of them accompanying the first applicant in returning to Turkey in July 2011.

87. Similar considerations apply to the daughter, the fifth applicant, who was born in Norway in 2005, who was at an adaptable age and whose health problems did not seem to constitute a hindrance to hers accompanying the remainder of the family if resettling in Turkey (see paragraphs 27 and 45 above). In this regard, it may be reiterated that a decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling (see N. v. the United Kingdom [GC], no. 26565/05, §§ 32-

51, ECHR 2008; compare D. v. the United Kingdom, 2 May 1997, §§ 53-54, Reports of Judgments and Decisions 1997-III). However, that does not appear to have been the situation in this case.

88. The Court will nonetheless consider whether the removal of the first applicant from Norway was incompatible with Article 8 of the Convention on account of exceptional circumstances pertaining in particular to the best interests of the youngest child (see Nunez, cited above, §§ 78 and 84; Antwi, cited above, §§ 100-101; Butt, cited above § 79).

89. In this connection, it is to be noted that in granting, on 28 February 2008, the second applicant, with the children, for one year a renewable residence- and work permit under section 8(2) (according to which such a permit could be granted if warranted by weighty humanitarian considerations or particular links to the country) of the Immigration Act 1988, the Board attached decisive weight to new information concerning the daughter's health together with the length of the children's residence in Norway (at that time four years and nine months in the case of the sons) and set as a condition that the mother continued to live in Norway.

90. Further details on the subject of the daughter were set out in the judgment of the High Court which found that the daughter's chronic and very serious degree of child autism and need for follow-up would affect the other family members strongly in the years to come and entail a burden on them far beyond the normal level. Her functional incapacity meant that she would always be dependent on her parents' resources. Her mother was exhausted and had a marginal level of functioning. It was the father who activated the daughter on a daily basis and she was particularly attached to him. Should he be expelled it was likely that the disturbance to her development would be aggravated and would cause a further burden to the mother, to the brothers and to others who assumed responsibilities for her (see paragraph 35 above).

91. The Supreme Court did not specifically disagree with the above-mentioned assessment but noted that, whilst the High Court had relied on the consideration that the daughter was suffering from a chronic and serious degree of child autism, the first applicant had submitted a medical statement of 27 October 2010 from which it appeared that her current diagnosis was "unspecified far-reaching developmental disturbance". She would not be able during her father's five year ban on reentry to receive any assistance from him in Norway and family contacts would then instead be maintained through visits in Turkey. However, his expulsion would not in the Supreme Court's view mean that she would be brought to bear an "extraordinary burden" (see paragraph 45 above).

92. The Court will not for the purposes of its examination of the present application pronounce any view on the appropriateness of the grant of a residence permit to the first applicant's wife and children, but notes that the grounds pertaining to the fifth applicant were of a kind that the Norwegian immigration authorities were prepared to regard as covered by the statutory criterion of "weighty humanitarian considerations" (see paragraph 23 above). In the present context it suffices to reiterate that the decisive criterion according to the Court's case-law is whether there were exceptional circumstances (see paragraph 81 above).

93. In view of the above, in particular the High Court's assessment – with which the Supreme Court did not specifically disagree – regarding the adverse consequences of the measure for the youngest child (see paragraphs 90 and 91 above), the Court considers that the expulsion of the first applicant father with a five-year re-entry ban constituted a very far-reaching measure especially vis-à-vis her.

94. The Court has taken note of the first applicant's criminal conviction by the District Court on 7 December 1999 for aggravated assault. Whilst the nature of the offence was serious, the extent of injury caused on the victim had not been great and the latter's provocation was a factor taken into account in mitigation of the applicant's sentence – 90 days' imprisonment, of which 60 days were suspended. Although the said judgment was transmitted to the Directorate of Immigration for consideration of whether there was a ground for ordering his expulsion on 5 May 2000 the authorities took no specific measures to deport him for about six years (see below). In the Court's view, bearing also in mind that the first applicant had not reoffended since, apart from a few minor traffic offences (see paragraph 13 and 26 above), his conviction is not in itself a factor that ought to carry significant weight in the instant case (see Butt, cited above, § 89).

95. Moreover, in contrast to a number of comparable cases dealt with by the Court (see, for example, Darren Omoregie and Others, cited above, § 64 with further references), the applicant parents in the case now under review had established their family life primarily in their country of origin well before arriving in the respondent State (see paragraphs 6 to 8 above) and could not therefore be reproached for having confronted the authorities with a fait accompli (see, mutatis mutandis, Butt, cited above, § 82; and Rodrigues da Silva and Hoogkamer, § 43). They were nonetheless aware that after settling in Norway their family life there would become precarious due to their immigration status. Indeed, as already stated above, Article 8 of the Convention does not entail a general obligation for a Contracting Party to the Convention to respect immigrants' choice of country of residence and to authorise family reunion in its territory. However, in view of the long duration of the period that lapsed from 1999-2000 until the Immigration Appeals Board's warning to the first applicant on 31 October 2006 (see paragraphs 11 to 13 above), the Court is not persuaded that the impugned measure to any appreciable degree fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures (see Nunez, cited above, § 82; compare Antwi, cited above, § 102). It may further be noted that shortly after the warning, the Board decided – on 8 November 2006 – to stay the implementation of his expulsion pending the City Court's judgment in his case, which was delivered some two years and a half later, on 23 April 2009 (see paragraphs 19 and 29 above).

96. The Court also finds it significant that in the meantime, in January 2008, the wife and the couple's three children had been granted a residence permit, by which time the family had lived united in Norway for more than four and a half years (see paragraph 23 above). She obtained this permit in spite of having lived in Norway unlawfully for an important period, for nearly three years from the Immigration Appeals Board's final rejection on 25 February 2005 of her May 2003 asylum request (see paragraph 14 above), until the Board in January 2008 decided to grant a residence- and work permit to her with the children (see paragraph 23 above). It is true that the husband's unlawful residence in the country had been considerably longer, and that for periods he also worked there unlawfully. However, considering especially the immigration authorities' unexplained inactivity practically for the entire period of his illegal stay in Norway, the Court is not convinced that these offences against the national immigration rules, by reason of their nature and degree, meant that the interests of the respondent State in ensuring efficient immigration control weighed more heavily in respect of the first applicant than they did for the second applicant so as to justify a differentiation between the parents for the purposes of the present proportionality assessment.

97. Thus, like in Nunez (cited above, § 79), the child in question in the present instance had strong bonds to both her mother and her father, albeit that she may have devoted more time than he in looking after the children at home because he was working as the family's only bread-winner outside the home. Moreover, as

indicated above, her parents had founded their family primarily in their country of origin well before arriving in Norway rather than in a situation of unlawful residence. When the first applicant was expelled in July 2011, the family had lived united in the country for nearly eight years. The competent authorities expected that the family would be split as a result of the expulsion, at least temporarily for the five years period during which the first applicant was prohibited from re-entering the country and the youngest child was prevented from seeing him other than by visiting him Turkey (see paragraphs 27 and 45 above). However, in as much as the measure deprived her of the care she needed from her father it does not appear to have been accompanied by reasons that were sufficient to show that the disputed interference was necessary within the meaning of paragraph 2 of Article 8.

98. Having regard to all of the above considerations, notably the youngest child's long-lasting and close bonds to her father, her special care needs and the long period of inactivity before the immigration authorities issued a warning to the first applicant and took their decision to order his expulsion with a re-entry ban, the Court is not convinced in 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. The Court is therefore not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between, on the one hand, the first applicant's need to be able to remain in Norway in order to maintain his contact with his daughter in her best interest (see Nunez, § 84) and, on the other hand, its public interest in ensuring effective immigration control – namely, according to the Government, 'the interests of ... the economic well-being of the country' and 'the prevention of disorder or crime'.

99. Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban entailed a violation of Article 8 of the Convention."

I sagen *Jeunesse v. the Netherlands (2014)* var klageren indrejst i opholdslandet på et visum fra en tidligere hollandsk koloni og havde giftet sig med en statsborger i opholdslandet. Hun blev i landet efter udløbet af sit visum og fik med sin ægtefælle tre børn, som alle var statsborgere i opholdslandet. Klageren søgte flere gange om opholdstilladelse, hvilket hver gang blev afslået, da klageren som udgangspunkt skulle søge fra hjemlandet. Efter 16 års ophold blev klageren forsøgt udsendt fra opholdslandet under henvisning til, at hun ikke havde et lovligt opholdsgrundlag. Børnene var på tidspunktet for Storkammerets afgørelse 14, knap ni og knap fire år.

EMD udtalte i præmis 114-123, at:

"114. Where confronted with a fait accompli the removal of the nonnational family member by the authorities would be incompatible with Article 8 only in exceptional circumstances (see paragraph 108 above). The Court must thus examine whether in the applicant's case there are any exceptional circumstances which warrant a finding that the Netherlands authorities failed to strike a fair balance in denying the applicant residence in the Netherlands.

115. The Court first and foremost takes into consideration the fact that all members of the applicant's family with the exception of herself are Netherlands nationals and that the applicant's spouse and their three children have a right to enjoy their family life with each other in the Netherlands. The Court further notes that the applicant held Netherlands nationality at birth. She subsequently lost her nationality when Suriname became independent. She then became a Surinamese national, not by her own choice but pursuant to Article 3

of the Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality (see paragraph 62 above). Consequently, her position cannot be simply considered to be on a par with that of other potential immigrants who have never held Netherlands nationality.

116. The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for more than sixteen years and that she has no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Netherlands authorities, while she repeatedly submitted residence requests and awaited the outcome of appeals. The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities.

117. Thirdly, the Court accepts, given the common background of the applicant and her husband and the relatively young age of their children, that there would appear to be no insurmountable obstacles for them to settle in Suriname. However, it is likely that the applicant and her family would experience a degree of hardship if they were forced to do so. When assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family.

118. The Court fourthly considers that the impact of the Netherlands authorities' decision on the applicant's three children is another important feature of this case. The Court observes that the best interests of the applicant's children must be taken into account in this balancing exercise (see above § 109). On this particular point, the Court reiterates 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 (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. For that purpose, in cases concerning family reunification, the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents (see Tuquabo-Tekle and Others v. the Netherlands, cited above, § 44).

119. Noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation. In this connection, the Court observes that the applicant's husband provides for the family by working full-time in a job that includes shift work. He is, consequently, absent from the home on some evenings. The applicant – being the mother and homemaker – is the primary and constant carer of the children who are deeply rooted in the Netherlands of which country – like their father – they are nationals. The materials in the case file do not disclose a direct link between the applicant's children and Suriname, a country where they have never been.

120. In examining whether there were insurmountable obstacles for the applicant and her family to settle in Suriname, the domestic authorities had some regard for the situation of the applicant's children (see paragraphs 23 (under 2.19 and 2.21), 28 and 34 (under 2.4.5) above). However, the Court considers that they fell

short of what is required in such cases and it reiterates that national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any such removal in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (see above § 109). The Court is not convinced that actual evidence on such matters was considered and assessed by the domestic authorities. Accordingly, it must conclude that insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit.

121. The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. 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.

122. The Court, whilst confirming the relevant principles set out above (see paragraphs 106-109), finds that, on the basis of the above considerations (see paragraphs 115-120) and viewing the relevant factors cumulatively, the circumstances of the applicant's case must be regarded as exceptional. Accordingly, the Court concludes that a fair balance has not been struck between the competing interests involved. There has thus been a failure by the Netherlands authorities to secure the applicant's right to respect for her family life as protected by Article 8 of the Convention.

123. There has accordingly been a violation of Article 8 of the Convention."

I sagen *Benamar v. the Netherlands (2005)* var situationen omvendt i forhold til de fleste sager, idet forældrene (moren og hendes nye mand) havde lovligt ophold i opholdslandet, mens hendes børn havde ulovligt ophold. EMD vurderede, hvorvidt der var uoverstigelige vanskeligheder, som hindrede, at moren kunne tage ophold med sine børn i deres hjemland. I sagen var moren, efter at være blevet skilt fra sin første ægtefælle og faren til hendes fire børn, indrejst i opholdslandet for at blive familiesammenført til sin nye ægtefælle. Klageren havde på baggrund af skilsmissen mistet forældremyndigheden over børnene. Klageren udrejste fra hjemlandet, da børnene var henholdsvis seks, otte, ti og tolv år. Seks år efter klagerens udrejse døde børnenes far, og hun blev nu af de marokkanske myndigheder tillagt den fulde forældremyndighed over børnene, hvorefter børnene søgte om opholdstilladelse i opholdslandet. De nationale myndigheder meddelte børnene afslag på familiesammenføring, da børnene senest havde været en del af deres fars husstand i hjemlandet. EMD udtalte, at:

"The mother chose to leave Morocco in 1991 and settled in the Netherlands with a Moroccan national residing there, leaving her four children behind in the care and custody of her ex-husband. The children were then 12, 10, 8 and 6 years' old, respectively. It was only on 13 September 1997, after the children's father had died, that the children applied for permission to join their mother in the Netherlands. The children were then 18, 16, 14 and 12 years' old respectively.

Prior to joining their mother in the Netherlands in August 1997, the children had lived in Morocco all their lives in the care and custody of their father. They must therefore be deemed to have strong links with the

linguistic and cultural environment of that country. It is further to be noted that by the time a final decision had been taken on the children's request, all of them had come of age. It has not been argued that the children could not stay in the house in Morocco owned by their maternal grandparents and the Court has found no reason for holding that the first applicant would be unable to fend for herself and to care for her adolescent siblings like she already did prior to their arrival in the Netherlands, if need be with the financial support of their mother. It further appears that the children have a maternal aunt living in Morocco.

Although the Court appreciates that the applicants would now prefer to maintain and intensify their family life in the Netherlands, Article 8, as noted above, does not guarantee a right to choose the most suitable place to develop family life (see Gül v. Switzerland, cited above, § 46, and Ahmut v. the Netherlands, cited above, § 63). Moreover, the Court has found no indication of any insurmountable objective obstacle for the applicants to develop this family life in Morocco. In this connection the Court considers that it has not been established that it would be impossible for the mother and her present husband, both being Moroccan nationals, to return to Morocco to settle with the children.

The fact that the children have been staying with their mother in the Netherlands since 1997 does not impose a positive obligation on the State to allow the children to reside there since they had illegally entered the Netherlands, i.e. without holding a provisional residence visa. Having chosen not to apply for a provisional residence visa from Morocco prior to travelling to the Netherlands, the applicants were not entitled to expect that, by confronting the Netherlands authorities with their presence in the country as a fait accompli, any right of residence would be conferred on them.

In these circumstances the respondent State cannot be said to have failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other (see Ramos Andrade v. the Netherlands (dec.), no. 53675/00, 6 July 2004; Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003; Adnane v. the Netherlands (dec.), no. 50568/99, 6 November 2001; Mensah v. the Netherlands (dec.), no. 47042/99, 9 October 2001; Lahnifi v. the Netherlands (dec.), no. 39329/98; 13 February 2001; and Kwakye-Nti and Dufie v. the Netherlands (dec.), no. 31519/96, 7 November 2000).

It follows that the present case discloses no appearance of a violation of Article 8 of the Convention on its facts, and that it must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention."

EMD afviste derefter sagen som *inadmissible*.

Se også sagen *Nacic and others v. Sweden (2012)* . I denne sag var klagerne, en familie bestående af forældre og to sønner, indrejst sammen i opholdslandet og havde søgt om asyl. Den ældste søn blev meddelt opholds-tilladelse på baggrund af sit helbred, mens de tre andre klagere fik afslag på asyl. Sønnen, som fik opholdstil-ladelse, var på dette tidspunkt fyldt 18 år. De svenske myndigheder fandt, at der var tungtvejende grunde til at lade ham opretholde sin opholdstilladelse i Sverige.

EMD udtalte i præmis 75-76:

"75. The question in the present case is whether, in view of the circumstances, the applicants still had a family life in Sweden within the meaning of Article 8 of the Convention after the third applicant had reached the age

of majority and, if so, whether the Migration Court of Appeal's decision to deport the first, second and fourth applicants amounted to an unjustified interference with this right.

76. The Court notes that the applicants have lived together as a family ever since arriving in Sweden in 2006 and that they presumably lived together in Kosovo before that. The fact that the third applicant reached the age of majority during the domestic proceedings did not change the fact that he was still a dependent member of the applicant family, in particular considering his state of health. In these circumstances the Court considers that the applicants' situation amounted to family life within the meaning of Article 8 § 1 of the Convention even after the third applicant had reached the age of majority. It further finds that the impugned decision to remove the first, second and fourth applicants from Sweden interfered with the applicants' right to family life."

EMD udtalte i præmis 84-85, at:

"84. The third applicant is now 21 years old and has lived in Sweden with the other applicants since 2006. According to the most recent medical certificate, dated June 2011, he had begun to feel better since being granted a residence permit. He had left the treatment centre and moved to an apartment. He had also begun studies at a college for adults. However, his positive development had been halted by the threat of disruption of the family and he had showed signs of falling back into depression. While acknowledging that this information is worrying, the Court finds that it has to be taken into account that the medical certificate mainly contains a description of how the applicant himself feels and that it neither suggests that he currently has a medical condition, nor that he is undergoing psychiatric or other treatment. In the Court's opinion, the medical certificate also indicates that his state of health is connected to a large extent to the situation he is in at the moment. Furthermore, as far as the Court is informed, there has been no further deterioration of his health since June 2011.

85. Notwithstanding the Migration Court of Appeal's assessment of the third applicant's mental health state in November 2009, the Court agrees with the Government that his current state of health cannot be seen as creating an impediment for him to reunite with the other applicants in their country of origin. Moreover, if necessary, he could receive medical care in Kosovo and Serbia. Against this background and taking into account the applicants' relatively limited ties to Sweden, the Court does not find that there are any insurmountable obstacles for the applicants to live together as a family in their country of origin."

EMD udtalte i præmis 87-88, at:

"87. Having regard to all the circumstances and taking into account the margin of appreciation afforded to States under Article 8 § 2 of the Convention, the Court considers that the Swedish authorities did not fail to strike a fair balance between the personal interests of the applicants as regards their family life on the one hand and to ensure an effective implementation of immigration control and hence to preserve the economic well-being of Sweden on the other.

88. Accordingly, there has been no violation of Article 8 of the Convention."

5.3.2.1.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

Der er ved gennemgangen af praksis ikke fundet domme, hvor EMD har taget stilling til betydningen af barnets alder ved indrejse/længden af barnets ophold i opholdslandet, formative år eller adaptable age i sager om inddragelse, nægtelse af forlængelse eller bortfald af klagerens opholdstilladelse, hvor der ikke foreligger kriminalitet.

5.3.2.1.6. Familiesammenføring med udlændinge, der har børn med lovligt ophold i opholdslandet

I sagen *Sen v. the Netherlands (2001)* var den første klager som 12-årig blevet familiesammenført til sin far i Nederlandene og havde fået permanent opholdstilladelse. Han blev gift med den anden klager i Tyrkiet, hvor hun blev boende efter indgåelse af ægteskabet. Den tredje klager blev efterfølgende født i Tyrkiet. Den anden klager flyttede derefter til Nederlandene og overlod den tredje klager i sin søsters og svogers varetægt i Tyrkiet. Den første og anden klager fik efterfølgende to børn i Nederlandene, som på det tidspunkt, hvor sagen blev indbragt for EMD, var fem og et år gamle, og på tidspunktet for EMD's afgørelse i sagen var 11 og syv år gamle. Omkring seks år efter den andens klagers indrejse søgte forældrene om opholdstilladelse til den tredje klager, hvilket blev afvist af de nationale myndigheder, som blandt andet vurderede, at den tredje klager ikke længere var en del af deres familieenhed, men derimod tilhørte mosterens familieenhed.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det komplette *legal summary* er indsat nedenfor. Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

EMD udtalte i præmis 39-42 (uofficiel dansk oversættelse):

"39. Som i Ahmut-sagen er klagernes særskilte bopæl resultatet af den beslutning, som forældrene bevidst har truffet, da den anden klager sluttede sig til sin mand i Nederlandene, og klagerne er derfor ikke afskåret fra at opretholde den grad af familieliv, som forældrene selv valgte i 1986. Sinem blev, efter at moren var rejst til Nederlandene i 1986, passet af sin moster og onkel (præmis 14 og 17 ovenfor). Hun har boet hele sit liv i Tyrkiet og har derfor stærke bånd til det sproglige og kulturelle miljø i sit land, hvor hun stadig har familie, nemlig to onkler, to tanter og kusiner, hvortil kommer hendes bedstefar, der regelmæssigt opholder sig i landet (præmis 17 ovenfor).

40. Domstolen finder i modsætning til sin vurdering i Ahmut-sagen, at der i den foreliggende sag imidlertid er en væsentlig hindring for, at familien Şen kan vende tilbage til Tyrkiet. De to første klagere, hvoraf den ene har permanent opholdstilladelse og den anden opholdstilladelse på grund af sit ægteskab med en person, der har tilladelse til at bosætte sig i Nederlandene, etablerede deres liv som par i Nederlandene, hvor de har haft lovligt ophold i mange år (jf. a contrario Gül-dommen, nævnt ovenfor, s. 175-176, præmis 41), og hvor et andet barn blev født i 1990, derefter et tredje i 1994. Disse to børn har altid boet i Nederlandene, i landets kulturelle miljø, og går i skole der (jf. dommen Berrehab, nævnt ovenfor, s. 8, § 7 og s. 16, præmis 29). De har derfor kun få eller ingen andre bånd end nationalitet til deres oprindelsesland (jf. navnlig dommen i Mehemi mod Frankrig af 26. september 1997, Samlingen 1997-VI, s. 1971, præmis 36), og der var derfor hindringer fra deres side for en flytning af familielivet til Tyrkiet (jr. a contrario dommene i Gül, s. 176, præmis 42, og

Ahmut, s. 2033, præmis 69). Under disse forhold var Sinems ankomst til Nederlandene den mest hensigtsmæssige måde at udvikle et familieliv med hende på, især da der i betragtning af hendes unge alder var et særligt behov for at fremme hendes integration i forældrenes familieenhed (jf. navnlig, mutatis mutandis, Johansen mod Norge af 7. august 1996, Samlingen 1996-III, s. 1001-1002, præmis 52, og s. 1003-1004, præmis 64, og X. , Y. og Z. mod Det Forenede Kongerige af 22. april 1997, Samlingen 1997-II, s. 632, præmis 43), der var i stand til og villig til at tage sig af hende. Det er rigtigt, at forældrene, efter at Sinem havde tilbragt de første tre år af sit liv med sin mor, valgte at efterlade deres ældste barn i Tyrkiet, da anden klager sluttede sig til sin mand i Nederlandene i 1986. Denne omstændighed, som indtraf i Sinems tidlige barndom, kan imidlertid ikke anses som en uigenkaldelig beslutning om, at hun altid skulle have bopæl i dette land, og om, at der kun skulle være kortvarig og løs kontakt med hende, og om at der definitivt gives afkald på samvær med hende og enhver idé om genforening af deres familie opgives. Det gælder tilsvarende for det forhold, at klagerne ikke har kunnet dokumentere, at de har bidraget økonomisk til deres datters underhold.

41. Den indklagede stat undlod ved kun at overlade valget til de to første klagere mellem at opgive den situation, de havde opnået i Nederlandene, eller opgive samværet med deres ældste datter, at finde en rimelig balance mellem på den ene side klagernes interesser og på den anden side sin egen interesse i at kontrollere immigrationen, uden at det er nødvendigt for Domstolen at tage stilling til spørgsmålet om, hvorvidt Sinems slægtninge bosat i Tyrkiet er villige og i stand til at tage sig af hende, som den indklagede regering hævder.

42. Der er følgelig sket en krænkelse af Konventionens artikel 8."

Af *legal summary* fremgår:

"Judgment 21.12.2001 [Section I]
Article 8
Article 8-1
Respect for family life

Family reunion involving child who had remained several years without his parents in native his country: violation

Facts: The first and second applicants, both Turkish nationals, are settled in the Netherlands. The first applicant went to live there under a family reunion arrangement in 1977. In 1982 he married the second applicant in Turkey. In 1983, the couple had a child – the third applicant. In 1986 the second applicant obtained a residence permit and went to join her husband, leaving the third applicant in the care of an aunt in Turkey. The applicants had two further children, in 1990 and 1994, both born in the Netherlands. In the meantime, in 1992, the first applicant had asked the Dutch authorities for a temporary residence permit for the third applicant, who was still living in Turkey. This was refused by the Minister of Foreign Affairs on the grounds that because of the mother's departure the child had changed family units and that the first two applicants had contributed to her upbringing.

Law: Article 8 – It was necessary to determine whether the Dutch authorities had a positive obligation to authorise the third applicant to live in the Netherlands, to enable the applicants to maintain and develop a

family life in Dutch territory. In order to establsih the scope of a State's obligations, the facts had to be assessed by the yardstick of a number of principles set out in the Gül v. Switzerland and Ahmut v. the Netherlands judgments. Firstly, the scope of a State's obligation to admit immigrants' relatives to its territory depends on the situation of the persons concerned and the general interest. Secondly, as a matter of well-established international law, a State has the right to control the entry of non-nationals into its territory and their residence there. Lastly, where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory. Other factors to be taken into account are the age of the children concerned, their situation in the country of origin and their degree of independence from their parents. In the present case the applicants lived apart as a result of the decision taken by the first two applicants of their own accord when the second applicant joined the first applicant in the Netherlands in 1986. The third applicant, who was left in the care of close relatives, had lived all her life in Turkey and had consequently formed strong ties with the linguistic and cultural environment of her country, where she still had close family. However, there was a major obstacle to the return of the applicants' family to Turkey. The first two applicants had established their matrimonial home in the Netherlands, where they had been legally resident for many years and where they had had two other children, born in 1990 and 1994. Those two children had always lived in the Netherlands, in the Dutch cultural environment, and attended schools there. They therefore had very few links, if any, with Turkey other than their nationality. Accordingly, a move to the Netherlands by the third applicant was the most appropriate way to establish family life with her, especially as, she being still a child, there was a particular need to integrate her into her parents' family unit. The fact that in 1986 the second applicant had left the third applicant, then aged three, in Turkey in order to join her husband in the Netherlands could not be regarded as an irrevocable decision to leave her in Turkey permanently and to give up the idea of reuniting their family. That was also true of the fact that the applicants had been unable to make a financial contribution towards their daughter's upbringing. In short, the respondent State had failed to strike a fair balance between the interests of the applicants and its own interest.

Conclusion: violation (unanimously)."

I sagen *Tuquabo-Tekle and others v. the Netherlands (2005)* var klageren efter sin ægtefælles død flygtet fra sit hjemland og indrejst i Norge, hvor hun blev meddelt humanitær opholdstilladelse. Klageren havde før flugten overladt sin ældste datter til sin mors ven og de yngste børn til sin mor. Børnene blev efterfølgende meddelt opholdstilladelse i Norge, men kun hendes søn indrejste. Klageren giftede sig efterfølgende med en statsborger fra hjemlandet med opholdstilladelse som flygtning i opholdslandet, og klageren og hendes søn blev familiesammenført i opholdslandet. Parret fik to fællesbørn, som på det tidspunkt, hvor sagen blev indbragt for EMD, var seks og fem år gamle, og på tidspunktet for EMD's afgørelse i sagen var 11 og ti år gamle. Klageren søgte endnu engang om familiesammenføring med sin datter, som i mellemtiden var blevet 15 år. De nationale myndigheder meddelte afslag med henvisning til, at familielivet mellem klageren og datteren var blevet afbrudt.

EMD udtalte i præmis 45-52, at:

"45. Turning to the particular circumstances of the case, the Court notes that the Government's submissions centre on their contention that the applicants could have applied for Mehret to come to the Netherlands much sooner, and that, in the absence of sound reasons for their not having done so, it had to be assumed that

Mehret's staying with her grandmother and uncle in Eritrea was intended to be a permanent arrangement. However, the Court has previously held that parents who leave children behind while they settle abroad cannot be assumed to have irrevocably decided that those children are to remain in the country of origin permanently and to have abandoned any idea of a future family reunion (see Şen v. the Netherlands, no. 31465/96, § 40, 21 December 2001). Indeed, it appears clearly from the facts of the present case that Mrs Tuquabo-Tekle always intended for Mehret to join her. Thus, as soon as she had been granted leave to remain in Norway, she took steps in order to be reunited with her children. Having obtained the Norwegian authorities' permission, she managed to be reunited with her son Adhanom but did not succeed in bringing Mehret to Norway at that time, owing to circumstances beyond her control (see paragraph 9 above).

46. The Court further notes that the Government have not disputed that Mrs Tuquabo-Tekle and her husband made efforts to obtain a passport for Mehret and accommodation suitable for the number of persons which their family would comprise if Mehret joined them. The Court accepts that any delays which occurred stemmed from the applicants' sincerely held belief – in which they were apparently supported by their legal representative – that it was not possible to apply for family reunion in the Netherlands until these matters had been taken care of, rather than from any decision on their part that Mehret should stay in Eritrea. Similarly, the fact that, according to the Government, Mrs Tuquabo-Tekle and her husband were not required to take these steps does not detract from the aim manifestly underlying their efforts: to be (re)united with Mehret in the Netherlands.

47. As regards the question to what extent it is true that Mehret's settling in the Netherlands would be the most adequate means for the applicants to develop family life together, the Court observes that the present application is very similar to the case of Şen v. the Netherlands (cited above), in which it found a violation of Article 8 of the Convention. That case also concerned parents with settled immigrant status in the Netherlands who chose to leave a daughter (Sinem) behind in the care of relatives in her country of origin (Turkey) for a number of years before they applied to be reunited with her. At this juncture the Court would remark that it is questionable to what extent it can be maintained in the present case, as the Government did, that Mrs Tuquabo-Tekle left Mehret behind of "her own free will", bearing in mind that she fled Eritrea in the course of a civil war to seek asylum abroad following the death of her husband. Be that as it may, it is in any event the case that Mrs Tuquabo-Tekle and her husband, just like Mr and Mrs Şen, have been lawfully residing in the Netherlands for a number of years, even opting for, and obtaining, Netherlands nationality. In addition, and also just as in the Şen case, two children have been born to the couple in the Netherlands: Tmnit in 1994 and Ablel in 1995. These two children have always lived in the Netherlands and its cultural and linguistic environment, have Netherlands nationality and attend school there. Consequently, they can only have minimal ties, if any, to their parents' country of origin (see Şen, cited above, § 40).

48. It was precisely these circumstances which led the Court to conclude in the case of Şen that a major impediment existed to that family's return to Turkey, and that allowing Sinem to come to the Netherlands would be the most adequate way in which the family could develop family life with her. The Court added that this was all the more so as, in view of Sinem's young age, her integration into her parents' close family unit was particularly exigent (ibid., § 40). It is in this latter context that the two cases are different: whereas Sinem Şen was 9 years old when her parents sought to be reunited with her (ibid., §§ 10 and 13), Mehret was already 15 when her mother and stepfather applied for a provisional residence visa on her behalf (see paragraph 11

above). The question therefore arises whether this constitutes such a material difference that the present case ought, for that reason, to be distinguished from Şen, and lead to a different outcome.

49. The Court has indeed previously rejected cases involving failed applications for family reunion and complaints under Article 8 where the children concerned had in the meantime reached an age where they were presumably not as much in need of care as young children and increasingly able to fend for themselves. In cases of this nature, the Court has also examined whether the children had grown up in the cultural and linguistic environment of their country of origin, whether they had other relatives there, and whether it could be expected of the parents to return to that country (see, for instance, Benamar v. the Netherlands (dec.), no. 43786/04, 5 April 2005; I.M. v. the Netherlands (dec.), no. 41266/98, 25 March 2003; and Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003).

50. In the present case the Court notes that the applicants have not alleged that Mehret, who undoubtedly has strong cultural and linguistic links with Eritrea, could no longer be looked after by the relatives who have been doing so ever since her mother left. They have, nevertheless, argued that Mehret's age – rather than making her less dependent on her mother – made it even more pertinent for her to be allowed to join her family in the Netherlands. This was because, in accordance with Eritrean custom, Mehret's grandmother had taken her out of school, and Mehret had also reached an age where she could be married off (see paragraph 13 above). Although Mrs Tuquabo-Tekle disagreed with the choices made for Mehret, she was unable to do anything about them as long as her daughter was living in Eritrea. The Court agrees with the Government that the applicants' arguments in this context do not, by themselves, warrant the conclusion that the State is under a positive obligation to allow Mehret to reside in the Netherlands. Even so – and bearing in mind that she was, after all, still a minor – the Court accepts in the particular circumstances of the present case that Mehret's age at the time the application for family reunion was lodged is not an element which should lead it to assess the case differently from that of Şen.

51. The Court would, moreover, add that, although not in itself decisive, it is noteworthy that when Mrs Tuquabo-Tekle successfully sought leave from the Norwegian authorities to be reunited with her daughter in Norway, Mehret was much the same age as Sinem Şen was when her parents lodged such an application with the Netherlands authorities (see paragraph 9 above).

52. Having regard to the above, the Court finds that the respondent State has failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other.

Accordingly, there has been a violation of Article 8 of the Convention."

5.3.2.2. Barnets/børnenes sprogkundskaber

EMD har i flere sager taget stilling til betydningen af klagerens barns/børns sprogkundskaber i forhold til klagerens hjemland ved vurderingen af, om en udsendelse[42] af klageren vil indebære et indgreb i retten til

[42] 323. According to well-established case-law, "in all decisions concerning children their best interests are of paramount importance. (...) It follows that there is an obligation on States to place the best interests of the child, and also

familieliv, som ikke er proportionalt med det legitime hensyn. EMD har i den forbindelse vurderet, om det vil være muligt for og rimeligt at forvente af klagerens barn/børn at udrejse med klageren til dennes hjemland med henblik på at udøve familielivet dér. Det skal for en god ordens skyld bemærkes, at det i sidstnævnte tilfælde selvfølgelig ikke påhviler barnet/børnene rent faktisk at udrejse med klageren til dennes hjemland.

EMD har endvidere i enkelte sager taget stilling til betydningen af, at klagerens barn/børn havde kendskab til sproget i opholdslandet.

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[13] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

5.3.2.2.1. Alvorlig kriminalitet

I sagen *Sezen v. the Netherlands (2006)* var den første klager indrejst i opholdslandet som 23-årig og havde fået opholdstilladelse som familiesammenført til sin ægtefælle (den anden klager), som havde boet i opholdslandet siden hun var syv år, og deres fælles barn. Tre år efter indrejsen blev den første klager idømt fire års fængsel for narkotikakriminalitet. Efter løsladelsen genoptog han samlivet med ægtefælle og barn, men fraflyttede senere det fælles hjem i en periode på omkring syv måneder. Knap fire måneder efter genoptagelse af samlivet fik klagerne endnu et barn. Den første klagers opholdstilladelse som familiesammenført blev omkring otte måneder senere nægtet forlænget under henvisning til samlivsafbrydelsen og straffedommen. Klagerens børn var henholdsvis otte og to år, da den nationale afgørelse blev truffet, og de var henholdsvis 16 og ti år, da EMD traf afgørelse i sagen.

EMD udtalte i præmis 44-50, at:

"44. At the time the first applicant was arrested, i.e. on 31 July 1992, he had been residing lawfully in the Netherlands for less than one and a half years, having been granted a residence permit in February 1991. Applying the "sliding scale" principle, the authorities of the respondent State attached weight to this undeniably short duration of the first applicant's lawful stay in the Netherlands before he committed the offence. It is nevertheless to be noted that, following his conviction on 20 January 1993, it was not until more than four years later, namely on 5 June 1997, that the decision was taken to refuse the first applicant continued residence. Following his early release from prison in April 1995, the first applicant had thus been allowed to build up even closer ties with the Netherlands for a further two years. In addition, it appears that the first applicant has not re-offended and that he has been gainfully employed ever since his release from prison.

45. As to the first applicant's connections with his country of origin, the Court considers that his situation is not comparable to that of a second-generation immigrant, given that he arrived in the Netherlands at the

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those of children as a group, at the centre of all decisions affecting their health and development" (Vavřička and Others v. the Czech Republic [GC], §§ 287-288 and below, for instance, X v. Latvia [GC], § 96). a. Mutual enjoymen

age of twenty-three. Not having been informed otherwise, the Court assumes that he received his schooling in Turkey and that he is conversant with the Turkish language. Thus, he undoubtedly has ties with Turkey. His ties to the Netherlands are mainly connected to his wife – the second applicant – and their two children."

46. The Court notes with some concern that none of the domestic authorities involved in the decision-making process appear to have paid any attention to the possible effects which the refusal of continued residence would have on the first applicant's family life (see Yıldız v. Austria, no. 295/97, § 43, 31 October 2002). It is true that the Regional Court of The Hague, sitting in Amsterdam, quashed the decision to impose an exclusion order on the first applicant for the reason that the Deputy Minister had failed to accord insufficient weight to the interests of the applicants and their children (see paragraph 19 above). However, the Regional Court upheld the decision not to prolong the first applicant's residence permit, and its reasoning on the subject did not refer to the consequences of that decision on his family life. In this context it is further to be noted that the Government assume that both the second applicant and the children speak Turkish (see paragraph 38 above). Had this matter been addressed in the course of the domestic proceedings, the authorities would have been aware of the fact that the children speak Dutch and Kurdish, but not Turkish.

47. Unlike the first applicant, his wife – the second applicant – may be considered a second-generation immigrant, having moved to the Netherlands at the age of seven and having lawfully resided there ever since. It is submitted, and has not been disputed, that all her relatives are also living in the Netherlands and that she does not have any family in Turkey. Although the parties disagree as to whether the second applicant was aware of the criminal activities of her husband, the fact remains that he had not yet committed the offence at the time they married and she entered into a family relationship with him, which is the relevant criterion in this context (see Boultif, cited above, § 48). Furthermore, the couple's two children were born in the Netherlands: Adem in 1990 and Mahsun in 1996. These two children have always lived in the Netherlands and its cultural and linguistic environment, and attend school there. Consequently, they can only have minimal ties, if any, to their parents' country of origin (see Şen v. the Netherlands, no. 31465/96, § 40, 21 December 2001) and, as noted above (paragraphs 32 and 46), they do not speak Turkish. In these circumstances, the Court accepts that following the first applicant to Turkey would mean a radical upheaval for the second applicant and in particular for the couple's children (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, p. 1971, § 36; see also Recommendation 1504 (2001) of the Parliamentary Assembly of the Council of Europe on the non-expulsion of long-term immigrants), and it finds that they cannot realistically be expected to do so.

48. The principal element which strikes the Court in the present case, however, is the fact that the applicants' marriage was deemed to have permanently broken down when the couple had merely ceased cohabiting for some six months in 1995/1996 and despite them making it clear to the authorities of the respondent State that cohabitation had been resumed and that there was no question of their marriage having broken down. Dutch law did not permit the first applicant's residence permit to be revoked or an exclusion order to be imposed at the time of his conviction, since he had held a strong residence status at that time (see Yılmaz v. Germany, no. 52853/99, § 48, 17 April 2003). Yet by ruling – four years after that conviction (paragraph 44 above) and notwithstanding the fact that a child had been conceived during the time the spouses were not living together – that the marriage had permanently broken down, the authorities were able to conclude that the first applicant had lost his indefinite right to remain and, subsequently, to refuse him continued residence

on the basis of the criminal conviction. By that time the first applicant had served his sentence and, as illustrated by the fact that he obtained gainful employment and that a second child was born to him and his wife, had begun rebuilding his life.

49. It is true that, in theory at least, the first applicant is entitled to make occasional visits to the Netherlands, due to the fact that the exclusion order that was initially imposed on him was ultimately withdrawn without having been enforced (paragraph 20 above). However, in this context the Court notes that the present case does not concern a divorced father with an access arrangement, but a functioning family unit where the parents and children are living together. The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 of the Convention and that to split up a family is an interference of a very serious order (see Mehemi v. France (no. 2), no. 53470/99, § 45, ECHR 2003-IV). Having regard to its finding at paragraph 47 above that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same as long as the first applicant continues to be denied the right to reside in the Netherlands. In this context the Court notes the Government's submission that the first applicant's criminal record would normally militate against a new residence permit being issued to him for a period of ten years. Although they also argued that Article 8 of the Convention would be taken into account in assessing whether his conviction would still be held against him, the Government failed to indicate when, and under what conditions, such an assessment would lead to a positive decision being taken on any future request for a residence permit being lodged by the first applicant.

50. In conclusion, the Court is of the opinion that, in the particular circumstances of the present case, the respondent State failed to strike a fair balance between the applicants' interests on the one hand and its own interest in preventing disorder or crime on the other.

There has, accordingly, been a violation of Article 8 of the Convention."

I sagen *Bajsultanov v. Austria (2012)* var klageren meddelt asyl i opholdslandet. Han blev idømt i alt 20 måneders fængsel for bl.a. flere tilfælde af vold samt udvist. EMD fastsatte længden af klagerens ophold i opholdslandet til ni år på tidspunktet for EMD's behandling af sagen. Klagerens ægtefælle var meddelt asyl afledt af klagerens forhold og de havde to børn, der på tidspunktet for EMD's behandling af sagen var otte og fem år.

Efter i præmis 79-82 at have konstateret, at udvisningen af klageren udgjorde et indgreb i hans ret til respekt for familieliv, og at dette indgreb var i overensstemmelse med loven og forfulgte et af de legitime hensyn, gennemgik EMD i præmis 83 de generelle principper, som indgår i afvejningen af, om indgrebet var nødvendigt i et demokratisk samfund, jf. kriterierne som sammenfattet i Boultif- og Üner-dommene.

Om karakteren og alvorligheden af den begåede kriminalitet udtalte EMD i præmis 84:

"Turning to the first set of criteria relating to the criminal offences committed by the applicant, the Court reiterates that the applicant was in 2006 convicted of attempted resistance to public authority, aggravated bodily harm and aggravated damage of property, and sentenced to eight months' imprisonment. Some two years later, in March 2008, he was again convicted of partly attempted and partly actual aggravated bodily

harm and sentenced to twelve months' imprisonment. The partial suspension and probation order in respect of his former conviction was itself suspended, and the applicant served both sentences. Earlier, in 2005, the applicant had also been convicted of attempted theft and sentenced to two weeks' imprisonment, suspended with probation. The Court thus acknowledges that the measure taken by the Austrian authorities was based on serious offences committed by the applicant. However, the Court also notes that the applicant was released from prison in August 2009 and went back to live with his family. In the approximately two and a half years since the applicant's release, no further criminal investigations have been initiated against him and there have been no further convictions."

EMD udtalte i præmis 85-92:

"85. As regards the length of the applicant's stay in the host country and his social and cultural links with Austria the Court notes that the applicant, who has now lived in Austria for almost nine years, has not established any particularly strong links to that country. He does not seem to have mastered the German language. He has also never worked in Austria and did not develop any significant social or cultural ties there.

86. On the other hand, the applicant lived in Chechnya for almost twenty-three years, went to school there and subsequently worked occasionally in different jobs. The applicant's parents and siblings still live in Chechnya, and the applicant has maintained regular contact with his father.

87. The Court therefore considers, in line with the Austrian authorities, that the applicant still has stronger social and cultural ties to his country of origin than to his host country."

88. As regards the applicant's family ties the Court notes that the applicant and his wife are Russian nationals, who arrived in Austria together in July 2003. The couple have two children, who were both born in Austria but who are also Russian nationals. The family lived together, apart from when the applicant was in prison, during which time however, the applicant's wife visited him regularly. After his release from prison the applicant went back to live with his family.

89. The Court further notes that the applicant's wife and the children are recognised refugees in Austria, with asylum status which has been awarded to them in separate decisions. However, the Court acknowledges that at the time the applicant's wife was considered to be at risk of persecution in Chechnya due to her husband being at risk. The applicant's wife herself never claimed a risk of ill-treatment because of her own conduct or her own role in any of the armed conflicts. Consequently, in view of the Court's finding with regard to the applicant's complaint under Article 3 of the Convention above, the applicant's wife can also not be considered as being at a real risk of being subjected to treatment contrary to Article 3 of the Convention if she returned to Chechnya.

90. The applicant's wife was born in Grozny and spent all her life in Chechnya until she left for Austria with her husband. The couple's children are still of an adaptable age (see Darren Omoregie and Others, cited above, § 66). The applicant's wife, who has resident status in Austria for herself and the children based on their asylum status, might have a considerable interest in not returning to Chechnya. But although the Court does not underestimate the difficulties of a relocation of the family, there is no indication that there are any

insurmountable obstacles in the way of the applicant's wife and the children following the applicant to Chechnya and developing a family life there (see Gül v. Switzerland, 19 February 1996, § 42, Reports 1996-I, and Darren Omoregie and Others, cited above, ibid.).

91. Thus in view of the seriousness of the criminal offences committed by the applicant, his strong and living ties to his country of origin, his parents and siblings' living there and the possibility for the applicant's wife and children to follow him to Chechnya and to develop a joint family life there, the Court finds that the Austrian authorities have not failed to strike a fair balance between the applicant's interests in respect of his family life and the public interest in the prevention of disorder or crime.

92. The applicant's expulsion to the Russian Federation would therefore not amount to a violation of Article 8 of the Convention."

I sagen *Hamesevic v. Denmark (2017)* var klageren indrejst som 23-årig og fik det efterfølgende år opholdstilladelse som flygtning. Han blev i Danmark gift med en tidligere statsborger fra sit hjemland. Parret fik tre børn, som på tidspunktet for EMD´s behandling af sagen var 16, 18 og 19 år gamle. Efter 19 års ophold blev klageren idømt tre års fængsel for våbensmugling og udvist for bestandig. Klageren var fem år tidligere blevet skilt fra sin ægtefælle, og børnene boede hos hende. Klageren var under sin afsoning blevet gift på ny med en tidligere statsborger i sit hjemland og havde anmodet om genåbning af en faderskabssag vedrørende hendes yngste barn, som han sandsynligvis var far til. Klagerens ægtefælle havde derudover to mindreårige særbørn, der boede hos hende. Klageren havde fortsat familie i hjemlandet, hvor han ofte havde været på ferie, og hvor han også havde planlagt at købe et hus. Klageren havde endelig tidligere været i beskæftigelse i Danmark, men havde to år forud for sin fængsling modtaget offentlige ydelser, da han var i behandling for en depression.

EMD udtalte i præmis 34-44, at:

"34. The applicant had three children from his first marriage. They are all Danish nationals. The High Court noted, in its judgment of 20 January 2015, that they were approximately 19, 18 and 16 years old and lived with their mother. In respect of the two eldest, who were of age, the Court reiterates that relations between parents and adult children do not constitute family life for the purpose of Article 8 unless the applicant can demonstrate additional elements of dependence (see, for example, A.S. v. Switzerland, no. 39350/13, § 49, 30 June 2015 and F.N. v. the United Kingdom (dec.), no. 3202/09, § 36, 17 September 2013). The applicant did not point to such dependence. Nor did he point to any obstacle to his maintaining contact with his 16-year-old child remaining with his ex-wife in Denmark, via the telephone or the internet, or by visits to Bosnia and Herzegovina, the country of origin of both the applicant and the child's mother.

35. The applicant's wife, A, is a Danish national. She originated from Bosnia and Herzegovina. They married on 31 May 2013 after having lived together for some years. When they commenced their relationship she could not have known about the offences which would be committed in 2012. It is noteworthy, though, that she and the applicant committed the offences together and that A was sentenced to one year's imprisonment.

36. On 17 October 2013 it was established that the applicant was also father of E, born in 2007, who is also a Danish national. The Court notes, however, that R had been registered as E's father until 12 July 2013 (see

paragraph 14 above) and that the applicant was detained from August 2012 until his deportation around June 2015.

37. A has four other children, who had close contact with their father, R, who lived in Denmark. Two of them were of age and had moved away from home. At the time of the applicant's deportation, A lived in an apartment with her three youngest children, including E, who were then 16, 14 and 8 years old. The children spoke Danish and Bosnian. A did not have a job.

38. The Court will examine together the questions of the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant was expelled, and the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant was expelled.

39. It points out that in its judgment Jeunesse v. the Netherlands [GC], (no. 12738/10, § 109, 3 October 2014), which concerned family reunion, the Court reiterated "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 ... Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it."

40. Whilst this principle applies to all decisions concerning children, the Court notes that in the context of the removal of a non-national parent as a consequence of a criminal conviction, the decision first and foremost concerns the offender. Furthermore, as case-law has shown, in such cases the nature and seriousness of the offence committed or the offending history may weigh heavy in the overall assessment (see, for example, Üner v. the Netherlands [GC], cited above, §§ 62-64 and Cömert v. Denmark (dec.), 14474/03, 10 April 2006).

41. The applicant and A maintained that she and the children would have to stay in Denmark. Their main reasoning in this respect was that "they would not be able to cope in Bosnia and Herzegovina", that "they had nothing in Bosnia and Herzegovina", that "it would be very difficult for them to settle there", that "E and A's children with R could not live by themselves in Denmark", "that A could not envisage taking them to Bosnia and Herzegovina" and "that E would not be able to understand that she would no longer attend school in Denmark" (see paragraphs 16, 17 and 20 above).

42. In its judgment of 20 January 2015 the High Court gave weight to the fact that both the applicant and A were from Bosnia and Herzegovina and accordingly spoke Bosnian. Moreover, it noted that A had stated that her three youngest children, who lived with her, including E, spoke Danish and Bosnian. Therefore, the High Court found it established that it was possible for them to continue family life with the applicant in Bosnia and Herzegovina.

43. The Court finds no grounds for concluding that such a finding was arbitrary or manifestly unreasonable. In addition, it notes, as appeared from the first set of proceedings, that the applicant and A had actually planned to buy a house in Bosnia and Herzegovina (see paragraphs 9 and 10 above).

44. Moreover, if A were to choose to remain in Denmark with her youngest children, including E, the applicant has not pointed to any obstacles for them to visit him in Bosnia and Herzegovina or for the family to maintain

contact via the telephone or the internet. 45. Finally, the Court observes that the applicant had strong ties with his country of origin. He only left Bosnia and Herzegovina when he was 23 years old. At that time his parents were still alive. During the two years before his arrest in 2012, he had been on vacation there about five times, and he had planned to buy there. The nature of the crimes committed also suggests that he had maintained such ties. 46. Having regard to the above, the Court is satisfied that the interference with the applicant's private life – the refusal to revoke his deportation order – was supported by relevant and sufficient reasons and that it was not disproportionate given all the circumstances of the case. 47. It follows that the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

EMD udtalte i præmis 48- 55, at:

"48. As regards the applicant's family situation, he has been married to his wife since 1999 and it has, explicitly, not been contested by the respondent Government that real and effective family existed between the applicant, his wife and their two children. It has to be noted that the applicant's wife could not know about the offences at issue at the time when she entered into a family relationship with the applicant, as the couple married in 1999 and thus prior to the commission of the offences in 2000. It has to be noted that the applicant, with the exception of the purchase and consumption of marihuana, for which he was fined in 2007, committed the criminal offences prior to the birth of his children.

49. The Court observes that the applicant's wife is a national of "the former Yugoslav Republic of Macedonia", i.e. of the country to which the applicant was expelled. The applicant's wife, who was born in 1978, lived there until 1990 and knows Albanian and the country's culture. She has relatives there and visits the country every year. The domestic courts considered that she could reintegrate in "the former Yugoslav Republic of Macedonia" without encountering serious difficulties, despite having lived in Switzerland for the past twenty years. The Court notes that the applicant's wife chose to follow him to Macedonia in 2011 and lived with him there until 2015, despite the fact that she could have remained in Switzerland as a holder of a permanent residence permit and maintained contact with the applicant through visits and means of telecommunication.

50. The Court observes that the couple's children, born in 2001 and in 2005, are likewise the nationals of 'the former Yugoslav Republic of Macedonia'. At the time the expulsion order became binding, the elder child was in primary school, whereas the younger one was in kindergarten. They were, thus, still of an adaptable age. While the Court accepts that the economic living conditions in 'the former Yugoslav Republic of Macedonia' are less favourable than in Switzerland, it also notes that the former is a Contracting State of the Council of Europe. It further accepts that the children knew the country's culture to a certain extent due to visits they had made together with their mother. While it is not clear to what extent the children knew Albanian, it does not appear arbitrary to accept that the presence of their parents, who both originate from the country, as well as further relatives from their mother's side, would alleviate their difficulties in integrating in 'the former Yugoslav Republic of Macedonia'. Moreover, it has to be noted that the children were not forced to move there, but could have remained in Switzerland with their mother as holders of permanent residence permits and maintained contact with the applicant through visits and means of telecommunication.

51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in "the former Yugoslav Republic of Macedonia" and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to "the former Yugoslav Republic of Macedonia".

53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in

preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

5.3.2.2.2. Mindre alvorlig kriminalitet

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis fem og seks måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden. Parrets fire børn var på tidspunktet for udvisningsafgørelsen mellem seks og 13 år.

EMD gennemgik i præmis 57 Boultif-kriterierne og udtalte i præmis 58:

"In addition, the Court will also take into account the particular ties which these immigrants have developed with the host country where they will have spent most of their life (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, § 36; Radovanovic, cited above, § 33; Üner, cited above, § 40)."

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som f.eks. narkotikahandel.

Vedrørende tilknytningen til opholdslandet udtalte EMD i præmis 61, at:

"With regard to the applicant's personal and family situation, the Court notes that the applicant, at the time of the expulsion order of 22 January 1999, had been lawfully residing in Germany for 27 years, having moved to that country at the age of ten in order to live there with his parents and brother and where he received his secondary school education. While the parties do not agree on the extent of the applicant's professional work, he had been employed for a certain period of that time. Since 1988 he had been in possession of a permanent residence permit. While it is true that the applicant and his wife had been separated during the first five years of their marriage as the applicant's wife and their first son did not follow the applicant to Germany until 1989, the family had been living together in Germany for ten years and there is no indication that their marriage and family life was anything less than effective."

I præmis 62 udtalte EMD om klagerens tilknytning til hjemlandet:

"On the other hand, the Court is not persuaded that the applicant has become so estranged from the country where he spent the first ten years of his life that he would no longer be able to settle in Turkey, having regard

to the fact that the applicant married his Turkish wife in Turkey, where their first son was born and that his wife and son did not follow him to Germany until 1989. It follows that the applicant must have entertained certain links to his country of origin at least until 1989. It can further be presumed that the applicant is familiar with the Turkish language, as he married a Turkish wife."

EMD udtalte i præmis 63-64, at:

"63. With regard to the question of whether the applicant's family could reasonably be expected to follow the applicant to Turkey, the Court notes that the applicant's wife and four children are Turkish nationals. As the applicant's wife entered German territory as an adult and ten years before the issue of the expulsion order, it can be assumed that she has sufficient links which would allow her to re-integrate into Turkish society.

64. The Court notes, however, that the applicant's four sons – who were, at the time the expulsion order had been issued, between six and thirteen years of age – had been born in Germany respectively entered Germany at a very young age where they received all their school education. Even if the children should have knowledge of the Turkish language, they would necessarily have to face major difficulties with regard to the different language of instruction and the different curriculum in Turkish schools."

I præmis 65 gennemgik EMD spørgsmålet om den manglende tidsbegrænsning i klagerens indrejseforbud.

Endelig udtalte EMD i præmis 66:

"The Court considers that the applicant's expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant's children could be expected to face if they followed him to Turkey, the Court considers that an unlimited exclusion from the German territory violates the applicant's rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention."

5.3.2.2.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Antwi and others v. Norway (2012)* havde klageren opnået sin opholdstilladelse på baggrund af svig. Klageren var i opholdslandet blevet gift og havde fået et barn. Syv år efter indrejsen fik opholdslandet kendskab til hans reelle identitet og året efter blev han udvist fra opholdslandet.

EMD udtalte i præmis 90, at:

"In applying the above principles [fra Nunez-dommen, red.] to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence

against gross or repeated violations of the Immigration Act (see Nunez, cited above, § 71, and Darren Omoregie and Others v. Norway, no. 265/07, § 67, 31 July 2008; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Nunez and Darren Omoregie and Others, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Nunez, cited above, § 73)."

EMD udtalte i præmis 91-105:

"91. Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country.

92. Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country.

93. Like the first applicant, the second applicant had grown up in Ghana. There she had lived until the age of seventeen when she was reunited with her father and siblings in Norway. Although she had become a Norwegian citizen and had family ties and employment links to Norway and probably would experience some difficulties in resettling in Ghana, there does not seem to be any particular obstacle preventing her from accompanying the first applicant to their country of origin. The Court has also taken note of her claim that, although aware that the first applicant originally had a Ghanaian background and had obtained a Ghanaian passport in connection with their marriage in Ghana on 11 February 2005, she should only have become aware of his true identity in this context. However, the above-mentioned factors cannot in the Court's view outweigh the public interest in sanctioning the first applicant's aggravated offences against the immigration rules with the impugned measure.

94. As to the third applicant, the Court notes that she is a Norwegian national who since birth has spent her entire life in Norway, is fully integrated into Norwegian society and, according to the material submitted to the Court, speaks Norwegian with her parents at home. In comparison, her direct links to Ghana are very limited, having visited the country three times (see paragraph 44 above) and having little knowledge of the languages practiced there.

95. Furthermore, as a result of the first applicant no longer holding a work permit and staying full-time at home and of the second applicant's being particularly occupied by her work, the first applicant assumes an important role in the third applicant's daily care and up-bringing. He is the parent who follows up her homework and parental contacts with her school and who facilitates her participation in sport activities. She is also

at an age, ten years, when this kind of support would be valuable and she is strongly attached to her father as she is to her mother.

96. It would most probably be difficult for her to adapt to life in Ghana, were she and her mother to accompany the father to Ghana, and to readapt to Norwegian life later.

97. Against this background, the Court shares the High Court's view that the implementation of the expulsion order would not be beneficial to her.

98. However, the Court sees no reason to call into doubt the High Court's findings to the effect that, both parents having been born and brought up in Ghana and having visited the country three times with their daughter, there were no insurmountable obstacles in the way of the applicants settling together in Ghana or, at the least, to maintaining regular contacts. As to the allegation that the third applicant's rashes had been aggravated by heat during her previous stays in Ghana, the High Court majority found that this had not been sufficiently documented and could not be relied upon. The minority agreed that the evidence submitted in support of this contention had been weak and observed that the information appeared to have originated from the first and the second applicants. In the proceedings before the Court, the applicants submitted no further evidence in support of this argument or placed emphasis on it.

99. As also observed by the High Court, it does not emerge that the third applicant had any special care needs or that her mother would be unable to provide satisfactory care on her own.

100. Moreover, the Court considers that there are certain fundamental differences between the present case and that of Nunez where it found that the impugned expulsion of an applicant mother would give rise to a violation of Article 8 of the Convention. In reaching this finding, the Court attached decisive weight to the exceptional circumstances pertaining to the applicant's children in that case, which were recapitulated in the following terms in its judgment (cited above, § 84): [citat af præmis 84 i Nunez-dommen, red.]."

101. Unlike what had been the situation of the children of Mrs Nunez, the third applicant had not been made vulnerable by previous disruptions and distress in her care situation (compare Nunez, cited above, §§ 79 to 81).

102. Also, the duration of the immigration authorities' processing of the matter was not so long as to give reason to question whether the impugned measure fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures (compare Nunez, cited above, § 82). On the contrary, in October 2005, only a few months after the discovery of the first applicant's fraud in July 2005, he was put on notice that he might be expelled from Norway. In May 2006 the Directorate ordered his expulsion and prohibition on re-entry and gave him until 24 July 2006 to leave the country.

103. There being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion.

104. The above considerations are not altered by the duration of the prohibition on re-entry – five years. In this connection, the Court reiterates that in a comparable case, Darren Omoregie (cited above, §§ 63-68), it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration

rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case.

105. In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand.

Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban would not entail a violation of Article 8 of the Convention."

I sagen *Alleleh a.o. v. Norway (2022)* havde den første klager opnået sin opholdstilladelse på baggrund af svig. Klagerens ægtefælle (anden klager) og deres fire børn, som på tidspunktet for dommen var 12, syv, syv og fire år gamle, (tredje – sjette klagere) var alle statsborgere i opholdslandet, ligesom hun selv havde opnået statsborgerskab i opholdslandet. 13 år efter indrejsen i opholdslandet blev myndighederne bekendt med klagerens rette identitet, hvorefter hendes statsborgerskab blev inddraget, og hun blev udvist med indrejseforbud i to år.

EMD udtalte i præmis 94-107:

"*94. The Court first notes that the decision to expel the first applicant and issue a two-year ban on re-entry was first taken by the Directorate of Immigration, and thereafter examined on appeal by the Immigration Appeals Board. Subsequently, a judicial review was carried out by three levels of court. During those proceedings, a psychologist was appointed to protect the best interests of the children, several witnesses were heard, and other pieces of evidence examined (see, in particular, paragraphs 22, 24 and 34 above). There is nothing to suggest that the expulsion case of the first applicant was not dealt with thoroughly and swiftly, enabling the decision makers to take into account all relevant circumstances, including those directly related to the situation of the four children.*

95. As one additional initial observation the Court observes that the Supreme Court's conclusion that there were no insurmountable obstacles to the family moving as a whole to Djibouti – which relates to an aspect that under the Court's case-law is highly relevant to the proportionality assessment under Article 8 § 2 of the Convention (see paragraph 90 above) – did not touch on the applicants' argument before the Court concerning the risk of genital mutilation. Based on the materials provided to the Court, that appears to have been connected to how the applicants had structured their pleadings before the Supreme Court. Given the applicants' own limited focus on and their apparent lack of attempts to substantiate that argument before the domestic authorities, and observing that the Supreme Court in any event, in its assessment of the proportionality of the expulsion, included the assumption that the family would decide that the father and the children would remain in Norway during the ban on re-entry imposed on the first applicant, the Court does not in the circumstances of the case find it appropriate to analyse the situation in Djibouti on the basis of new material or replace the assessment of the national courts by its own on that point. It is sufficient to observe that the applicants have not shown convincingly that the Supreme Court's finding that the second to sixth applicants could also in principle go to Djibouti – either to stay (see paragraph 63 above) or at least to visit the first applicant (see paragraph 70 above) – was arbitrary or otherwise manifestly deficient.

96. The Court moreover notes the Supreme Court's meticulous examination of the Court's case-law in order to infer relevant legal standards under Article 8 of the Convention and to apply them in a Convention–compliant manner when deciding the first applicant's expulsion case. Such an approach is crucial for the distribution of responsibility between the Court and the domestic courts, in order to ensure that the proper standards have been applied at domestic level (see, as a recent authority, Savran, cited above, §§ 188-89).

97. The Court also attaches importance to the Supreme Court's detailed reasoning with regard to its explanation of the weighty immigration policy arguments in favour of the expulsion of the first applicant. The Supreme Court made particular reference to the seriousness of her offences and that a sanction – as had also been emphasised by the legislature in the preparatory work to the Immigration Act (see, in particular, paragraphs 46-48 above) – in the form of expulsion was considered necessary in order to uphold respect for the immigration regulations and deter from future contraventions, that is to say for reasons of general deterrence (see, inter alia, paragraph 60 above). Indeed, as already found by the Court in a number of cases, a scheme of implementation of national immigration law which is based on administrative sanctions in the form of expulsion and a ban on re-entry does not as such raise an issue of failure to comply with Article 8 of the Convention (see, for example, Antwi and Others, cited above, § 90). Thus, the Court has in principle no objections to the Supreme Court's approach in this respect, bearing in mind, at the same time, that any such scheme must be construed and applied in a manner that is compatible with the Convention rights of all involved.

98. The Court furthermore observes that the Oslo City Court and the Borgarting High Court each examined the facts of the case with regard to what an expulsion would entail for each of the applicants, including the children (see paragraphs 26-33 and 36-42 above, respectively). The Borgarting High Court's findings as to the facts of the case, the children's situation included, formed the basis for the Supreme Court's assessment of the case within the scope of the appeal, the appeal having been limited to the High Court's application of the law. In this respect the Supreme Court considered that the proportionality analysis, unlike what had been done by the High Court (see paragraph 35 above), had to be conducted in the light of the Court's case-law according to which an expulsion of a person whose grounds for residence were precarious at the outset would only be disproportionate in "exceptional" circumstances (see, for example, paragraphs 52, 54 and 64 above). Moreover, the Supreme Court concluded that the facts of the case as established by the Borgarting High Court did not support the finding that such "exceptional circumstances" existed. In this connection the Supreme Court emphasised that there was nothing in the lower instances' findings of fact that stood out from what had generally to be assumed to follow from expulsion of one of the parents for a relatively short period (see paragraphs 66 and 71 above).

99. Regarding the Supreme Court's legal starting points under Article 8 of the Convention, the Court notes that the first applicant was not a "settled migrant" in Norway in so far as her stay there was based on repeatedly giving incorrect information over a long period and therefore had never had a valid legal basis. It was for that reason the Supreme Court proceeded on the basis that the expulsion was valid unless "exceptional circumstances" could be identified. Although the Court does not disagree with the Supreme Court regarding this being the starting point, the Court also notes the very particular aspect of the instant case that the sanction imposed on the first applicant impacted as much, if not more, on her family members, notably her children, all being Norwegian nationals who had been born and lived all their lives in Norway. Even if the other family members would follow the first applicant to Djibouti during the period when the ban on re-entry would be in force in order to preserve "family life", they would have to experience a considerable unwanted change in their "private life" in moving to a country with which they had no connection, including as concerned language. This contrasted with the first applicant's own situation, coming from Djibouti, speaking the language, having family there and even having visited there after she had arrived in Norway (see, inter alia, paragraph 26 above). The expulsion imposed on the first applicant to sanction her behaviour could thus, somewhat paradoxically, put an equally heavy if not heavier strain on the other family members. The Court observes in this context – as did the Supreme Court – that the Norwegian Parliament has requested that the Government

consider an amendment of the Immigration Act to "make it possible for the immigration administration to supplement the use of expulsion and prohibition of entry with a broader set of sanctions where warranted by special circumstances such as the child's best interests" (see paragraph 57 above).

100. Furthermore, the Court understands the Supreme Court's role in being limited to correcting what had been an erroneous understanding of the law by the Borgarting High Court. Nonetheless, even an examination of whether any "exceptional circumstances" existed also required a concrete and broad examination of the whole case and how the whole family would be affected by the expulsion of one of them. It might even be particularly important that the Supreme Court demonstrate that concrete assessment in a situation where the lower court had, regardless of its misunderstanding of the law, given a detailed explanation of why it, based on evidence that had been presented to it directly during its hearing, considered the expulsion to contradict the children's best interests, which in its assessment made the expulsion disproportionate vis-à-vis them (see paragraphs 36-42 above).

101. Turning, then, to the concrete proportionality assessment, the Court notes that the facts with regard to what impact an expulsion would have on the children had been established by way of a thorough process where an expert had been engaged and the children's views obtained in so far as possible based on their age and maturity (see, inter alia, paragraph 37 above). The factual findings on that point had also been set out in detail by the Borgarting High Court in its judgment, providing a basis for the Supreme Court in its application of the law (see paragraph 98 above).

102. Against that background, the Court does not consider that it has a basis for concluding that the Supreme Court erred in its assessment that there were no concrete facts in the case before it that gave grounds for characterising the children's situation as different from what would essentially always follow with the expulsion of a parent. The Court therefore understands the Supreme Court's reluctance to qualify the circumstances as "exceptional" within the meaning of the Court's case-law. The Court notes that the case differed from those of Nunez and Kaplan and Others (both cited above), where the Court found violations of Article 8 of the Convention. It refers to Antwi and Others (cited above, §§ 101-02), where a five-year re-entry ban was accepted by the Court with reference to the fact that the child in question, also a Norwegian national who since birth had spent her entire life in Norway, had not been made vulnerable by previous disruption and that the duration of the immigration authorities' processing of the matter had not been so long as to give reasons to question whether the impugned measure fulfilled the requirements of swiftness and efficiency, in contrast to what had been the situation in the case of Nunez. The applicant children in the instant case had not either been exposed to the same degree of disruption and stress as in the case of Nunez (cited above). Neither can the authorities be blamed for not having dealt with the expulsion case in a timely manner. The facts of the current case also clearly differ from those in the case of Butt (cited above).

103. Moreover, the Court observes that the Supreme Court stressed various aspects that mitigated the effects of the expulsion on the children. First of all, the Supreme Court emphasised that it was only out of consideration for the children that the ban on re-entry imposed on the first applicant had been limited to two years in the first place (see paragraph 70 above). The duration of the exclusion order is an important element in the proportionality assessment (see Savran, cited above, § 182), and the Court must take into account that it did not find re-entry bans of five years imposed on parents disproportionate in cases such as Antwi and Others (cited above, § 104) and Darren Omoregie and Others (cited above, § 67).

104. Furthermore, the Supreme Court emphasised the first applicant's possibility to apply to have the ban from re-entry revised (see paragraphs 57 and 71 above). Such a revision of the re-entry ban according to the second paragraph of section 71 of the Immigration Act (see paragraph 75 above) would enable the domestic authorities to take into account any subsequent negative development, such as the second applicant not being able to take adequately care of the four children, or any unforeseen change related to the children's health or overall situation. The Supreme Court also emphasised the first applicant's possibility to apply for access to

Norway for brief visits during the two-year ban from re-entry (see paragraph 57 above). Lastly, the Court finds reasons to stress not only the importance of the fact that the ban from re-entry had been limited to two years (see paragraph 103 above), but that it proceeds on the basis that she will be allowed to resume her family life in Norway when the two years have passed.

105. Considering all of the above, the Court accepts that the present case disclosed no exceptional circumstances as such requiring the respondent State to withdraw the expulsion order so as to enable the applicants to maintain and continue to develop family life in Norway. Moreover, the Court accepts that the domestic authorities were faced with a balancing of interests that had to be done in a situation where particularly weighty interests in immigration control supported the first applicant's expulsion while at the same time an expulsion would impose considerable difficulties on the other applicants. The Court also accepts that the domestic authorities, including the Supreme Court, sought to attend to the children's interests in so far they could be reconciled with the public interest reasons in sanctioning the first applicant's behaviour.

106. Therefore, as to the final conclusion that the expulsion was not disproportionate because it did not exceed the standards indicated by the Court in its case-law relevant to the case, the Court does not find that the authorities of the respondent State transgressed their margin of appreciation when, having carefully examined the facts and adequately balanced the interests in issue (see paragraphs 92-93 above), they decided to expel the first applicant and to prohibit her re-entry for two years. Neither are there any other reasons for the Court to substitute its own assessment for that of the competent national authorities, bearing in mind in particular the domestic courts' careful examination.

107. On the basis of the above, the Court concludes that there has been no violation of Article 8 of the Convention."

5.3.2.2.4. Ulovligt ophold

I sagen *Jeunesse v. the Netherlands (2014)* var klageren indrejst i opholdslandet på et visum fra en tidligere hollandsk koloni og havde giftet sig med en statsborger i opholdslandet. Hun blev i landet efter udløbet af sit visum og fik med sin ægtefælle tre børn, som alle var statsborgere i opholdslandet. Klageren søgte flere gange om opholdstilladelse, hvilket hver gang blev afslået, da klageren som udgangspunkt skulle søge fra hjemlandet. Efter 16 års ophold blev klageren forsøgt udsendt fra opholdslandet under henvisning til, at hun ikke havde et lovligt opholdsgrundlag. Børnene var på tidspunktet for Storkammerets afgørelse henholdsvis 14, knap ni og knap fire år.

EMD udtalte i præmis 113-123, at:

"113. The Court reiterates that the applicant's presence in the Netherlands has been irregular since she outstayed the 45-day tourist visa granted to her in 1997. It is true that at that time admission to the Netherlands was governed by the Aliens Act 1965 but the applicant's situation – in view of the reason why her request for a residence permit of 20 October 1997 was not processed (see paragraph 14 above) – is governed by the Aliens Act 2000. Having made numerous attempts to secure regular residence in the Netherlands and having been unsuccessful on each occasion, the applicant was aware – well before she commenced her family life in the Netherlands – of the precariousness of her residence status.

114. Where confronted with a fait accompli the removal of the nonnational family member by the authorities would be incompatible with Article 8 only in exceptional circumstances (see paragraph 108 above). The Court must thus examine whether in the applicant's case there are any exceptional circumstances which warrant a

finding that the Netherlands authorities failed to strike a fair balance in denying the applicant residence in the Netherlands.

115. The Court first and foremost takes into consideration the fact that all members of the applicant's family with the exception of herself are Netherlands nationals and that the applicant's spouse and their three children have a right to enjoy their family life with each other in the Netherlands. The Court further notes that the applicant held Netherlands nationality at birth. She subsequently lost her nationality when Suriname became independent. She then became a Surinamese national, not by her own choice but pursuant to Article 3 of the Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality (see paragraph 62 above). Consequently, her position cannot be simply considered to be on a par with that of other potential immigrants who have never held Netherlands nationality.

116. The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for more than sixteen years and that she has no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Netherlands authorities, while she repeatedly submitted residence requests and awaited the outcome of appeals. The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities.

117. Thirdly, the Court accepts, given the common background of the applicant and her husband and the relatively young age of their children, that there would appear to be no insurmountable obstacles for them to settle in Suriname. However, it is likely that the applicant and her family would experience a degree of hardship if they were forced to do so. When assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family.

118. The Court fourthly considers that the impact of the Netherlands authorities' decision on the applicant's three children is another important feature of this case. The Court observes that the best interests of the applicant's children must be taken into account in this balancing exercise (see above § 109). On this particular point, the Court reiterates 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 (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. For that purpose, in cases concerning family reunification, the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents (see Tuquabo-Tekle and Others v. the Netherlands, cited above, § 44).

119. Noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation. In this connection, the Court observes that the applicant's husband provides for the family by working full-time in a job that includes shift work. He is, consequently, absent from the home on some evenings. The applicant – being the mother and homemaker – is the primary and constant carer of the children who are deeply rooted

in the Netherlands of which country – like their father – they are nationals. The materials in the case file do not disclose a direct link between the applicant's children and Suriname, a country where they have never been.

120. In examining whether there were insurmountable obstacles for the applicant and her family to settle in Suriname, the domestic authorities had some regard for the situation of the applicant's children (see paragraphs 23 (under 2.19 and 2.21), 28 and 34 (under 2.4.5) above). However, the Court considers that they fell short of what is required in such cases and it reiterates that national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any such removal in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (see above § 109). The Court is not convinced that actual evidence on such matters was considered and assessed by the domestic authorities. Accordingly, it must conclude that insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit."

121. The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. 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.

122. The Court, whilst confirming the relevant principles set out above (see paragraphs 106-109), finds that, on the basis of the above considerations (see paragraphs 115-120) and viewing the relevant factors cumulatively, the circumstances of the applicant's case must be regarded as exceptional. Accordingly, the Court concludes that a fair balance has not been struck between the competing interests involved. There has thus been a failure by the Netherlands authorities to secure the applicant's right to respect for her family life as protected by Article 8 of the Convention.

123. There has accordingly been a violation of Article 8 of the Convention."

Sagen *Gezginci v. Switzerland (2010)* omhandlede såvel ulovligt ophold såvel som nægtelse af forlængelse af opholdstilladelse.

EMD har i deres *legal summary* karakteriseret sagen som *long term illegal immigration*, hvorfor den er placeret i dette afsnit.

Dommen foreligger ikke på engelsk i en officiel oversættelse, hvorfor hele EMD´s *legal summary* er citeret herunder:

"Gezginci v. Switzerland - 16327/05

Judgment 9.12.2010 [Section I]

Article 8

Expulsion

Deportation order against long-term illegal immigrant: deportation would not constitute a violation

Facts – The applicant is a Turkish national who has lived in Switzerland since 1978, on the basis of residence permits from 1980 to 1998 and unlawfully during the remaining periods. In 1997 the national authorities decided not to renew his residence permit. A few months later they set March 1999 as the deadline for his deportation from Switzerland. However, the applicant did not leave the country. In 2003, after a serious work-related accident, he applied for a residence permit on humanitarian grounds. The authorities refused the application. Shortly afterwards his wife disappeared without trace, leaving him to care for their eleven-year-old daughter. The applicant lodged several unsuccessful appeals against the deportation order, which is still in force.

Law – Article 8: In view of the applicant's very long-standing residence in Switzerland, the refusal to grant him a residence permit on humanitarian grounds amounted to interference with his right to respect for his private life. That interference had been in accordance with the law and had pursued the legitimate aims of ensuring the economic well-being of the country, preventing disorder or crime and protecting the rights and freedoms of others. In order to determine whether it had been necessary in a democratic society, a number of factors had to be taken into consideration. First of all, the applicant's convictions between 1982 and 1992 had not been very serious and since 1993 his conduct did not appear to have been open to criticism from a purely criminal-law standpoint. Next, the applicant had lived in Switzerland for approximately thirty years, not counting periods spent abroad, thanks to the considerable tolerance shown by the authorities since 1999. Furthermore, some members of the applicant's family still lived in Turkey and would be able to help him resettle there and find work; he also spoke Turkish fluently. Similar considerations would apply were he to opt for Romania, a country which he knew from visits, where his wife lived and his daughter had spent much of her life, and where he appeared to have been in gainful employment. Furthermore, it was clear from his attitude that he was unable and unwilling to find employment in Switzerland. As to his daughter, given that she had spent most of her life in Romania and Turkey, was a citizen of both countries and probably spoke both languages, she could reasonably be expected to be able to adjust if she returned there. Lastly, the applicant's health was not liable to significantly hinder his integration in Turkey, given that he would have access there to the necessary medicines and treatment and would undoubtedly receive an invalidity pension. Accordingly, regard being had in particular to the fact that the applicant had been residing unlawfully in Switzerland since 1997, his lack of willingness to integrate there, his failure to abide by the rules of the country and the fact that his ties with his country of origin did not appear to have been completely severed, the respondent State could be said to have struck a fair balance between the interests of the applicant and his daughter on the one hand and its own interest in controlling immigration on the other.

Conclusion: the applicant's deportation would not amount to a violation (five votes to two)."

5.3.2.2.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

Der er ved gennemgangen af praksis ikke fundet domme, hvor EMD har taget stilling til betydningen af barnets sprogkundskaber i sager om inddragelse, nægtelse af forlængelse eller bortfald af klagerens opholdstilladelse, hvor der ikke foreligger kriminalitet.

5.3.2.2.6. Familiesammenføring med udlændinge, der har børn med lovligt ophold i opholdslandet

I sagen *Tuquabo-Tekle and others v. the Netherlands (2005)* var klageren efter sin ægtefælles død flygtet fra sit hjemland og indrejst i Norge, hvor hun blev meddelt humanitær opholdstilladelse. Klageren havde før flugten overladt sin ældste datter til sin mors ven og de yngste børn til sin mor. Børnene blev efterfølgende meddelt opholdstilladelse i Norge, men kun hendes søn indrejste. Klageren giftede sig efterfølgende med en statsborger fra hjemlandet med opholdstilladelse som flygtning i opholdslandet, og klageren og hendes søn blev familiesammenført i opholdslandet. Parret fik to fællesbørn, som på det tidspunkt, hvor sagen blev indbragt for EMD, var seks og fem år gamle, og på tidspunktet for EMD's afgørelse i sagen var 11 og ti år gamle. Klageren søgte endnu engang om familiesammenføring med sin datter, som i mellemtiden var blevet 15 år. De nationale myndigheder meddelte afslag med henvisning til, at familielivet mellem klageren og datteren var blevet afbrudt.

EMD udtalte i præmis 45-52:

"45. Turning to the particular circumstances of the case, the Court notes that the Government's submissions centre on their contention that the applicants could have applied for Mehret to come to the Netherlands much sooner, and that, in the absence of sound reasons for their not having done so, it had to be assumed that Mehret's staying with her grandmother and uncle in Eritrea was intended to be a permanent arrangement. However, the Court has previously held that parents who leave children behind while they settle abroad cannot be assumed to have irrevocably decided that those children are to remain in the country of origin permanently and to have abandoned any idea of a future family reunion (see Şen v. the Netherlands, no. 31465/96, § 40, 21 December 2001). Indeed, it appears clearly from the facts of the present case that Mrs Tuquabo-Tekle always intended for Mehret to join her. Thus, as soon as she had been granted leave to remain in Norway, she took steps in order to be reunited with her children. Having obtained the Norwegian authorities' permission, she managed to be reunited with her son Adhanom but did not succeed in bringing Mehret to Norway at that time, owing to circumstances beyond her control (see paragraph 9 above).

46. The Court further notes that the Government have not disputed that Mrs Tuquabo-Tekle and her husband made efforts to obtain a passport for Mehret and accommodation suitable for the number of persons which their family would comprise if Mehret joined them. The Court accepts that any delays which occurred stemmed from the applicants' sincerely held belief – in which they were apparently supported by their legal representative – that it was not possible to apply for family reunion in the Netherlands until these matters had been taken care of, rather than from any decision on their part that Mehret should stay in Eritrea. Similarly, the fact that, according to the Government, Mrs Tuquabo-Tekle and her husband were not required to take these steps does not detract from the aim manifestly underlying their efforts: to be (re)united with Mehret in the Netherlands.

47. As regards the question to what extent it is true that Mehret's settling in the Netherlands would be the most adequate means for the applicants to develop family life together, the Court observes that the present

application is very similar to the case of Şen v. the Netherlands (cited above), in which it found a violation of Article 8 of the Convention. That case also concerned parents with settled immigrant status in the Netherlands who chose to leave a daughter (Sinem) behind in the care of relatives in her country of origin (Turkey) for a number of years before they applied to be reunited with her. At this juncture the Court would remark that it is questionable to what extent it can be maintained in the present case, as the Government did, that Mrs Tuquabo-Tekle left Mehret behind of "her own free will", bearing in mind that she fled Eritrea in the course of a civil war to seek asylum abroad following the death of her husband. Be that as it may, it is in any event the case that Mrs Tuquabo-Tekle and her husband, just like Mr and Mrs Şen, have been lawfully residing in the Netherlands for a number of years, even opting for, and obtaining, Netherlands nationality. In addition, and also just as in the Şen case, two children have been born to the couple in the Netherlands: Tmnit in 1994 and Ablel in 1995. These two children have always lived in the Netherlands and its cultural and linguistic environment, have Netherlands nationality and attend school there. Consequently, they can only have minimal ties, if any, to their parents' country of origin (see Şen, cited above, § 40).

48. It was precisely these circumstances which led the Court to conclude in the case of Şen that a major impediment existed to that family's return to Turkey, and that allowing Sinem to come to the Netherlands would be the most adequate way in which the family could develop family life with her. The Court added that this was all the more so as, in view of Sinem's young age, her integration into her parents' close family unit was particularly exigent (ibid., § 40). It is in this latter context that the two cases are different: whereas Sinem Şen was 9 years old when her parents sought to be reunited with her (ibid., §§ 10 and 13), Mehret was already 15 when her mother and stepfather applied for a provisional residence visa on her behalf (see paragraph 11 above). The question therefore arises whether this constitutes such a material difference that the present case ought, for that reason, to be distinguished from Şen, and lead to a different outcome.

49. The Court has indeed previously rejected cases involving failed applications for family reunion and complaints under Article 8 where the children concerned had in the meantime reached an age where they were presumably not as much in need of care as young children and increasingly able to fend for themselves. In cases of this nature, the Court has also examined whether the children had grown up in the cultural and linguistic environment of their country of origin, whether they had other relatives there, and whether it could be expected of the parents to return to that country (see, for instance, Benamar v. the Netherlands (dec.), no. 43786/04, 5 April 2005; I.M. v. the Netherlands (dec.), no. 41266/98, 25 March 2003; and Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003).

50. In the present case the Court notes that the applicants have not alleged that Mehret, who undoubtedly has strong cultural and linguistic links with Eritrea, could no longer be looked after by the relatives who have been doing so ever since her mother left. They have, nevertheless, argued that Mehret's age – rather than making her less dependent on her mother – made it even more pertinent for her to be allowed to join her family in the Netherlands. This was because, in accordance with Eritrean custom, Mehret's grandmother had taken her out of school, and Mehret had also reached an age where she could be married off (see paragraph 13 above). Although Mrs Tuquabo-Tekle disagreed with the choices made for Mehret, she was unable to do anything about them as long as her daughter was living in Eritrea. The Court agrees with the Government that the applicants' arguments in this context do not, by themselves, warrant the conclusion that the State is under a positive obligation to allow Mehret to reside in the Netherlands. Even so – and bearing in mind that she was, after all, still a minor – the Court accepts in the particular circumstances of the present case that

Mehret's age at the time the application for family reunion was lodged is not an element which should lead it to assess the case differently from that of Şen.

51. The Court would, moreover, add that, although not in itself decisive, it is noteworthy that when Mrs Tuquabo-Tekle successfully sought leave from the Norwegian authorities to be reunited with her daughter in Norway, Mehret was much the same age as Sinem Şen was when her parents lodged such an application with the Netherlands authorities (see paragraph 9 above).

52. Having regard to the above, the Court finds that the respondent State has failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other.

Accordingly, there has been a violation of Article 8 of the Convention."

5.3.2.3. Barnets/børnenes personlige, sociale og/eller kulturelle tilknytning

EMD har i flere sager taget stilling til betydningen af klagerens barns/børns personlige, sociale og/eller kulturelle tilknytning til henholdsvis klagerens hjemland og opholdslandet ved vurderingen af, om en udsendelse[43] af klageren vil indebære et indgreb i retten til familieliv, som ikke er proportionalt med det legitime hensyn. EMD har i den forbindelse vurderet, om det vil være muligt for og rimeligt at forvente af klagerens barn/børn at udrejse med klageren til dennes hjemland med henblik på at udøve familielivet dér. Det skal for en god ordens skyld bemærkes, at det i sidstnævnte tilfælde selvfølgelig ikke påhviler barnet/børnene rent faktisk at udrejse med klageren til dennes hjemland.

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[15] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

5.3.2.3.1. Alvorlig kriminalitet

I sagen *Sezen v. the Netherlands (2006)* var den første klager indrejst i opholdslandet som 23-årig og havde fået opholdstilladelse som familiesammenført til sin ægtefælle (den anden klager), som havde boet i opholdslandet siden hun var syv år, og deres fælles barn. Tre år efter indrejsen blev den første klager idømt fire års fængsel for narkotikakriminalitet. Efter løsladelsen genoptog han samlivet med ægtefælle og barn, men fraflyttede senere det fælles hjem i en periode på omkring syv måneder. Knap fire måneder efter genoptagelse af samlivet fik klagerne endnu et barn. Den første klagers opholdstilladelse som familiesammenført blev om-

[43] 323. According to well-established case-law, "in all decisions concerning children their best interests are of paramount importance. (...) It follows that there is an obligation on States to place the best interests of the child, and also those of children as a group, at the centre of all decisions affecting their health and development" (Vavřička and Others v. the Czech Republic [GC], §§ 287-288 and below, for instance, X v. Latvia [GC], § 96). a. Mutual enjoymen

kring otte måneder senere nægtet forlænget under henvisning til samlivsafbrydelsen og straffedommen. Klagerens børn var henholdsvis otte og to år, da den nationale afgørelse blev truffet, og de var henholdsvis 16 og ti år, da EMD traf afgørelse i sagen.

EMD udtalte i præmis 43-50, at:

43. The Court will first consider the nature and seriousness of the offence committed by the first applicant in the present case. It observes in this context that in 1993 he was convicted of a drug offence, namely the possession of large quantities of heroin. As the Court has held on previous occasions, it understands – in view of the devastating effects drugs have on people's lives – why the authorities show great firmness to those who actively contribute to the spread of this scourge (see Baghli v. France, no. 34374/94, § 48, ECHR 1999-VIII). The fact that it concerned a first conviction does not, in the Court's view, detract from the seriousness and gravity of the crime (see Bouchelkia v. France, judgment of 29 January 1997, Reports 1997-I, p. 65, § 51, and Amrollahi v. Denmark, no. 56811/00, § 37, 11 July 2002).

44. At the time the first applicant was arrested, i.e. on 31 July 1992, he had been residing lawfully in the Netherlands for less than one and a half years, having been granted a residence permit in February 1991. Applying the "sliding scale" principle, the authorities of the respondent State attached weight to this undeniably short duration of the first applicant's lawful stay in the Netherlands before he committed the offence. It is nevertheless to be noted that, following his conviction on 20 January 1993, it was not until more than four years later, namely on 5 June 1997, that the decision was taken to refuse the first applicant continued residence. Following his early release from prison in April 1995, the first applicant had thus been allowed to build up even closer ties with the Netherlands for a further two years. In addition, it appears that the first applicant has not re-offended and that he has been gainfully employed ever since his release from prison.

45. As to the first applicant's connections with his country of origin, the Court considers that his situation is not comparable to that of a second-generation immigrant, given that he arrived in the Netherlands at the age of twenty-three. Not having been informed otherwise, the Court assumes that he received his schooling in Turkey and that he is conversant with the Turkish language. Thus, he undoubtedly has ties with Turkey. His ties to the Netherlands are mainly connected to his wife – the second applicant – and their two children.

46. The Court notes with some concern that none of the domestic authorities involved in the decision-making process appear to have paid any attention to the possible effects which the refusal of continued residence would have on the first applicant's family life (see Yıldız v. Austria, no. 295/97, § 43, 31 October 2002). It is true that the Regional Court of The Hague, sitting in Amsterdam, quashed the decision to impose an exclusion order on the first applicant for the reason that the Deputy Minister had failed to accord insufficient weight to the interests of the applicants and their children (see paragraph 19 above). However, the Regional Court upheld the decision not to prolong the first applicant's residence permit, and its reasoning on the subject did not refer to the consequences of that decision on his family life. In this context it is further to be noted that the Government assume that both the second applicant and the children speak Turkish (see paragraph 38 above). Had this matter been addressed in the course of the domestic proceedings, the authorities would have been aware of the fact that the children speak Dutch and Kurdish, but not Turkish.

47. Unlike the first applicant, his wife – the second applicant – may be considered a second-generation immigrant, having moved to the Netherlands at the age of seven and having lawfully resided there ever since. It is

submitted, and has not been disputed, that all her relatives are also living in the Netherlands and that she does not have any family in Turkey. Although the parties disagree as to whether the second applicant was aware of the criminal activities of her husband, the fact remains that he had not yet committed the offence at the time they married and she entered into a family relationship with him, which is the relevant criterion in this context (see Boultif, cited above, § 48). Furthermore, the couple's two children were born in the Netherlands: Adem in 1990 and Mahsun in 1996. These two children have always lived in the Netherlands and its cultural and linguistic environment, and attend school there. Consequently, they can only have minimal ties, if any, to their parents' country of origin (see Şen v. the Netherlands, no. 31465/96, § 40, 21 December 2001) and, as noted above (paragraphs 32 and 46), they do not speak Turkish. In these circumstances, the Court accepts that following the first applicant to Turkey would mean a radical upheaval for the second applicant and in particular for the couple's children (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, p. 1971, § 36; see also Recommendation 1504 (2001) of the Parliamentary Assembly of the Council of Europe on the non-expulsion of long-term immigrants), and it finds that they cannot realistically be expected to do so.

48. The principal element which strikes the Court in the present case, however, is the fact that the applicants' marriage was deemed to have permanently broken down when the couple had merely ceased cohabiting for some six months in 1995/1996 and despite them making it clear to the authorities of the respondent State that cohabitation had been resumed and that there was no question of their marriage having broken down. Dutch law did not permit the first applicant's residence permit to be revoked or an exclusion order to be imposed at the time of his conviction, since he had held a strong residence status at that time (see Yılmaz v. Germany, no. 52853/99, § 48, 17 April 2003). Yet by ruling – four years after that conviction (paragraph 44 above) and notwithstanding the fact that a child had been conceived during the time the spouses were not living together – that the marriage had permanently broken down, the authorities were able to conclude that the first applicant had lost his indefinite right to remain and, subsequently, to refuse him continued residence on the basis of the criminal conviction. By that time the first applicant had served his sentence and, as illustrated by the fact that he obtained gainful employment and that a second child was born to him and his wife, had begun rebuilding his life.

49. It is true that, in theory at least, the first applicant is entitled to make occasional visits to the Netherlands, due to the fact that the exclusion order that was initially imposed on him was ultimately withdrawn without having been enforced (paragraph 20 above). However, in this context the Court notes that the present case does not concern a divorced father with an access arrangement, but a functioning family unit where the parents and children are living together. The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 of the Convention and that to split up a family is an interference of a very serious order (see Mehemi v. France (no. 2), no. 53470/99, § 45, ECHR 2003-IV). Having regard to its finding at paragraph 47 above that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same as long as the first applicant continues to be denied the right to reside in the Netherlands. In this context the Court notes the Government's submission that the first applicant's criminal record would normally militate against a new residence permit being issued to him for a period of ten years. Although they also argued that Article 8 of the Convention would be taken into account in assessing whether his conviction would still be held against him, the Government failed to indicate when, and

under what conditions, such an assessment would lead to a positive decision being taken on any future request for a residence permit being lodged by the first applicant.

50. In conclusion, the Court is of the opinion that, in the particular circumstances of the present case, the respondent State failed to strike a fair balance between the applicants' interests on the one hand and its own interest in preventing disorder or crime on the other.

There has, accordingly, been a violation of Article 8 of the Convention."

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (*homicide with indirect intent*) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

EMD udtalte i præmis 45-55, at:

"45. As regards the length of the applicant's stay in Switzerland, the Court observes that he arrived in Switzerland in 1989 at the age of nine and lived in Switzerland for more than twenty years. His stay in Switzerland was, thus, of a considerable length of time.

46. With regard to the time elapsed since the offence was committed and the applicant's conduct during that period, the Court notes that he committed both the embezzlement and the homicide in 2000, even though he was only convicted for those offences in 2003 and 2004, respectively. Noting that the applicant commenced the service of his prison sentence only in 2006, six years after the commission of the offence and that he was released on parole in October 2009 after having served two thirds of his sentence, the Court observes that he has, apart from a fine in the amount of 120 CHF for the purchase and consumption of marihuana in 2007, not reoffended after his criminal conviction.

47. The Court notes that the expulsion order was served in July 2009, shortly before the applicant's release on parole. It became final in July 2010, following the exhaustion of remedies against it. Observing that roughly ten years passed between the commission of the offence and the conclusion of the court proceedings concerning the applicant's expulsion, the Court considers that this considerable length of time cannot be imputed to the respondent State, for the applicant commenced serving his prison sentence only in 2006, following the exhaustion of remedies against his criminal conviction, and his expulsion was not possible before he had served at least two thirds of his sentence, in 2009. Therefore, the Court finds that the proceedings were conducted with reasonable expedition.

48. As regards the applicant's family situation, he has been married to his wife since 1999 and it has, explicitly, not been contested by the respondent Government that real and effective family existed between the applicant, his wife and their two children. It has to be noted that the applicant's wife could not know about the offences at issue at the time when she entered into a family relationship with the applicant, as the couple married in 1999 and thus prior to the commission of the offences in 2000. It has to be noted that the applicant, with the exception of the purchase and consumption of marihuana, for which he was fined in 2007, committed the criminal offences prior to the birth of his children.

49. The Court observes that the applicant's wife is a national of "the former Yugoslav Republic of Macedonia", i.e. of the country to which the applicant was expelled. The applicant's wife, who was born in 1978, lived there until 1990 and knows Albanian and the country's culture. She has relatives there and visits the country every year. The domestic courts considered that she could reintegrate in "the former Yugoslav Republic of Macedonia" without encountering serious difficulties, despite having lived in Switzerland for the past twenty years. The Court notes that the applicant's wife chose to follow him to Macedonia in 2011 and lived with him there until 2015, despite the fact that she could have remained in Switzerland as a holder of a permanent residence permit and maintained contact with the applicant through visits and means of telecommunication.

50. The Court observes that the couple's children, born in 2001 and in 2005, are likewise the nationals of "the former Yugoslav Republic of Macedonia". At the time the expulsion order became binding, the elder child was in primary school, whereas the younger one was in kindergarten. They were, thus, still of an adaptable age. While the Court accepts that the economic living conditions in "the former Yugoslav Republic of Macedonia" are less favourable than in Switzerland, it also notes that the former is a Contracting State of the Council of Europe. It further accepts that the children knew the country's culture to a certain extent due to visits they had made together with their mother. While it is not clear to what extent the children knew Albanian, it does not appear arbitrary to accept that the presence of their parents, who both originate from the country, as well as further relatives from their mother's side, would alleviate their difficulties in integrating in "the former Yugoslav Republic of Macedonia". Moreover, it has to be noted that the children were not forced to move there, but could have remained in Switzerland with their mother as holders of permanent residence permits and maintained contact with the applicant through visits and means of telecommunication.

51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in "the former Yugoslav Republic of Macedonia" and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to "the former Yugoslav Republic of Macedonia".

53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time

in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

5.3.2.3.2. Mindre alvorlig kriminalitet

Der er ved gennemgangen af praksis ikke fundet domme, hvor EMD har taget stilling til betydningen af klagerens barns/børns personlige, sociale og kulturelle tilknytning til henholdsvis opholdslandet og klagerens hjemland i sager, hvor klageren er udvist som følge af mindre alvorlig begået kriminalitet.

5.3.2.3.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Antwi and others v. Norway (2012)* havde klageren opnået sin opholdstilladelse på baggrund af svig. Klageren var i opholdslandet blevet gift og havde fået et barn. Syv år efter indrejsen fik opholdslandet kendskab til hans reelle identitet og året efter blev han udvist fra opholdslandet.

EMD udtalte i præmis 90, at:

"In applying the above principles [fra Nunez-dommen, red.] to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence

against gross or repeated violations of the Immigration Act (see Nunez, cited above, § 71, and Darren Omoregie and Others v. Norway, no. 265/07, § 67, 31 July 2008; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Nunez and Darren Omoregie and Others, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Nunez, cited above, § 73)."

EMD udtalte i præmis 91-105:

"91. Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country.

92. Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country."

93. Like the first applicant, the second applicant had grown up in Ghana. There she had lived until the age of seventeen when she was reunited with her father and siblings in Norway. Although she had become a Norwegian citizen and had family ties and employment links to Norway and probably would experience some difficulties in resettling in Ghana, there does not seem to be any particular obstacle preventing her from accompanying the first applicant to their country of origin. The Court has also taken note of her claim that, although aware that the first applicant originally had a Ghanaian background and had obtained a Ghanaian passport in connection with their marriage in Ghana on 11 February 2005, she should only have become aware of his true identity in this context. However, the above-mentioned factors cannot in the Court's view outweigh the public interest in sanctioning the first applicant's aggravated offences against the immigration rules with the impugned measure.

94. As to the third applicant, the Court notes that she is a Norwegian national who since birth has spent her entire life in Norway, is fully integrated into Norwegian society and, according to the material submitted to the Court, speaks Norwegian with her parents at home. In comparison, her direct links to Ghana are very limited, having visited the country three times (see paragraph 44 above) and having little knowledge of the languages practiced there.

95. Furthermore, as a result of the first applicant no longer holding a work permit and staying full-time at home and of the second applicant's being particularly occupied by her work, the first applicant assumes an important role in the third applicant's daily care and up-bringing. He is the parent who follows up her homework and parental contacts with her school and who facilitates her participation in sport activities. She is also

at an age, ten years, when this kind of support would be valuable and she is strongly attached to her father as she is to her mother.

96. It would most probably be difficult for her to adapt to life in Ghana, were she and her mother to accompany the father to Ghana, and to readapt to Norwegian life later.

97. Against this background, the Court shares the High Court's view that the implementation of the expulsion order would not be beneficial to her.

98. However, the Court sees no reason to call into doubt the High Court's findings to the effect that, both parents having been born and brought up in Ghana and having visited the country three times with their daughter, there were no insurmountable obstacles in the way of the applicants settling together in Ghana or, at the least, to maintaining regular contacts. As to the allegation that the third applicant's rashes had been aggravated by heat during her previous stays in Ghana, the High Court majority found that this had not been sufficiently documented and could not be relied upon. The minority agreed that the evidence submitted in support of this contention had been weak and observed that the information appeared to have originated from the first and the second applicants. In the proceedings before the Court, the applicants submitted no further evidence in support of this argument or placed emphasis on it.

99. As also observed by the High Court, it does not emerge that the third applicant had any special care needs or that her mother would be unable to provide satisfactory care on her own.

100. Moreover, the Court considers that there are certain fundamental differences between the present case and that of Nunez where it found that the impugned expulsion of an applicant mother would give rise to a violation of Article 8 of the Convention. In reaching this finding, the Court attached decisive weight to the exceptional circumstances pertaining to the applicant's children in that case, which were recapitulated in the following terms in its judgment (cited above, § 84): [citat af præmis 84 i Nunez-dommen, red.]

101. Unlike what had been the situation of the children of Mrs Nunez, the third applicant had not been made vulnerable by previous disruptions and distress in her care situation (compare Nunez, cited above, §§ 79 to 81).

102. Also, the duration of the immigration authorities' processing of the matter was not so long as to give reason to question whether the impugned measure fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures (compare Nunez, cited above, § 82). On the contrary, in October 2005, only a few months after the discovery of the first applicant's fraud in July 2005, he was put on notice that he might be expelled from Norway. In May 2006 the Directorate ordered his expulsion and prohibition on re-entry and gave him until 24 July 2006 to leave the country.

103. There being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion.

104. The above considerations are not altered by the duration of the prohibition on re-entry – five years. In this connection, the Court reiterates that in a comparable case, Darren Omoregie (cited above, §§ 63-68), it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration

rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case.

105. In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand.

Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban would not entail a violation of Article 8 of the Convention."

I sagen *Alleleh a.o. v. Norway (2022)* havde den første klager opnået sin opholdstilladelse på baggrund af svig. Klagerens ægtefælle (anden klager) og deres fire børn, som på tidspunktet for dommen var 12, syv, syv og fire år gamle, (tredje – sjette klagere) var alle statsborgere i opholdslandet, ligesom hun selv havde opnået statsborgerskab i opholdslandet. 13 år efter indrejsen i opholdslandet blev myndighederne bekendt med klagerens rette identitet, hvorefter hendes statsborgerskab blev inddraget, og hun blev udvist med indrejseforbud i to år.

EMD udtalte i præmis 94-107:

"*94. The Court first notes that the decision to expel the first applicant and issue a two-year ban on re-entry was first taken by the Directorate of Immigration, and thereafter examined on appeal by the Immigration Appeals Board. Subsequently, a judicial review was carried out by three levels of court. During those proceedings, a psychologist was appointed to protect the best interests of the children, several witnesses were heard, and other pieces of evidence examined (see, in particular, paragraphs 22, 24 and 34 above). There is nothing to suggest that the expulsion case of the first applicant was not dealt with thoroughly and swiftly, enabling the decision makers to take into account all relevant circumstances, including those directly related to the situation of the four children.*

95. As one additional initial observation the Court observes that the Supreme Court's conclusion that there were no insurmountable obstacles to the family moving as a whole to Djibouti – which relates to an aspect that under the Court's case-law is highly relevant to the proportionality assessment under Article 8 § 2 of the Convention (see paragraph 90 above) – did not touch on the applicants' argument before the Court concerning the risk of genital mutilation. Based on the materials provided to the Court, that appears to have been connected to how the applicants had structured their pleadings before the Supreme Court. Given the applicants' own limited focus on and their apparent lack of attempts to substantiate that argument before the domestic authorities, and observing that the Supreme Court in any event, in its assessment of the proportionality of the expulsion, included the assumption that the family would decide that the father and the children would remain in Norway during the ban on re-entry imposed on the first applicant, the Court does not in the circumstances of the case find it appropriate to analyse the situation in Djibouti on the basis of new material or replace the assessment of the national courts by its own on that point. It is sufficient to observe that the applicants have not shown convincingly that the Supreme Court's finding that the second to sixth applicants could also in principle go to Djibouti – either to stay (see paragraph 63 above) or at least to visit the first applicant (see paragraph 70 above) – was arbitrary or otherwise manifestly deficient.

96. The Court moreover notes the Supreme Court's meticulous examination of the Court's case-law in order to infer relevant legal standards under Article 8 of the Convention and to apply them in a Convention–compliant manner when deciding the first applicant's expulsion case. Such an approach is crucial for the distribution of responsibility between the Court and the domestic courts, in order to ensure that the proper standards have been applied at domestic level (see, as a recent authority, Savran, cited above, §§ 188-89).

97. The Court also attaches importance to the Supreme Court's detailed reasoning with regard to its explanation of the weighty immigration policy arguments in favour of the expulsion of the first applicant. The Supreme Court made particular reference to the seriousness of her offences and that a sanction – as had also been emphasised by the legislature in the preparatory work to the Immigration Act (see, in particular, paragraphs 46-48 above) – in the form of expulsion was considered necessary in order to uphold respect for the immigration regulations and deter from future contraventions, that is to say for reasons of general deterrence (see, inter alia, paragraph 60 above). Indeed, as already found by the Court in a number of cases, a scheme of implementation of national immigration law which is based on administrative sanctions in the form of expulsion and a ban on re-entry does not as such raise an issue of failure to comply with Article 8 of the Convention (see, for example, Antwi and Others, cited above, § 90). Thus, the Court has in principle no objections to the Supreme Court's approach in this respect, bearing in mind, at the same time, that any such scheme must be construed and applied in a manner that is compatible with the Convention rights of all involved.

98. The Court furthermore observes that the Oslo City Court and the Borgarting High Court each examined the facts of the case with regard to what an expulsion would entail for each of the applicants, including the children (see paragraphs 26-33 and 36-42 above, respectively). The Borgarting High Court's findings as to the facts of the case, the children's situation included, formed the basis for the Supreme Court's assessment of the case within the scope of the appeal, the appeal having been limited to the High Court's application of the law. In this respect the Supreme Court considered that the proportionality analysis, unlike what had been done by the High Court (see paragraph 35 above), had to be conducted in the light of the Court's case-law according to which an expulsion of a person whose grounds for residence were precarious at the outset would only be disproportionate in "exceptional" circumstances (see, for example, paragraphs 52, 54 and 64 above). Moreover, the Supreme Court concluded that the facts of the case as established by the Borgarting High Court did not support the finding that such "exceptional circumstances" existed. In this connection the Supreme Court emphasised that there was nothing in the lower instances' findings of fact that stood out from what had generally to be assumed to follow from expulsion of one of the parents for a relatively short period (see paragraphs 66 and 71 above).

99. Regarding the Supreme Court's legal starting points under Article 8 of the Convention, the Court notes that the first applicant was not a "settled migrant" in Norway in so far as her stay there was based on repeatedly giving incorrect information over a long period and therefore had never had a valid legal basis. It was for that reason the Supreme Court proceeded on the basis that the expulsion was valid unless "exceptional circumstances" could be identified. Although the Court does not disagree with the Supreme Court regarding this being the starting point, the Court also notes the very particular aspect of the instant case that the sanction imposed on the first applicant impacted as much, if not more, on her family members, notably her children, all being Norwegian nationals who had been born and lived all their lives in Norway. Even if the other family members would follow the first applicant to Djibouti during the period when the ban on re-entry would be in force in order to preserve "family life", they would have to experience a considerable unwanted change in their "private life" in moving to a country with which they had no connection, including as concerned language. This contrasted with the first applicant's own situation, coming from Djibouti, speaking the language, having family there and even having visited there after she had arrived in Norway (see, inter alia, paragraph 26 above). The expulsion imposed on the first applicant to sanction her behaviour could thus, somewhat paradoxically, put an equally heavy if not heavier strain on the other family members. The Court observes in this context – as did the Supreme Court – that the Norwegian Parliament has requested that the Government

consider an amendment of the Immigration Act to "make it possible for the immigration administration to supplement the use of expulsion and prohibition of entry with a broader set of sanctions where warranted by special circumstances such as the child's best interests" (see paragraph 57 above).

100. Furthermore, the Court understands the Supreme Court's role in being limited to correcting what had been an erroneous understanding of the law by the Borgarting High Court. Nonetheless, even an examination of whether any "exceptional circumstances" existed also required a concrete and broad examination of the whole case and how the whole family would be affected by the expulsion of one of them. It might even be particularly important that the Supreme Court demonstrate that concrete assessment in a situation where the lower court had, regardless of its misunderstanding of the law, given a detailed explanation of why it, based on evidence that had been presented to it directly during its hearing, considered the expulsion to contradict the children's best interests, which in its assessment made the expulsion disproportionate vis-à-vis them (see paragraphs 36-42 above).

101. Turning, then, to the concrete proportionality assessment, the Court notes that the facts with regard to what impact an expulsion would have on the children had been established by way of a thorough process where an expert had been engaged and the children's views obtained in so far as possible based on their age and maturity (see, inter alia, paragraph 37 above). The factual findings on that point had also been set out in detail by the Borgarting High Court in its judgment, providing a basis for the Supreme Court in its application of the law (see paragraph 98 above).

102. Against that background, the Court does not consider that it has a basis for concluding that the Supreme Court erred in its assessment that there were no concrete facts in the case before it that gave grounds for characterising the children's situation as different from what would essentially always follow with the expulsion of a parent. The Court therefore understands the Supreme Court's reluctance to qualify the circumstances as "exceptional" within the meaning of the Court's case-law. The Court notes that the case differed from those of Nunez and Kaplan and Others (both cited above), where the Court found violations of Article 8 of the Convention. It refers to Antwi and Others (cited above, §§ 101-02), where a five-year re-entry ban was accepted by the Court with reference to the fact that the child in question, also a Norwegian national who since birth had spent her entire life in Norway, had not been made vulnerable by previous disruption and that the duration of the immigration authorities' processing of the matter had not been so long as to give reasons to question whether the impugned measure fulfilled the requirements of swiftness and efficiency, in contrast to what had been the situation in the case of Nunez. The applicant children in the instant case had not either been exposed to the same degree of disruption and stress as in the case of Nunez (cited above). Neither can the authorities be blamed for not having dealt with the expulsion case in a timely manner. The facts of the current case also clearly differ from those in the case of Butt (cited above).

103. Moreover, the Court observes that the Supreme Court stressed various aspects that mitigated the effects of the expulsion on the children. First of all, the Supreme Court emphasised that it was only out of consideration for the children that the ban on re-entry imposed on the first applicant had been limited to two years in the first place (see paragraph 70 above). The duration of the exclusion order is an important element in the proportionality assessment (see Savran, cited above, § 182), and the Court must take into account that it did not find re-entry bans of five years imposed on parents disproportionate in cases such as Antwi and Others (cited above, § 104) and Darren Omoregie and Others (cited above, § 67).

104. Furthermore, the Supreme Court emphasised the first applicant's possibility to apply to have the ban from re-entry revised (see paragraphs 57 and 71 above). Such a revision of the re-entry ban according to the second paragraph of section 71 of the Immigration Act (see paragraph 75 above) would enable the domestic authorities to take into account any subsequent negative development, such as the second applicant not being able to take adequately care of the four children, or any unforeseen change related to the children's health or overall situation. The Supreme Court also emphasised the first applicant's possibility to apply for access to

Norway for brief visits during the two-year ban from re-entry (see paragraph 57 above). Lastly, the Court finds reasons to stress not only the importance of the fact that the ban from re-entry had been limited to two years (see paragraph 103 above), but that it proceeds on the basis that she will be allowed to resume her family life in Norway when the two years have passed.

105. Considering all of the above, the Court accepts that the present case disclosed no exceptional circumstances as such requiring the respondent State to withdraw the expulsion order so as to enable the applicants to maintain and continue to develop family life in Norway. Moreover, the Court accepts that the domestic authorities were faced with a balancing of interests that had to be done in a situation where particularly weighty interests in immigration control supported the first applicant's expulsion while at the same time an expulsion would impose considerable difficulties on the other applicants. The Court also accepts that the domestic authorities, including the Supreme Court, sought to attend to the children's interests in so far they could be reconciled with the public interest reasons in sanctioning the first applicant's behaviour.

106. Therefore, as to the final conclusion that the expulsion was not disproportionate because it did not exceed the standards indicated by the Court in its case-law relevant to the case, the Court does not find that the authorities of the respondent State transgressed their margin of appreciation when, having carefully examined the facts and adequately balanced the interests in issue (see paragraphs 92-93 above), they decided to expel the first applicant and to prohibit her re-entry for two years. Neither are there any other reasons for the Court to substitute its own assessment for that of the competent national authorities, bearing in mind in particular the domestic courts' careful examination.

107. On the basis of the above, the Court concludes that there has been no violation of Article 8 of the Convention."

5.3.2.3.4. Ulovligt ophold

I sagen *Jeunesse v. the Netherlands (2014)* var klageren indrejst i opholdslandet på et visum fra en tidligere hollandsk koloni og havde giftet sig med en statsborger i opholdslandet. Hun blev i landet efter udløbet af sit visum og fik med sin ægtefælle tre børn, som alle var statsborgere i opholdslandet. Klageren søgte flere gange om opholdstilladelse, hvilket hver gang blev afslået, da klageren som udgangspunkt skulle søge fra hjemlandet. Efter 16 års ophold blev klageren forsøgt udsendt fra opholdslandet under henvisning til, at hun ikke havde et lovligt opholdsgrundlag. Børnene var på tidspunktet for Storkammerets afgørelse 14, knap ni og knap fire år.

EMD udtalte i præmis 113-123, at:

"113. The Court reiterates that the applicant's presence in the Netherlands has been irregular since she outstayed the 45-day tourist visa granted to her in 1997. It is true that at that time admission to the Netherlands was governed by the Aliens Act 1965 but the applicant's situation – in view of the reason why her request for a residence permit of 20 October 1997 was not processed (see paragraph 14 above) – is governed by the Aliens Act 2000. Having made numerous attempts to secure regular residence in the Netherlands and having been unsuccessful on each occasion, the applicant was aware – well before she commenced her family life in the Netherlands – of the precariousness of her residence status.

114. Where confronted with a fait accompli the removal of the nonnational family member by the authorities would be incompatible with Article 8 only in exceptional circumstances (see paragraph 108 above). The Court must thus examine whether in the applicant's case there are any exceptional circumstances which warrant a

finding that the Netherlands authorities failed to strike a fair balance in denying the applicant residence in the Netherlands.

115. The Court first and foremost takes into consideration the fact that all members of the applicant's family with the exception of herself are Netherlands nationals and that the applicant's spouse and their three children have a right to enjoy their family life with each other in the Netherlands. The Court further notes that the applicant held Netherlands nationality at birth. She subsequently lost her nationality when Suriname became independent. She then became a Surinamese national, not by her own choice but pursuant to Article 3 of the Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality (see paragraph 62 above). Consequently, her position cannot be simply considered to be on a par with that of other potential immigrants who have never held Netherlands nationality.

116. The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for more than sixteen years and that she has no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Netherlands authorities, while she repeatedly submitted residence requests and awaited the outcome of appeals. The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities.

117. Thirdly, the Court accepts, given the common background of the applicant and her husband and the relatively young age of their children, that there would appear to be no insurmountable obstacles for them to settle in Suriname. However, it is likely that the applicant and her family would experience a degree of hardship if they were forced to do so. When assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family.

118. The Court fourthly considers that the impact of the Netherlands authorities' decision on the applicant's three children is another important feature of this case. The Court observes that the best interests of the applicant's children must be taken into account in this balancing exercise (see above § 109). On this particular point, the Court reiterates 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 (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. For that purpose, in cases concerning family reunification, the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents (see Tuquabo-Tekle and Others v. the Netherlands, cited above, § 44).

119. Noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation. In this connection, the Court observes that the applicant's husband provides for the family by working full-time in a job that includes shift work. He is, consequently, absent from the home on some evenings. The applicant – being the mother and homemaker – is the primary and constant carer of the children who are deeply rooted

in the Netherlands of which country – like their father – they are nationals. The materials in the case file do not disclose a direct link between the applicant's children and Suriname, a country where they have never been.

120. In examining whether there were insurmountable obstacles for the applicant and her family to settle in Suriname, the domestic authorities had some regard for the situation of the applicant's children (see paragraphs 23 (under 2.19 and 2.21), 28 and 34 (under 2.4.5) above). However, the Court considers that they fell short of what is required in such cases and it reiterates that national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any such removal in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (see above § 109). The Court is not convinced that actual evidence on such matters was considered and assessed by the domestic authorities. Accordingly, it must conclude that insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit."

121. The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. 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.

122. The Court, whilst confirming the relevant principles set out above (see paragraphs 106-109), finds that, on the basis of the above considerations (see paragraphs 115-120) and viewing the relevant factors cumulatively, the circumstances of the applicant's case must be regarded as exceptional. Accordingly, the Court concludes that a fair balance has not been struck between the competing interests involved. There has thus been a failure by the Netherlands authorities to secure the applicant's right to respect for her family life as protected by Article 8 of the Convention.

123. There has accordingly been a violation of Article 8 of the Convention."

5.3.2.3.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

Der er ved gennemgangen af praksis ikke fundet domme, hvor EMD har taget stilling til betydningen af klagerens barns/børns personlige, sociale og kulturelle tilknytning til henholdsvis opholdslandet og klagerens hjemland i sager om inddragelse, nægtelse af forlængelse eller bortfald af klagerens opholdstilladelse, hvor der ikke foreligger kriminalitet.

5.3.2.3.6. Familiesammenføring med udlændinge, der har børn med lovligt ophold i opholdslandet

I sagen *Tuquabo-Tekle and others v. the Netherlands (2005)* var klageren efter sin ægtefælles død flygtet fra sit hjemland og indrejst i Norge, hvor hun blev meddelt humanitær opholdstilladelse. Klageren havde før flugten overladt sin ældste datter til sin mors ven og de yngste børn til sin mor. Børnene blev efterfølgende

meddelt opholdstilladelse i Norge, men kun hendes søn indrejste. Klageren giftede sig efterfølgende med en statsborger fra hjemlandet med opholdstilladelse som flygtning i opholdslandet, og klageren og hendes søn blev familiesammenført i opholdslandet. Parret fik to fællesbørn, som på det tidspunkt, hvor sagen blev indbragt for EMD, var seks og fem år gamle, og på tidspunktet for EMD's afgørelse i sagen var 11 og ti år gamle. Klageren søgte endnu engang om familiesammenføring med sin datter, som i mellemtiden var blevet 15 år. De nationale myndigheder meddelte afslag med henvisning til, at familielivet mellem klageren og datteren var blevet afbrudt.

EMD udtalte i præmis 45-52, at:

"45. Turning to the particular circumstances of the case, the Court notes that the Government's submissions centre on their contention that the applicants could have applied for Mehret to come to the Netherlands much sooner, and that, in the absence of sound reasons for their not having done so, it had to be assumed that Mehret's staying with her grandmother and uncle in Eritrea was intended to be a permanent arrangement. However, the Court has previously held that parents who leave children behind while they settle abroad cannot be assumed to have irrevocably decided that those children are to remain in the country of origin permanently and to have abandoned any idea of a future family reunion (see Şen v. the Netherlands, no. 31465/96, § 40, 21 December 2001). Indeed, it appears clearly from the facts of the present case that Mrs Tuquabo-Tekle always intended for Mehret to join her. Thus, as soon as she had been granted leave to remain in Norway, she took steps in order to be reunited with her children. Having obtained the Norwegian authorities' permission, she managed to be reunited with her son Adhanom but did not succeed in bringing Mehret to Norway at that time, owing to circumstances beyond her control (see paragraph 9 above).

46. The Court further notes that the Government have not disputed that Mrs Tuquabo-Tekle and her husband made efforts to obtain a passport for Mehret and accommodation suitable for the number of persons which their family would comprise if Mehret joined them. The Court accepts that any delays which occurred stemmed from the applicants' sincerely held belief – in which they were apparently supported by their legal representative – that it was not possible to apply for family reunion in the Netherlands until these matters had been taken care of, rather than from any decision on their part that Mehret should stay in Eritrea. Similarly, the fact that, according to the Government, Mrs Tuquabo-Tekle and her husband were not required to take these steps does not detract from the aim manifestly underlying their efforts: to be (re)united with Mehret in the Netherlands.

47. As regards the question to what extent it is true that Mehret's settling in the Netherlands would be the most adequate means for the applicants to develop family life together, the Court observes that the present application is very similar to the case of Şen v. the Netherlands (cited above), in which it found a violation of Article 8 of the Convention. That case also concerned parents with settled immigrant status in the Netherlands who chose to leave a daughter (Sinem) behind in the care of relatives in her country of origin (Turkey) for a number of years before they applied to be reunited with her. At this juncture the Court would remark that it is questionable to what extent it can be maintained in the present case, as the Government did, that Mrs Tuquabo-Tekle left Mehret behind of "her own free will", bearing in mind that she fled Eritrea in the course of a civil war to seek asylum abroad following the death of her husband. Be that as it may, it is in any event the case that Mrs Tuquabo-Tekle and her husband, just like Mr and Mrs Şen, have been lawfully residing in the Netherlands for a number of years, even opting for, and obtaining, Netherlands nationality. In addition, and also just as in the Şen case, two children have been born to the couple in the Netherlands: Tmnit in 1994

and Ablel in 1995. These two children have always lived in the Netherlands and its cultural and linguistic environment, have Netherlands nationality and attend school there. Consequently, they can only have minimal ties, if any, to their parents' country of origin (see Şen, cited above, § 40).

48. It was precisely these circumstances which led the Court to conclude in the case of Şen that a major impediment existed to that family's return to Turkey, and that allowing Sinem to come to the Netherlands would be the most adequate way in which the family could develop family life with her. The Court added that this was all the more so as, in view of Sinem's young age, her integration into her parents' close family unit was particularly exigent (ibid., § 40). It is in this latter context that the two cases are different: whereas Sinem Şen was 9 years old when her parents sought to be reunited with her (ibid., §§ 10 and 13), Mehret was already 15 when her mother and stepfather applied for a provisional residence visa on her behalf (see paragraph 11 above). The question therefore arises whether this constitutes such a material difference that the present case ought, for that reason, to be distinguished from Şen, and lead to a different outcome.

49. The Court has indeed previously rejected cases involving failed applications for family reunion and complaints under Article 8 where the children concerned had in the meantime reached an age where they were presumably not as much in need of care as young children and increasingly able to fend for themselves. In cases of this nature, the Court has also examined whether the children had grown up in the cultural and linguistic environment of their country of origin, whether they had other relatives there, and whether it could be expected of the parents to return to that country (see, for instance, Benamar v. the Netherlands (dec.), no. 43786/04, 5 April 2005; I.M. v. the Netherlands (dec.), no. 41266/98, 25 March 2003; and Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003).

50. In the present case the Court notes that the applicants have not alleged that Mehret, who undoubtedly has strong cultural and linguistic links with Eritrea, could no longer be looked after by the relatives who have been doing so ever since her mother left. They have, nevertheless, argued that Mehret's age – rather than making her less dependent on her mother – made it even more pertinent for her to be allowed to join her family in the Netherlands. This was because, in accordance with Eritrean custom, Mehret's grandmother had taken her out of school, and Mehret had also reached an age where she could be married off (see paragraph 13 above). Although Mrs Tuquabo-Tekle disagreed with the choices made for Mehret, she was unable to do anything about them as long as her daughter was living in Eritrea. The Court agrees with the Government that the applicants' arguments in this context do not, by themselves, warrant the conclusion that the State is under a positive obligation to allow Mehret to reside in the Netherlands. Even so – and bearing in mind that she was, after all, still a minor – the Court accepts in the particular circumstances of the present case that Mehret's age at the time the application for family reunion was lodged is not an element which should lead it to assess the case differently from that of Şen.

51. The Court would, moreover, add that, although not in itself decisive, it is noteworthy that when Mrs Tuquabo-Tekle successfully sought leave from the Norwegian authorities to be reunited with her daughter in Norway, Mehret was much the same age as Sinem Şen was when her parents lodged such an application with the Netherlands authorities (see paragraph 9 above).

52. Having regard to the above, the Court finds that the respondent State has failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other.

Accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Sen v. the Netherlands (2001)* var den første klager som 12-årig blevet familiesammenført til sin far i Nederlandene og havde fået permanent opholdstilladelse. Han blev gift med den anden klager i Tyrkiet, hvor hun blev boende efter indgåelse af ægteskabet. Den tredje klager blev efterfølgende født i Tyrkiet. Den anden klager flyttede derefter til Nederlandene og overlod den tredje klager i sin søsters og svogers varetægt i Tyrkiet. Den første og anden klager fik efterfølgende to børn i Nederlandene, som på det tidspunkt, hvor sagen blev indbragt for EMD, var fem og et år gamle, og på tidspunktet for EMD's afgørelse i sagen var 11 og syv år gamle. Omkring seks år efter den andens klagers indrejse søgte forældrene om opholdstilladelse til den tredje klager, hvilket blev afvist af de nationale myndigheder, som blandt andet vurderede, at den tredje klager ikke længere var en del af deres familieenhed, men derimod tilhørte mosterens familieenhed.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det komplette *legal summary* i afsnit 5.2.2.1.5.

Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

EMD udtalte i præmis 39-42 (uofficiel dansk oversættelse):

"39. Som i Ahmut-sagen er klagernes særskilte bopæl resultatet af den beslutning, som forældrene bevidst har truffet, da den anden klager sluttede sig til sin mand i Nederlandene, og klagerne er derfor ikke afskåret fra at opretholde den grad af familieliv, som forældrene selv valgte i 1986. Sinem blev, efter at moren var rejst til Nederlandene i 1986, passet af sin moster og onkel (præmis 14 og 17 ovenfor). Hun har boet hele sit liv i Tyrkiet og har derfor stærke bånd til det sproglige og kulturelle miljø i sit land, hvor hun stadig har familie, nemlig to onkler, to tanter og kusiner, hvortil kommer hendes bedstefar, der regelmæssigt opholder sig i landet (præmis 17 ovenfor).

40. Domstolen finder i modsætning til sin vurdering i Ahmut-sagen, at der i den foreliggende sag imidlertid er en væsentlig hindring for, at familien Şen kan vende tilbage til Tyrkiet. De to første klagere, hvoraf den ene har permanent opholdstilladelse og den anden opholdstilladelse på grund af sit ægteskab med en person, der har tilladelse til at bosætte sig i Nederlandene, etablerede deres liv som par i Nederlandene, hvor de har haft lovligt ophold i mange år (jf. a contrario Gül-dommen, nævnt ovenfor, s. 175-176, præmis 41), og hvor et andet barn blev født i 1990, derefter et tredje i 1994. Disse to børn har altid boet i Nederlandene, i landets kulturelle miljø, og går i skole der (jf. dommen Berrehab, nævnt ovenfor, s. 8, § 7 og s. 16, præmis 29). De har derfor kun få eller ingen andre bånd end nationalitet til deres oprindelsesland (jf. navnlig dommen i Mehemi mod Frankrig af 26. september 1997, Samlingen 1997-VI, s. 1971, præmis 36), og der var derfor hindringer fra deres side for en flytning af familielivet til Tyrkiet (jr. a contrario dommene i Gül, s. 176, præmis 42, og Ahmut, s. 2033, præmis 69). Under disse forhold var Sinems ankomst til Nederlandene den mest hensigtsmæssige måde at udvikle et familieliv med hende på, især da der i betragtning af hendes unge alder var et særligt behov for at fremme hendes integration i forældrenes familieenhed (jf. navnlig, mutatis mutandis, Johansen mod Norge af 7. august 1996, Samlingen 1996-III, s. 1001-1002, præmis 52, og s. 1003-1004, præmis 64, og X. , Y. og Z. mod Det Forenede Kongerige af 22. april 1997, Samlingen 1997-II, s. 632, præmis 43),

der var i stand til og villig til at tage sig af hende. Det er rigtigt, at forældrene, efter at Sinem havde tilbragt de første tre år af sit liv med sin mor, valgte at efterlade deres ældste barn i Tyrkiet, da anden klager sluttede sig til sin mand i Nederlandene i 1986. Denne omstændighed, som indtraf i Sinems tidlige barndom, kan imidlertid ikke anses som en uigenkaldelig beslutning om, at hun altid skulle have bopæl i dette land, og om, at der kun skulle være kortvarig og løs kontakt med hende, og om at der definitivt gives afkald på samvær med hende og enhver idé om genforening af deres familie opgives. Det gælder tilsvarende for det forhold, at klagerne ikke har kunnet dokumentere, at de har bidraget økonomisk til deres datters underhold.

41. Den indklagede stat undlod ved kun at overlade valget til de to første klagere mellem at opgive den situation, de havde opnået i Nederlandene, eller opgive samværet med deres ældste datter, at finde en rimelig balance mellem på den ene side klagernes interesser og på den anden side sin egen interesse i at kontrollere immigrationen, uden at det er nødvendigt for Domstolen at tage stilling til spørgsmålet om, hvorvidt Sinems slægtninge bosat i Tyrkiet er villige og i stand til at tage sig af hende, som den indklagede regering hævder.

42. Der er følgelig sket en krænkelse af Konventionens artikel 8."

5.3.2.4. Karakteren og intensiteten af forholdet mellem klageren og barnet/børnene

EMD har i flere sager taget stilling til betydningen af karakteren og intensiteten af forholdet mellem klageren og dennes barn/børn ved vurderingen af, om en udsendelse[44] af klageren vil indebære et indgreb i retten til familieliv, som ikke er proportionalt med det legitime hensyn.

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[16] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

5.3.2.4.1. Alvorlig kriminalitet

I sagen *Sezen v. the Netherlands (2006)* var den første klager indrejst i opholdslandet som 23-årig og havde fået opholdstilladelse som familiesammenført til sin ægtefælle (den anden klager), som havde boet i opholdslandet siden hun var syv år, og deres fælles barn. Tre år efter indrejsen blev den første klager idømt fire års fængsel for narkotikakriminalitet. Efter løsladelsen genoptog han samlivet med ægtefælle og barn, men fraflyttede senere det fælles hjem i en periode på omkring syv måneder. Knap fire måneder efter genoptagelse af samlivet fik klagerne endnu et barn. Den første klagers opholdstilladelse som familiesammenført blev om-

[44] 323. According to well-established case-law, "in all decisions concerning children their best interests are of paramount importance. (...) It follows that there is an obligation on States to place the best interests of the child, and also those of children as a group, at the centre of all decisions affecting their health and development" (Vavřička and Others v. the Czech Republic [GC], §§ 287-288 and below, for instance, X v. Latvia [GC], § 96). a. Mutual enjoymen

kring otte måneder senere nægtet forlænget under henvisning til samlivsafbrydelsen og straffedommen. Klagerens børn var otte og to år, da den nationale afgørelse blev truffet, og de var 16 og ti år, da EMD traf afgørelse i sagen.

EMD udtalte i præmis 43-50, at:

"43. The Court will first consider the nature and seriousness of the offence committed by the first applicant in the present case. It observes in this context that in 1993 he was convicted of a drug offence, namely the possession of large quantities of heroin. As the Court has held on previous occasions, it understands – in view of the devastating effects drugs have on people's lives – why the authorities show great firmness to those who actively contribute to the spread of this scourge (see Baghli v. France, no. 34374/94, § 48, ECHR 1999-VIII). The fact that it concerned a first conviction does not, in the Court's view, detract from the seriousness and gravity of the crime (see Bouchelkia v. France, judgment of 29 January 1997, Reports 1997-I, p. 65, § 51, and Amrollahi v. Denmark, no. 56811/00, § 37, 11 July 2002).

44. At the time the first applicant was arrested, i.e. on 31 July 1992, he had been residing lawfully in the Netherlands for less than one and a half years, having been granted a residence permit in February 1991. Applying the "sliding scale" principle, the authorities of the respondent State attached weight to this undeniably short duration of the first applicant's lawful stay in the Netherlands before he committed the offence. It is nevertheless to be noted that, following his conviction on 20 January 1993, it was not until more than four years later, namely on 5 June 1997, that the decision was taken to refuse the first applicant continued residence. Following his early release from prison in April 1995, the first applicant had thus been allowed to build up even closer ties with the Netherlands for a further two years. In addition, it appears that the first applicant has not re-offended and that he has been gainfully employed ever since his release from prison.

45. As to the first applicant's connections with his country of origin, the Court considers that his situation is not comparable to that of a second-generation immigrant, given that he arrived in the Netherlands at the age of twenty-three. Not having been informed otherwise, the Court assumes that he received his schooling in Turkey and that he is conversant with the Turkish language. Thus, he undoubtedly has ties with Turkey. His ties to the Netherlands are mainly connected to his wife – the second applicant – and their two children.

46. The Court notes with some concern that none of the domestic authorities involved in the decision-making process appear to have paid any attention to the possible effects which the refusal of continued residence would have on the first applicant's family life (see Yıldız v. Austria, no. 295/97, § 43, 31 October 2002). It is true that the Regional Court of The Hague, sitting in Amsterdam, quashed the decision to impose an exclusion order on the first applicant for the reason that the Deputy Minister had failed to accord insufficient weight to the interests of the applicants and their children (see paragraph 19 above). However, the Regional Court upheld the decision not to prolong the first applicant's residence permit, and its reasoning on the subject did not refer to the consequences of that decision on his family life. In this context it is further to be noted that the Government assume that both the second applicant and the children speak Turkish (see paragraph 38 above). Had this matter been addressed in the course of the domestic proceedings, the authorities would have been aware of the fact that the children speak Dutch and Kurdish, but not Turkish.

47. Unlike the first applicant, his wife – the second applicant – may be considered a second-generation immigrant, having moved to the Netherlands at the age of seven and having lawfully resided there ever since. It is

submitted, and has not been disputed, that all her relatives are also living in the Netherlands and that she does not have any family in Turkey. Although the parties disagree as to whether the second applicant was aware of the criminal activities of her husband, the fact remains that he had not yet committed the offence at the time they married and she entered into a family relationship with him, which is the relevant criterion in this context (see Boultif, cited above, § 48). Furthermore, the couple's two children were born in the Netherlands: Adem in 1990 and Mahsun in 1996. These two children have always lived in the Netherlands and its cultural and linguistic environment, and attend school there. Consequently, they can only have minimal ties, if any, to their parents' country of origin (see Şen v. the Netherlands, no. 31465/96, § 40, 21 December 2001) and, as noted above (paragraphs 32 and 46), they do not speak Turkish. In these circumstances, the Court accepts that following the first applicant to Turkey would mean a radical upheaval for the second applicant and in particular for the couple's children (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, p. 1971, § 36; see also Recommendation 1504 (2001) of the Parliamentary Assembly of the Council of Europe on the non-expulsion of long-term immigrants), and it finds that they cannot realistically be expected to do so.

48. The principal element which strikes the Court in the present case, however, is the fact that the applicants' marriage was deemed to have permanently broken down when the couple had merely ceased cohabiting for some six months in 1995/1996 and despite them making it clear to the authorities of the respondent State that cohabitation had been resumed and that there was no question of their marriage having broken down. Dutch law did not permit the first applicant's residence permit to be revoked or an exclusion order to be imposed at the time of his conviction, since he had held a strong residence status at that time (see Yılmaz v. Germany, no. 52853/99, § 48, 17 April 2003). Yet by ruling – four years after that conviction (paragraph 44 above) and notwithstanding the fact that a child had been conceived during the time the spouses were not living together – that the marriage had permanently broken down, the authorities were able to conclude that the first applicant had lost his indefinite right to remain and, subsequently, to refuse him continued residence on the basis of the criminal conviction. By that time the first applicant had served his sentence and, as illustrated by the fact that he obtained gainful employment and that a second child was born to him and his wife, had begun rebuilding his life.

49. It is true that, in theory at least, the first applicant is entitled to make occasional visits to the Netherlands, due to the fact that the exclusion order that was initially imposed on him was ultimately withdrawn without having been enforced (paragraph 20 above). However, in this context the Court notes that the present case does not concern a divorced father with an access arrangement, but a functioning family unit where the parents and children are living together. The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 of the Convention and that to split up a family is an interference of a very serious order (see Mehemi v. France (no. 2), no. 53470/99, § 45, ECHR 2003-IV). Having regard to its finding at paragraph 47 above that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same as long as the first applicant continues to be denied the right to reside in the Netherlands. In this context the Court notes the Government's submission that the first applicant's criminal record would normally militate against a new residence permit being issued to him for a period of ten years. Although they also argued that Article 8 of the Convention would be taken into account in assessing whether his conviction would still be held against him, the Government failed to indicate when, and

under what conditions, such an assessment would lead to a positive decision being taken on any future request for a residence permit being lodged by the first applicant.

50. In conclusion, the Court is of the opinion that, in the particular circumstances of the present case, the respondent State failed to strike a fair balance between the applicants' interests on the one hand and its own interest in preventing disorder or crime on the other.

There has, accordingly, been a violation of Article 8 of the Convention."

I sagen *Üner v. the Netherlands (2006)* blev klageren idømt syv års fængsel for drab og udvist for bestandig. Klageren var indrejst som 12-årig sammen med sin mor og sine søskende som familiesammenført til faren. På tidspunktet, hvor afgørelsen om udvisning blev endelig, havde han opholdt sig 17 år i opholdslandet og havde to mindreårige børn med sin nederlandske partner. Han var flyttet fra partneren efter halvandet års samliv, da det ældste barn var omkring ni måneder gammel, men forblev i tæt kontakt med partneren og barnet i de følgende omkring otte måneder indtil fængslingen. Partneren og det ældste barn besøgte klageren i fængslet mindst en gang om ugen og ofte hyppigere. Mens klageren var fængslet, fik parret endnu et barn, som klageren ligeledes så hver uge. Klageren havde på tidspunktet for EMD´s afgørelse opholdt sig 25 år i opholdslandet. Klagerens børn var henholdsvis seks år og halvandet år gamle på tidspunktet for den nationale afgørelse om udvisning.

EMD fastslog i præmis 61, at der forelå et indgreb både i klagerens ret til respekt for familieliv og hans ret til respekt for privatliv. EMD udtalte imidlertid:

"[...] Even so, having regard to the particular issues at stake in the present case and the positions taken by the parties, the Court will pay special attention to the applicant's right to respect for his family life."

EMD udtalte i præmis 62-65, at:

"62. The Court considers at the outset that the applicant lived for a considerable length of time in the Netherlands, the country that he moved to at the age of 12 together with his mother and brothers in order to join his father, and where he held a permanent residence status. Moreover, he subsequently went on to found a family there. In these circumstances, the Court does not doubt that the applicant had strong ties with the Netherlands. That said, it cannot overlook the fact that the applicant 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. As the Chamber put it in paragraph 46 of its judgment, "... the disruption of their family life would not have the same impact as it would [have had] if they had been living together as a family for a much longer time". Moreover, while it is true that the applicant came to the Netherlands at a relatively young age, the Court is not prepared to accept that he had spent so little time in Turkey that, at the time he was returned to that country, he no longer had any social or cultural (including linguistic) ties with Turkish society.

63. As to the criminal conviction which led to the impugned measures, the Court is of the view that the offences of manslaughter and assault committed by the applicant were of a very serious nature. While the applicant claimed that he had acted in self-defence – a claim that was in any event rejected by the trial courts (see paragraphs 44 and 50 above) – the fact remained that he had two loaded guns on his person. Taking his previous convictions into account (see paragraphs 14 and 16 above), the Court finds that the applicant may

be said to have displayed criminal propensities. Having regard to Netherlands law and practice relating to early release (see paragraph 34 above), the Court is, furthermore, not inclined to attach particular weight to the fact that the applicant was released after serving two-thirds of his sentence.

64. The Court concurs with the Chamber in its finding that at the time the exclusion order became final the applicant's children were still very young – six and one and a half years old respectively – and thus of an adaptable age (see paragraph 46 of the Chamber judgment). Given that they have Netherlands nationality, they would – if they followed their father to Turkey – be able to return to the Netherlands regularly to visit other family members residing there. Even though it would not wish to underestimate the practical difficulties entailed for his Dutch partner in following the applicant to Turkey, the Court considers that in the particular circumstances of the case the family's interests were outweighed by the other considerations set out above (see paragraphs 62 and 63).

65. The Court appreciates that the exclusion order imposed on the applicant has even more far-reaching consequences than the withdrawal of his permanent residence permit, as it renders even short visits to the Netherlands impossible for as long as the order is in place. However, having regard to the nature and the seriousness of the offences committed by the applicant, and bearing in mind that the exclusion order is limited to ten years, the Court cannot find that the respondent State assigned too much weight to its own interests when it decided to impose that measure. In this context, the Court notes that the applicant, provided he complied with a number of requirements, would be able to return to the Netherlands once the exclusion order had been lifted (see paragraphs 32 and 51 above)."

EMD udtalte i præmis 67:

"In the light of the above, the Court finds that a fair balance was struck in this case in that the applicant's expulsion and exclusion from the Netherlands were proportionate to the aims pursued and therefore necessary in a democratic society.

Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *A.H. Khan v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som syvårig og var tidligere blevet dømt for samleje med en mindreårig, to forsøg på røveri samt overfald. Som 30-årig blev han ydermere idømt fem års fængsel for røveri og udvist. Klageren blev udsendt ni år efter sin sidste dom. På tidspunktet for EMD´s afgørelse af sagen var han far til seks børn i alderen fra 12 til 17 år. Klageren var på daværende tidspunkt ikke i forhold med mødrene til sine børn.

EMD udtalte i præmis 37, at:

"[…] the Court finds that, on balance, the applicant lived in the United Kingdom from 1978, when he was aged seven, returning to Pakistan only for visits. It is therefore accepted that he has lived in the United Kingdom since an early age, a factor which means that serious reasons would be required before his deportation could be found to be proportionate (see Maslov v. Austria [GC], no. 1638/03, § 75, 23 June 2008)."

EMD fandt den af klageren begåede kriminalitet alvorlig og fremhævede, at det forhold, at han havde begået kriminalitet igen kort tid efter løsladelsen, viste, at han ikke var rehabiliteret og derfor fortsat udgjorde en fare for offentligheden, hvorfor der var gode grunde til at udsende ham (præmis 38).

I præmis 39 udtalte EMD, at:

"The Court must now consider the applicant's circumstances in the United Kingdom, with a view to determining whether his family and private life, and his consequent level of integration into British society, were such as to outweigh the seriousness of his criminal history. Looking first at the nationalities of the persons involved, the Court notes that, unlike the applicant, his mother and siblings are all now naturalised British citizens. The applicant's six children are also British citizens, as are their mothers. Finally, the applicant claimed to be in a relationship with a British citizen. The Court notes that, although this relationship apparently began in 2008, the applicant made no mention of this partner at his appeal hearing in 2009, when both of the mothers of his children were referred to as his current partners. The applicant appears to have mentioned his new partner for the first time in representations to the Secretary of State in November 2009, only a few months before he was deported. The applicant has not stated whether the relationship has still subsisted since his deportation. The Court cannot therefore attach much weight to this relationship, or find that it is a relationship akin to marriage."

EMD udtalte i præmis 40-41, at:

"40. As regards the applicant's relationship with his children and their mothers, the Court notes that, as predicted by the Tribunal, neither woman chose to accompany the applicant to Pakistan and both remain in the United Kingdom with their children. The Court also notes that the extent of the applicant's relationship with his children and their mothers was limited even at the time of his deportation, given that he had not lived with them since 1999 or seen the children since 2000. The applicant had not therefore seen his children in the ten years prior to his deportation and the eldest child would only have been aged four the last time he or she had seen his or her father. There was also, as noted by the Tribunal, some doubt as to whether the applicant fulfilled a positive role in his children's lives, given that four of the six had, at various times, been on the social services' "at risk" register. Given the length of time since the applicant last had face-to-face contact with his children, as a result of his offending and consequent imprisonment, and the lack of evidence as to the existence of a positive relationship between the applicant and his children, the Court takes the view that the applicant has not established that his children's best interests were adversely affected by his deportation.

41. Finally, the Court turns to the question of the respective solidity of the applicant's ties to the United Kingdom and to Pakistan. The Court notes that, unlike his younger brother, the applicant returned to Pakistan for visits following his arrival in the United Kingdom and also married there. In the absence of any evidence to the contrary, the Court assumes that this marriage is still, legally at least, subsisting. The applicant therefore maintained some level of connection to his country of origin and was not deported as a stranger to the country. As regards his ties to the United Kingdom, the Court has addressed the question of his family life, both with his parents and siblings and with his various partners and children, above, and found it to be limited in its extent. Furthermore, the applicant's private life in the United Kingdom, as observed by the Tribunal, has been constrained by his convictions and spells in prison. Whilst he was mainly educated in the United Kingdom and has worked, he does not appear to have established a lengthy or consistent employment history. In short, and despite the length of his stay, the applicant did not achieve a significant level of integration into British society. The Court is aware that, as a settled migrant who spent much of his childhood in the United Kingdom, serious reasons would be required to render the applicant's deportation proportionate (see Maslov, cited

above, § 75). However, having regard to his substantial offending history, including offences of violence and recidivism following the commencement of deportation proceedings against him, the Court is of the view that such serious reasons are present in the applicant's case. His private and family life in the United Kingdom were not such as to outweigh the risk he presented of future offending and harm to the public and his deportation was therefore proportionate to the legitimate aim of preventing crime. As such, the applicant's deportation to Pakistan did not amount to a violation of Article 8."

I sagen *Salem v. Denmark (2016)* blev klageren dømt for narkotikakriminalitet og andre alvorlige forhold og idømt fem års fængsel samt udvist betinget med indrejseforbud gældende i to år. Klageren var indrejst i opholdslandet i en alder af 23 år og var først blevet meddelt opholdstilladelse som familiesammenført til sin tidligere ægtefælle, hvorefter han efterfølgende blev meddelt opholdstilladelse på baggrund af asyl. På tidspunktet, hvor de nationale myndigheder afsagde endelig dom om udvisning (2011), havde klageren og hans tidligere ægtefælle otte børn, som var i alderen fra fem til 16 år, og som alle var danske statsborgere. EMD afgjorde sagen fem år efter de nationale myndigheder (2016).

EMD udtalte i præmis 77-83, at:

"77. In the present case, the applicant's eight children were between 5 and 16 years old when the deportation order became final. Before the Supreme Court the applicant's then wife stated that she would be unable to follow the applicant if he were deported from Denmark, and that the children would not manage outside Denmark. During the domestic proceedings, statements were obtained from the Children's Department at the municipality and the children's schools and day-care institutions, which recounted that several of the eight children had serious problems, including of a psychological and educational nature (see paragraph 25 above). Four of the children received special education and several of the children needed extra support and supervision in their schools and institutions. Massive public support measures had been provided due to a significant need to teach them normal social behaviour. Finally, the placement of some of the sons in public care was under consideration.

78. In the Court's view it is doubtful whether, on the basis of those statements, or on the material before it, the applicant has substantiated that he had a central role in the family (see paragraph 63 above) and that his children's best interests were adversely affected by his deportation (see, for example, A.W. Khan v. the United Kingdom, cited above, § 40).

79. The Supreme Court did not expressly state whether it found that there were no insurmountable obstacles for the applicant's wife and children to follow him. It rather appears that the majority found that in any event the separation of the applicant from his wife and children could not outweigh the other counterbalancing factors, notably that the applicant had a leading and central role in the commission of persistent, organised and aggravated drug crimes (see paragraph 39 above).

80. The Court notes in addition that it transpired from the statements mentioned above (see paragraphs 25 and 77) that several of the applicant's eight children had serious problems and therefore were being supported by various Danish authorities.

81. Finally, the Court notes that the applicant has not pointed to any obstacles for the children to visit him in Lebanon or for the family to maintain contact via the telephone or the internet.

82. In the light of the above, the Court recognises that the Supreme Court carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law, including the applicant's family situation. Moreover, having regard to the gravity of the drug crimes committed by the applicant, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court finds that the interference was supported by relevant and sufficient reasons, and was proportionate in that a fair balance was struck between the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other hand.

83. Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Assem Hassan Ali v. Denmark (2018)* var klageren idømt fem års fængsel for narkokriminalitet og udvist for bestandig. Han havde på tidspunktet for udvisningen opholdt sig 20 år i opholdslandet og havde under sit ophold fået seks børn i alderen fra syv til 14 år med to forskellige kvinder. Alle børnene var danske statsborgere.

EMD gennemgik klagerens kriminelle forhold i præmis 46-47.

EMD udtalte i præmis 49-64, at:

"49. As to the solidity of social, cultural and family ties with the host country and with the country of destination, the Court observes that during the criminal proceedings leading to the expulsion order, in August 2008 the Immigration Service (Udlændingeservice) stated that the applicant spoke Arabic and only a little Danish. An interpreter had been used during his interview with the Immigration Service. The applicant had never had a job in Denmark. The applicant's parents and siblings remained in Jordan, where the applicant had visited them a couple of years before. However, in the revocation proceedings leading to the High Court's decision of 27 January 2014, the applicant stated that he had broken off contact with his father and his eight siblings in Jordan in 2005. He did not develop this statement further and the Court does not attach any particular weight to this assertion.

50. As to the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life, the Court notes that the applicant's first wife, X, from his marriage in 1997, was a stateless Palestinian woman from Lebanon who had obtained Danish nationality. She and the applicant had three children together, born between 1997 and 2001. They had Danish nationality and their legal status was not affected by the applicant's expulsion order. After the divorce in 2001, the applicant maintained contact with X and his children. During the revocation proceedings in 2013, before the High Court, the applicant submitted that he and X planned to re-marry, but that it had not been decided whether she would follow him to Jordan in case of expulsion. At the relevant time, however, the applicant was serving his prison sentence and facing the implementation of the expulsion order. Thus, he could not have had a justified expectation that he would be able to exercise his right to a family life in Denmark with X. Moreover, there is no indication that they did remarry either before the applicant was deported on 14 April 2014 or thereafter. Accordingly, the criterion relating to the seriousness of the difficulties which spouse X is likely to encounter in the country to which the applicant is to be expelled does not apply.

51. The applicant's second wife, Y, from his marriage under Islamic law in 2002, was an Iraqi woman of Kurdish origin. They married before the offences at issue were committed. Thus, the criterion of whether the spouse knew about the offence at the time when he or she entered into a family relationship does not come

into play in the present case. In respect of their marriage it is noteworthy, though, that they divorced in May 2013, before the District Court's decision of 3 June 2013 to refuse to revoke the expulsion order. Accordingly, the criterion relating to the seriousness of the difficulties which spouse Y is likely to encounter in the country to which the applicant is to be expelled does not apply. Y and the applicant had three children together, born between 2003 and 2009. The children had Danish nationality and their legal status was not affected by the applicant's expulsion order.

52. When in 2009 the applicant was convicted of a serious drug crime, sentenced to five years' imprisonment, and his expulsion ordered, it was a known fact that he had six children. In their judgments of 11 March 2009 and 25 November 2009, respectively, the District Court and the High Court did not expressly state whether they found that the applicant's then wife, Y, and their three children could follow him to Jordan or whether, in any event, a separation of the applicant from his then wife and children could not outweigh the other counterbalancing factors, notably that the applicant had committed a serious drugs crime (see paragraphs 14 and 15 above).

53. In the revocation proceedings, when examining whether material changes had occurred in the applicants' circumstances within the meaning of section 50, subsection 1, of the Aliens Act, the District Court, in its decision of 3 June 2013 stated, among other things, that "as material changes in his circumstances, the applicant has referred to the circumstances that the health of his children has deteriorated .... Since the High Court delivered its judgment [in 2009], the applicant has maintained contact with his wife and his children. However, that circumstance cannot independently lead to the conclusion that there have been material changes in circumstances. In the assessment of the court, the information available does not provide any basis on which to conclude that there have been material changes in the health of his children. ...". The High Court concurred with this finding and added, in its decision of 27 January 2014 "that the information presented to the High Court ... on the intention of the applicant and his ex-wife to remarry cannot lead to a different outcome".

54. The remaining criterion in the case to be examined is "the best interests and well-being of the children, in particular the seriousness of the difficulties which any of the applicant's children are likely to encounter in the country to which the applicant is to be expelled".

55. In its judgment Jeunesse v. the Netherlands [GC], (no. 12738/10, § 109, 3 October 2014), which concerned family reunion, the Court reiterated "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 ... Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it.

56. Whilst this principle applies to all decisions concerning children, the Court notes that in the context of the removal of a non-national parent as a consequence of a criminal conviction, the decision first and foremost concerns the offender. Furthermore, as case-law has shown, in such cases the nature and seriousness of the offence committed or the offending history may outweigh the other criteria to take into account (see, for example, Cömert v. Denmark (dec.), 14474/03, 10 April 2006; Üner v. the Netherlands [GC], cited above, §§ 62-64; and Salem v Denmark, cited above, § 76).

57. In the present case, when the revocation proceedings were pending before the District Court in 2013, the applicant's children were approximately 14, 12, 11, 9, 8 and 7 years old. They would all remain in Denmark, so no question arose as to "the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled". The issue was rather which difficulties they would encounter in Denmark due to the separation from their father. The three eldest children would live with their mother, X, as they had done since their parents divorced in 2001. The eldest son was living part-time in an institution. The three youngest children would live with their mother, Y, as they had done since the applicant was detained in April 2008.

58. Both the District Court and the High Court found unsubstantiated the applicant's allegation that the children's health had deteriorated since the expulsion order was issued in 2009. The applicant's eldest son's medical condition was also known in 2009.

59. The domestic courts also stated that the fact that, while imprisoned, the applicant has maintained contact with his children since 2009, could not independently lead to the conclusion that there have been 'material changes in [the applicant's] circumstances' (see section 50 of the Aliens Act).

60. The domestic courts did not as such comment on X's allegation that 'It would be a disaster if her children were separated permanently from their father. They had lived in a strong hope that they would reunite with their father upon his release. She feared that her children would break down if [the applicant] were to be deported. It would become very difficult to integrate them into Danish society'. Nor did they take a stand on Y's allegation that 'her eldest son had a support person. The reason was that he isolated himself. The reason why he isolated himself was that he missed being part of a whole family. It would help if he could be with [the applicant] ... It would also have a very negative impact on the children if their father were deported.'

61. Apart from observing that such statements cannot be considered established facts, on the basis of the other material before it, the Court is not convinced that the applicant's children's best interests were adversely affected by the applicant's deportation to such an extent that those should outweigh the other criteria to take into account (see, for example, A.H. Khan v. the United Kingdom, no. 6222/10, § 40, 20 December 2011).

62. The Court also notes that apart from financial restraints (see paragraph 17 above), the applicant has not pointed to any obstacles, at least for the five younger children to visit him in Jordan, or for them all to maintain contact with him in other ways.

63. In the light of the above, the Court recognises that the District Court and the High Court carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law, including the applicant's family situation. Moreover, having regard to the gravity of the drugs crime committed by the applicant, the Court finds that the interference was supported by relevant and sufficient reasons, and was proportionate in that a fair balance was struck between the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other hand (see, among many others, Salem v. Denmark, cited above, § 82; Hamesevic v. Denmark (dec.), no. 25748/15, § 43, 16 May 2017; Alam v. Denmark (dec.), no. 33809/15, § 35, 6 June 2017; and Ndidi v. the United Kingdom, no. 41215/14, § 76, 14 September 2017).

64. Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Onur v. the United Kingdom (2009)* blev klageren udvist fra opholdslandet på grund af alvorlig kriminalitet. Mens klageren var fængslet for et tidligere forhold, fødte hans tidligere partner deres fællesbarn, men klageren fremgik ikke som far til hende på fødselsattesten. Efter sin afsoning var klageren sammen med sin datter to-tre dage om ugen. Han fik efterfølgende to børn med sin nye partner. Klageren anførte i sin klage til EMD, at en udvisning ville være i strid med EMRK artikel 8 på grund af et eksisterende familieliv med hans datter fra et tidligere forhold og med hans børn fra hans nuværende forhold.

EMD udtalte i præmis 43-45:

"43. It is clear from the Court's case-law that children born either to a married couple or to a co-habiting couple are ipso jure part of that family from the moment of birth and that family life exists between the children and their parents (see L. v. the Netherlands, no. 45582/99, § 35, ECHR 2004-IV). The applicant therefore enjoyed family life in the United Kingdom with his current partner and their oldest child (the youngest was born after his deportation to Turkey).

44. The applicant's oldest child, however, is in a different position as his relationship with her mother had broken down before she was born and the child has never lived with the applicant. The Court has previously indicated that in the absence of co-habitation, other factors may serve to demonstrate that a relationship has sufficient constancy to create de facto family ties (Kroon and Others v. the Netherlands, 27 October 1994, § 30, Series A no. 297-C). Such factors include the nature and duration of the parents' relationship, and in particular whether they had planned to have a child; whether the father subsequently recognised the child as his; contributions made to the child's care and upbringing; and the quality and regularity of contact (see Kroon, cited above, §30; Keegan v. Ireland, 26 May 1994, § 45, Series A no. 290; Haas v. the Netherlands, no. 36983/97, § 42 ECHR 2004-I and Camp and Bourimi v. the Netherlands, no. 28369/95, § 36, ECHR 2000-X). In the present case, the applicant had been in a six-year relationship with the child's mother. Although the relationship ended shortly before the child's birth, she knew the applicant as her father, and following his release from prison she spent two to three days a week with him. The Court therefore accepts that this relationship had sufficient constancy to amount to family life.

45. The Court does not find, however, that the applicant enjoyed family life with his mother and siblings as he has not demonstrated the additional element of dependence normally required to establish family life between adult parents and adult children (see Slivenko v. Latvia [GC], no. 48321/99 ECHR 2003-X). 46. Nevertheless, the Court recalls that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant therefore constitutes an interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect (see Maslov v. Austria [GC], no. 1638/03, ECHR 2008 § 63). 47. Accordingly, the measures complained of interfered with both the applicant's "private life" and his "family life". Such interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", as pursuing one or more of the legitimate aims listed therein, and as being "necessary in a democratic society" in order to achieve the aim or aims concerned."

Vedrørende spørgsmålet om, om indgrebet var nødvendigt i et demokratisk samfund, udtalte EMD efter gennemgang af kriterierne som udledt i Boultif- og Üner-dommene i præmis 55-63:

"55. Although the majority of the applicant's criminal convictions were at the less serious end of the spectrum of criminal activity and were nonviolent in nature, the Court cannot ignore the more serious convictions for burglary and robbery. The conviction for robbery was particularly serious: in sentencing the applicant to four and a half years' imprisonment the judge noted that the applicant was one of the ringleaders of the operation and that the use of weapons made it a terrifying ordeal for the victims. Moreover, although the applicant submits that the majority of his offences were committed when he was between seventeen and eighteen years old, he was in fact nineteen years old when he was last convicted of burglary and twenty-two years old when he was convicted of robbery. The present case is therefore readily distinguishable from Maslov v. Austria [GC], no. 1638/03, § 81, 23 June 2008, where the Court found a violation of Article 8. In Maslov, the (mostly non-violent) offences were committed by the applicant when he was between fourteen and fifteen years old and could therefore be regarded as acts of juvenile delinquency.

56. As a result of the Secretary of State's delay in issuing the Notice of Decision to Make a Deportation Order, the applicant enjoyed the benefit of three years at liberty in the United Kingdom following his release from prison. Although he did not commit any serious offences during this period, in May 2005 he was sentenced to twenty-eight days' imprisonment following his conviction for a road traffic offence and failure to surrender to custody. While the Court would not place much weight on the road traffic offence, the fact remains that the applicant subsequently failed to surrender to custody, and the imposition of a custodial sentence would suggest that he did so without reasonable cause.

57. The Court accepts that the applicant has spent a significant amount of time in the United Kingdom although it could not be said that he spent the major part of his childhood or youth there. He did not return to Turkey during the nineteen years he lived in the United Kingdom and although he spoke Turkish at the time of his removal from the United Kingdom, he no longer had any social, cultural or family ties to Turkey. His partner and his three children live in the United Kingdom and are British citizens. His mother, his brother and three of his sisters hold either British citizenship or a permanent right of residency. In the circumstances, the Court does not doubt that the applicant has strong ties to the United Kingdom.

58. The applicant's eldest child is currently eight years old. Although she has never lived with the applicant, the Court has already held that their relationship amounted to family life as she had a close relationship with him prior to his deportation, spending on average two to three days a week with him. Nevertheless, without underestimating the disruptive effect that the applicant's deportation has had, and will continue to have, on her life, it is unlikely to have had the same impact as it would if the applicant and his daughter had been living together as a family. Contact by telephone and email could easily be maintained from Turkey, and there would be nothing to prevent his daughter from travelling to Turkey to visit him.

59. The Court has found that the applicant also enjoyed family life in the United Kingdom with his current partner and their oldest child. The fact remains, however, that he lived for a relatively short period with his partner and their first born child, and he has never lived with their youngest child. Moreover, the applicant's partner was aware of his criminal record and immigration history when they decided to marry and start a family. In particular, she was aware that in 2001 the Secretary of State had advised the applicant that he was considering deportation. Although the Court has some sympathy with the applicant on account of the long

and inexplicable delay in the commencement of deportation action, in the circumstances of the present case it does not accept that the delay entitled the applicant and his partner to assume that no further action would be taken. The Home Office had never indicated that it had considered his case and decided against deportation, and in April 2006, just five months before the marriage, the Home Office had announced that there would be a "crackdown" following the much-publicised admission that 1023 foreign national criminals, who should have been considered for deportation or removal, had completed their prison sentences and were released without any consideration of deportation or removal action.

60. Although the Court would not wish to underestimate the practical difficulties entailed for the applicant or his partner in relocating to Turkey, no evidence has been adduced which would indicate that it would be either impossible or exceptionally difficult for them to do so. Although the applicant was, prior to his deportation, diagnosed as suffering from mild to moderate depression, panic disorder, mild mental retardation, borderline intellectual functioning and dyslexia, there is no evidence to suggest that he could not receive treatment or counselling in Turkey should the need arise. Furthermore, although the applicant's partner is British, there are no circumstances that would inherently preclude her from living in Turkey. The couple's children are still very young – the eldest is just under two years old and the youngest just under one – and thus of an adaptable age. Given that they have British citizenship, if the applicant's partner and children followed him to Turkey they would be able to return to the United Kingdom regularly to visit other family members residing there.

61. Finally, the Court has had regard to the duration of the deportation order. Although the Immigration Rules do not set a specific period after which revocation would be appropriate, it would appear that at the very latest the applicant would be able to apply to have the deportation order revoked ten years after his deportation.

62. In light of the above, the Court finds that a fair balance was struck in this case in that the applicant's expulsion and exclusion from the United Kingdom was proportionate to the aims pursued and therefore necessary in a democratic society.

63. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Loy v. Germany (2014)* var klageren indrejst i opholdslandet som femårig. Som 26-årig blev han idømt fire måneders betinget fængsel for vold mod sine børns mor og tre år senere blev han idømt et års betinget fængsel for vold på en natklub. To år senere blev han idømt to et halvt års fængsel for narkotikakriminalitet. Det år, han fyldte 32 år, blev klageren udvist af opholdslandet med indrejseforbehold uden fastsat tidsbegrænsning, og to år senere blev han udsendt til hjemlandet. På udvisningstidspunktet var klageren skilt fra sin tidligere ægtefælle, som var statsborger i opholdslandet, og med hvem klageren havde fået to børn, som ligeledes var statsborgere i opholdslandet og 21 og 17 år gamle på tidspunktet for klagerens udvisning. Han giftede sig igen efter udvisningsdommen.

EMD konstaterede i præmis 28, at indgrebet var i overensstemmelse med lovgivningen og tjente et legitimt formål. Til brug for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund og proportionalt med det forfulgte hensyn, gennemgik EMD i præmis 30 kriterierne som sammenfattet i Üner- og Maslov-dommene og konstaterede derefter i præmis 31, at den af klageren begåede kriminalitet, som også omfattede narkotikakriminalitet, var alvorlig. I præmis 32 konstaterede EMD, at klageren havde boet næsten 30 år i opholdslandet og havde tidsubgrænset opholdstilladelse, da udvisningsafgørelsen blev endelig.

EMD udtalte i præmis 34-36, at:

"34. As to the applicant's family relationship with the children of his previous relationship, the Court notes that the applicant recognized paternity of the children. However, the applicant has not established that he was in any way involved in the children's upbringing before his arrest. The second of the applicant's convictions for violent offences relates to a physical attack on the mother. The Court further notes that no visits took place during the applicant's stay in prison. His daughter refused to see him and his son was not informed about his prison stay. Only after his release (and when expulsion proceedings were under way) some encounters have taken place but in the absence of further substantiated information in this regard, the Court considers that the applicant's family ties with his children were not very developed.

35. The Court accepts that the applicant's expulsion resulted in separating him further from his children. However, the expulsion is unlikely to have the same impact as it would if the applicant and his children had been living together as a family. Moreover, the Court the children are now aged 21 and 17, and contacts can continue by phone and e-mail as well as by way of visits to the applicant (see Onur, cited above, § 58).

36. As to the applicant's family life with his spouse, the Court notes that when the applicant contacted the registry office in June 2006 (when the applicant was still in prison), the expulsion order had already been served, and by the time they married in February 2007, the applicant's first appeal against the expulsion order had been dismissed. Their family life, such as it was, was thus always against the background of pending expulsion proceedings. They separated soon after the marriage. In these circumstances, no decisive weight can be attached to the family relationship with his spouse (see A.W. Khan v. the United Kingdom, no. 47486/06, §§ 46, 47, 12 January 2010)."

Herefter udtalte EMD i præmis 37 om klagerens tilknytning til opholdslandet:

"The Court also looks for significant relations within the society of the host country (see Trabelsi, cited above, § 62; Mutlag, cited above, § 58; Lukic v. Germany (dec.), no. 25021/08, 20 September 2011) and notes that apart from mentioning that he went to school and completed a vocational training in Germany in his submissions the applicant submits nothing by way of evidence of his participation in social life apart from the length of his residence. Apart from referring to his children and his former spouse he made reference to the fact that his father, stepmother and siblings live in Germany. He claims that he has contact with his sister, but gives no further details. No information on other social contacts was provided. Therefore, in the present case only few significant relations can be established."

I præmis 38 gennemgik EMD klagerens tilknytning til hjemlandet og konstaterede, at han havde boet der, til han var fem år gammel, og at han angiveligt talte noget serbisk. I præmis 39 konstaterede EMD, at indrejseforbuddet ikke nødvendigvis behøvede at være permanent, idet klageren kunne søge om at få det tidsbegrænset.

I præmis 40 udtalte EMD, at:

"Against the background of the gravity of the applicant's drug related offence, together with the earlier crimes of violence committed by the applicant, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family and his private life reasonably against the State's interest in

preventing disorder and crime. Appreciating the consequences of the expulsion for the applicant, the Court cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to impose this measure."

EMD afviste derefter sagen som *inadmissible*, idet klagen blev vurderet *manifestly ill-founded*.

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

EMD udtalte i præmis 48-50, at:

"48. As regards the applicant's family situation, he has been married to his wife since 1999 and it has, explicitly, not been contested by the respondent Government that real and effective family existed between the applicant, his wife and their two children. It has to be noted that the applicant's wife could not know about the offences at issue at the time when she entered into a family relationship with the applicant, as the couple married in 1999 and thus prior to the commission of the offences in 2000. It has to be noted that the applicant, with the exception of the purchase and consumption of marihuana, for which he was fined in 2007, committed the criminal offences prior to the birth of his children.

49. The Court observes that the applicant's wife is a national of "the former Yugoslav Republic of Macedonia", i.e. of the country to which the applicant was expelled. The applicant's wife, who was born in 1978, lived there until 1990 and knows Albanian and the country's culture. She has relatives there and visits the country every year. The domestic courts considered that she could reintegrate in "the former Yugoslav Republic of Macedonia" without encountering serious difficulties, despite having lived in Switzerland for the past twenty years. The Court notes that the applicant's wife chose to follow him to Macedonia in 2011 and lived with him *there until 2015, despite the fact that she could have remained in Switzerland as a holder of a permanent residence permit and maintained contact with the applicant through visits and means of telecommunication.*

50. The Court observes that the couple's children, born in 2001 and in 2005, are likewise the nationals of "the former Yugoslav Republic of Macedonia". At the time the expulsion order became binding, the elder child was in primary school, whereas the younger one was in kindergarten. They were, thus, still of an adaptable age. While the Court accepts that the economic living conditions in "the former Yugoslav Republic of Macedonia" are less favourable than in Switzerland, it also notes that the former is a Contracting State of the Council of Europe. It further accepts that the children knew the country's culture to a certain extent due to visits they had made together with their mother. While it is not clear to what extent the children knew Albanian, it does not appear arbitrary to accept that the presence of their parents, who both originate from the country, as

well as further relatives from their mother's side, would alleviate their difficulties in integrating in "the former Yugoslav Republic of Macedonia". Moreover, it has to be noted that the children were not forced to move there, but could have remained in Switzerland with their mother as holders of permanent residence permits and maintained contact with the applicant through visits and means of telecommunication."

Betydningen af længden af klagerens ophold blev gennemgået i præmis 51 og 52, hvor EMD vurderede hans tilknytning til henholdsvis opholdslandet og hjemlandet:

"51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'."

EMD udtalte herefter i præmis 53-55:

"53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and

order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Otite v. the United Kingdom (2022)* blev klageren idømt fire år og otte måneders fængsel for økonomisk kriminalitet og udvist for bestandig. Klageren var indrejst som 31-årig som familiesammenført til sin ægtefælle, der havde oprindelse i samme land som klageren, og som ligesom parrets tre børn i alderen 12, 17 og 19 år var statsborger i opholdslandet. Klageren havde på tidspunktet for dommen opholdt sig i opholdslandet i 19 år. Han havde været på fri fod i 11 år og havde i fire af de 11 år været involveret i kriminalitet. Familien havde efter det oplyste ikke besøgt klageren under afsoningen.

I præmis 49 gennemgik EMD kriminalitetens alvor og lagde vægt på, at klageren over en fireårig periode havde drevet en dokumentfabrik, hvilket havde involveret et stort antal ofre og betragtelige pengebeløb, og at han ikke havde erkendt overtrædelsernes påvirkning og konsekvenser for ofrene og samfundet, ligesom der var betragtelig risiko for, at han ville fortsætte med at opføre sig som før.

Herefter udtalte EMD i præmis 51-54:

"*51. The third party intervenors suggest that in cases such as the present the bests [sic] interests of the children should be a primary consideration (see paragraphs 34-35 above). […]*

52. In the present case, while the applicant's deportation would undoubtedly be difficult for his wife and children, there is nothing to suggest that their need for his support is particularly acute. His children are now nineteen, seventeen and twelve years old. His eldest daughter has type 1 diabetes, but there is no evidence to suggest that the applicant's presence in the United Kingdom is important for her physical well-being. According to the evidence before the Upper Tribunal, the children did not have contact with him during the whole period while he was in prison (see paragraph 17 above). Following his custodial sentence he was detained in immigration detention (see paragraph 31 above). It is not known whether he returned to the family home following his release from detention.

53. Even if the applicant has returned to the family home, his wife has family in the United Kingdom and has established ties in the community (see paragraph 12 above). The family, which has already coped with his lengthy absence while in prison and immigration detention, would therefore have a support network in the event of his deportation. In addition, although the Upper Tribunal proceeded on the basis that the applicant's family would not return to Nigeria with him, there is no evidence to suggest that they could not do so. The applicant himself lived in Nigeria for the first thirty-one years of his life (see paragraph 5 above). Although his wife and children are British citizens, his wife is of Nigerian origin and his children would be entitled to Nigerian citizenship through him (see paragraph 12 above). The case is therefore readily distinguishable from that of Unuane, in which the applicant's partner and children had to stay in the United Kingdom as the eldest child was awaiting heart surgery, and the Upper Tribunal had itself acknowledged that they needed the applicant to be there with them to provide support (see Unuane, cited above, § 89).

54. The applicant has not brought forward any arguments which would speak against the possibility of his family visiting him in Nigeria and staying in contact via telephone and the internet (see Salem v. Denmark, no. 77036/11, § 81, 1 December 2016; see also Külekci, cited above, §49). Furthermore, the applicant only left Nigeria when he was thirty-one years old (see paragraph 5 above), and there is no evidence to suggest that he no longer has family, social, cultural and linguistic ties there (see, for example, Külekci, cited above, § 50)."

Efter i præmis 54, 2. punktum, at have konstateret, at der ikke var noget der tydede på, at klageren ikke længere havde bånd til hjemlandet, konkluderede EMD i præmis 56-57:

"*56. The foregoing considerations are sufficient to enable the Court to conclude that the strength of the applicant's family and private life in the United Kingdom is not such as to outweigh the public interest in his deportation.*

57. Accordingly, his deportation would not violate Article 8 of the Convention."

Der kan endvidere henvises til sagen *Loukili v. the Netherlands (2023).*

5.3.2.4.2. Mindre alvorlig kriminalitet

I sagen *Keles v. Germany (2002)* var klageren indrejst i opholdslandet, da han var ti år gammel. Som 22-årig giftede han sig i hjemlandet med en statsborger fra hjemlandet, og fem år senere indrejste ægtefællen og parrets barn i opholdslandet. Parret fik herefter yderligere tre børn. Klageren blev dømt for flere tilfælde af spirituskørsel, brug af narkotika, vold og for at hindre en embedsmand i at udføre sit arbejde. Han blev i de fleste tilfælde idømt dagbøder, og de eneste fængselsstraffe lød på henholdsvis fem og seks måneder. Klageren blev efter 27 års ophold udvist med henvisning til, at han grundet sine mange tilfælde af spirituskørsel udgjorde en alvorlig fare for den offentlige orden.

EMD gennemgik i præmis 57 Boultif-kriterierne og udtalte i præmis 58:

"In addition, the Court will also take into account the particular ties which these immigrants have developed with the host country where they will have spent most of their life (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, § 36; Radovanovic, cited above, § 33; Üner, cited above, § 40)."

I præmis 59 forholdt EMD sig til karakteren og alvorligheden af den af klageren begåede kriminalitet og tillagde det vægt, at klagerens eneste fængselsstraffe kun var på fem og seks måneder, ligesom EMD fremhævede, at der ikke var tale om den slags kriminalitet, som medlemslandene med rette slog hårdt ned på som f.eks. narkotikahandel.

Vedrørende tilknytningen til opholdslandet udtalte EMD i præmis 61, at:

"With regard to the applicant's personal and family situation, the Court notes that the applicant, at the time of the expulsion order of 22 January 1999, had been lawfully residing in Germany for 27 years, having moved to that country at the age of ten in order to live there with his parents and brother and where he received his secondary school education. While the parties do not agree on the extent of the applicant's professional work, he had been employed for a certain period of that time. Since 1988 he had been in possession of a permanent residence permit. While it is true that the applicant and his wife had been separated during the first five years of their marriage as the applicant's wife and their first son did not follow the applicant to Germany until 1989, the family had been living together in Germany for ten years and there is no indication that their marriage and family life was anything less than effective."

EMD udtalte i præmis 62-66:

"62. On the other hand, the Court is not persuaded that the applicant has become so estranged from the country where he spent the first ten years of his life that he would no longer be able to settle in Turkey, having regard to the fact that the applicant married his Turkish wife in Turkey, where their first son was born and

that his wife and son did not follow him to Germany until 1989. It follows that the applicant must have entertained certain links to his country of origin at least until 1989. It can further be presumed that the applicant is familiar with the Turkish language, as he married a Turkish wife.

63. With regard to the question of whether the applicant's family could reasonably be expected to follow the applicant to Turkey, the Court notes that the applicant's wife and four children are Turkish nationals. As the applicant's wife entered German territory as an adult and ten years before the issue of the expulsion order, it can be assumed that she has sufficient links which would allow her to re-integrate into Turkish society.

64. The Court notes, however, that the applicant's four sons – who were, at the time the expulsion order had been issued, between six and thirteen years of age – had been born in Germany respectively entered Germany at a very young age where they received all their school education. Even if the children should have knowledge of the Turkish language, they would necessarily have to face major difficulties with regard to the different language of instruction and the different curriculum in Turkish schools.

65. The Court finally notes that the expulsion order has been issued without setting a time-limit to the applicant's exclusion from the German territory. As pointed out by the Government, the domestic authorities, pursuant to section 8 § 2 of the Alien's Act, will generally set a time-limit to the exclusion from German territory upon the alien's request (see also Yilmaz, cited above, § 47). However, while the applicant has filed such requests in 2002 and 2003, no decision has yet been given, the reasons for which being in dispute between the parties.

66. The Court considers that the applicant's expulsion as such was possible. Given however the circumstances of this specific case, in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicant's children could be expected to face if they followed him to Turkey, the Court considers that an unlimited exclusion from the German territory violates the applicant's rights to the enjoyment of his private and family life. There has accordingly been a violation of Article 8 of the Convention."

5.3.2.4.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Nunez v. Norway (2009)* havde klageren opnået sin opholdstilladelse på baggrund af svig. Da opholdstilladelsen blev inddraget, havde hun opholdt sig i opholdslandet fra hun var 21 til hun var 26 år, i alt fem år, og havde stiftet familie i opholdslandet ved at gifte sig og få børn.

Om den udviste svig udtalte EMD i præmis 72-74, at:

"72. Nor does the Court see any reason to disagree with the assessment made by the national immigration authorities and courts (see paragraphs 47 to 51 of the Supreme Court's judgment) as to the aggravated character of the applicant's administrative offences under the Immigration Act. In July 1996 she had returned to Norway in breach of the two-year-prohibition on re-entry imposed in March 1996. She had given misleading information about her identity, her previous stay in Norway and her criminal conviction. By having intentionally done so she had obtained residence and work permits, which were renewed a number of times, then a settlement permit, none of which she had been entitled to. She had thus lived and worked in the country unlawfully throughout and the seriousness of her offences does not seem to have diminished with time.

73. In these circumstances, the Court considers that the public interest in favour of ordering the applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention.

74. The Court further observes that when the applicant re-entered Norway in breach of the re-entry ban in July 1996, she was an adult and had no links to the country. Whilst aware that she had re-entered illegally, she married a Norwegian national in October 1996. In April 2001 they separated. From the spring 2001 she co-habited with Mr O. and two daughters were born by the couple in June 2002 and December 2003, respectively. In the Court's view, at no stage from her re-entering Norway illegally in July 1996 until being put on notice in January 2002 (see paragraph 11 above) could she reasonably had entertained any expectation of being able to remain in the country."

EMD udtalte i præmis 75-85, at:

"75. This is not altered by the fact that, following the couple's separation in October 2005, the applicant assumed the daily care of the children until May 2007, when the Oslo City Court granted the daily care and the sole parental responsibilities to the father, or by the extended contact rights to the children that she was granted from then onwards.

76. Moreover, when the applicant arrived in Norway at the age of twenty-one, she had lived all her life in the Dominican Republic. During her stay in Norway she co-habited from the spring of 2001 to October 2005 with Mr O. who was also a national of her home country. Her links to Norway could hardly be said to outweigh her attachment to her home country and, as noted above, had in any event been formed through unlawful residence and without any legitimate expectation of being able remain in the country.

77. It therefore matters little from the perspective of the applicant's Article 8 rights that the proceedings had been prolonged by the fact that the revocation of her work- and settlement permit and the expulsion order and re-entry ban had been processed, not in parallel, but separately.

78. However, the Court will examine whether particular regard to the children's best interest would nonetheless upset the fair balance under Article 8.

79. It is to be noted that from their birth in 2002 and 2003, respectively, until the City Court's judgment of 24 May 2007 in the custody case, the children had been living permanently with the applicant, who had also assumed their daily care since her separation from their father in October 2005. Thus, as noted by the Supreme Court's minority, the applicant was the children's primary care person from their birth and until their father was granted custody in 2007. The Court regards it as significant that by virtue of that judgment, which attached great weight to the decision to expel the applicant (see paragraph 18 above), the children were moved from her to live with their father, whilst she was granted extended rights of contact with them. As observed by the Supreme Court minority, together with the father, the applicant was the most important person in the children's lives.

80. Also, an equally important consequence of the said judgment of 24May 2007 was that the children, who had lived all their lives in Norway, would remain in the country in order to live with their father, a settled immigrant.

81. Moreover, in the assessment of the Supreme Court's minority, the children had experienced stress, presumably due to the risk of their mother's being expelled as well as disruption in their care situation, first by their parents' being separated, then by being moved from their mother's home to that of their father. They would have difficulty in understanding the reasons were they to be separated from their mother. Pending her expulsion and the two-year re-entry ban she would probably not return to Norway and it was uncertain whether they would be able to visit her outside Norway. The Court has taken note that, as observed by the Supreme Court's majority, Mr O. stated that, in the event that the applicant were to be expelled, he would facilitate contacts between the children and her, notably during summer and Christmas holidays. According to the Supreme Court's majority, there was no reason to assume that it would not be possible to maintain contact between the children and the applicant during the expulsion period. Nevertheless, the Court observes that, as a result of the decisions taken in the expulsion case and in the custody case, the children would in all likelihood be separated from their mother practically for two years, a very long period for children of the ages in question. There is no guarantee that at the end of this period the mother would be able to return. Whether their separation would be permanent or temporary is in the realm of speculation. In these circumstances, it could be assumed that the children were vulnerable, as held by the minority of the Supreme Court.

82. The Court observes furthermore that, although the unlawful character of the applicant's stay in Norway was brought to the authorities' attention in the summer of 2001 and she admitted this to the police in December 2001, it was not until 26 April 2005 that the Directorate of Immigration decided to order her expulsion with a prohibition on re-entering for two years. Although this state of affairs could to some extent be explained by the immigration authorities' choice to process the revocation of her work and settlement permit not in parallel but separately, it does not appear to the Court that the impugned measure to any appreciable degree fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures (see paragraph 50 of the Supreme Court's judgment quoted at paragraph 23 above).

83. In light of the above, the Court shares the view of the Supreme Court's minority that the applicant's expulsion with a two-year re-entry ban would no doubt constitute a very far-reaching measure vis-à-vis the children.

84. Having regard to all of the above considerations, notably the children's long lasting and close bonds to their mother, the decision in the custody proceedings, the disruption and stress that the children had already experienced and the long period that elapsed before the immigration authorities took their decision to order the applicant's expulsion with a re-entry ban, the Court is not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention. Reference is made in this context also to Article 3 of the UN Convention on the Rights of the Child, according to which the best interests of the child shall be a primary consideration in all actions taken by public authorities concerning children (see Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, § 135, ECHR 2010-...). The Court is therefore not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicant's need to be able to remain in Norway in order to maintain her contact with her children in their best interests, on the other hand.

85. In sum, the Court concludes that the applicant's expulsion from Norway with a two-year re-entry ban would entail a violation of Article 8 of the Convention."

I sagen *Antwi and others v. Norway (2012)* havde klageren ligeledes opnået sin opholdstilladelse på baggrund af svig. Klageren var i opholdslandet blevet gift og havde fået et barn. Syv år efter indrejsen fik opholdslandet kendskab til hans reelle identitet og året efter blev han udvist fra opholdslandet.

EMD udtalte i præmis 90-105:

"90. In applying the above principles [fra Nunez-dommen, red.] to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Nunez, cited above, § 71, and Darren Omoregie and Others v. Norway, no. 265/07, § 67, 31 July 2008; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Nunez and Darren Omoregie and Others, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Nunez, cited above, § 73).

91. Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country.

92. Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country.

93. Like the first applicant, the second applicant had grown up in Ghana. There she had lived until the age of seventeen when she was reunited with her father and siblings in Norway. Although she had become a Norwegian citizen and had family ties and employment links to Norway and probably would experience some difficulties in resettling in Ghana, there does not seem to be any particular obstacle preventing her from accompanying the first applicant to their country of origin. The Court has also taken note of her claim that, although aware that the first applicant originally had a Ghanaian background and had obtained a Ghanaian passport in connection with their marriage in Ghana on 11 February 2005, she should only have become

aware of his true identity in this context. However, the above-mentioned factors cannot in the Court's view outweigh the public interest in sanctioning the first applicant's aggravated offences against the immigration rules with the impugned measure.

94. As to the third applicant, the Court notes that she is a Norwegian national who since birth has spent her entire life in Norway, is fully integrated into Norwegian society and, according to the material submitted to the Court, speaks Norwegian with her parents at home. In comparison, her direct links to Ghana are very limited, having visited the country three times (see paragraph 44 above) and having little knowledge of the languages practiced there.

95. Furthermore, as a result of the first applicant no longer holding a work permit and staying full-time at home and of the second applicant's being particularly occupied by her work, the first applicant assumes an important role in the third applicant's daily care and up-bringing. He is the parent who follows up her home-work and parental contacts with her school and who facilitates her participation in sport activities. She is also at an age, ten years, when this kind of support would be valuable and she is strongly attached to her father as she is to her mother.

96. It would most probably be difficult for her to adapt to life in Ghana, were she and her mother to accompany the father to Ghana, and to readapt to Norwegian life later.

97. Against this background, the Court shares the High Court's view that the implementation of the expulsion order would not be beneficial to her.

98. However, the Court sees no reason to call into doubt the High Court's findings to the effect that, both parents having been born and brought up in Ghana and having visited the country three times with their daughter, there were no insurmountable obstacles in the way of the applicants settling together in Ghana or, at the least, to maintaining regular contacts. As to the allegation that the third applicant's rashes had been aggravated by heat during her previous stays in Ghana, the High Court majority found that this had not been sufficiently documented and could not be relied upon. The minority agreed that the evidence submitted in support of this contention had been weak and observed that the information appeared to have originated from the first and the second applicants. In the proceedings before the Court, the applicants submitted no further evidence in support of this argument or placed emphasis on it.

99. As also observed by the High Court, it does not emerge that the third applicant had any special care needs or that her mother would be unable to provide satisfactory care on her own.

100. Moreover, the Court considers that there are certain fundamental differences between the present case and that of Nunez where it found that the impugned expulsion of an applicant mother would give rise to a violation of Article 8 of the Convention. In reaching this finding, the Court attached decisive weight to the exceptional circumstances pertaining to the applicant's children in that case, which were recapitulated in the following terms in its judgment (cited above, § 84): "Having regard to all of the above considerations, notably the children's long lasting and close bonds to their mother, the decision in the custody proceedings [to move the children to the father], the disruption and stress that the children had already experienced and the long period that elapsed before the immigration authorities took their decision to order the applicant's expulsion with a re-entry ban, the Court is not convinced in the concrete and exceptional circumstances of the case that

sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention."

101. Unlike what had been the situation of the children of Mrs Nunez, the third applicant had not been made vulnerable by previous disruptions and distress in her care situation (compare Nunez, cited above, §§ 79 to 81).

102. Also, the duration of the immigration authorities' processing of the matter was not so long as to give reason to question whether the impugned measure fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures (compare Nunez, cited above, § 82). On the contrary, in October 2005, only a few months after the discovery of the first applicant's fraud in July 2005, he was put on notice that he might be expelled from Norway. In May 2006 the Directorate ordered his expulsion and prohibition on re-entry and gave him until 24 July 2006 to leave the country.

103. There being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion.

104. The above considerations are not altered by the duration of the prohibition on re-entry – five years. In this connection, the Court reiterates that in a comparable case, Darren Omoregie (cited above, §§ 63-68), it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case.

105. In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand.
Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban would not entail a violation of Article 8 of the Convention."

I sagen *Eze v. Sweden (2019)* havde klageren i forbindelse med en ansøgning om asyl opgivet et navn og fødedato. Han blev meddelt afslag på asyl, da de nationale myndigheder fandt, at han ikke havde sandsynliggjort sin identitet. Klageren giftede sig efterfølgende med en statsborger fra opholdslandet og søgte på ny om opholdstilladelse på baggrund af ægteskabet. Han opgav her et andet navn og fødedato. Klageren blev meddelt en midlertidig opholdstilladelse, da han havde fremvist en fødselsattest, hvoraf navnet fremgik. Klageren søgte to år efter om forlængelse af sin opholdstilladelse og indleverede i den forbindelse et forfalsket pas. Året efter indgivelsen af ansøgningen om forlængelse fik parret et barn. Klageren blev meddelt afslag på forlængelse af sin opholdstilladelse, da denne var opnået på baggrund af svig.

EMD udtalte i præmis 52-56, at:

"52. The Court acknowledges that the decision to refuse the applicant a permit to reside in Sweden will have a considerable impact on his family life, as his wife is a Swedish citizen and she and their common child are living in Sweden. However, there does not seem to be any insurmountable obstacles for them to move to the applicant in Nigeria. In any event, they have been visiting him there and could continue to do so.

53. Furthermore, an important factor in the present case is that the applicant and his wife created their family life at a time when the applicant had no residence permit. They started a relationship in mid-2011 when the applicant's asylum application had been rejected at first instance and married a year later when that application had been dismissed by a final decision and there was an enforceable deportation order against the applicant. Their son was born in June 2015, more than a year after the expiry of the applicant's temporary residence permit and following the Migration Agency's conclusion that the passport submitted in support of his application for an extension was a forgery. Thus, the applicant's family life was both established and extended at times when his immigration status was such that the persistence of that family life in Sweden was precarious. The applicant therefore had no reasonable expectation that he would be able to remain in the country and maintain his family life there.

54. In the above circumstances, the refused residence permit for the applicant could be incompatible with Article 8 only in exceptional circumstances. As the applicant and his wife have a four-year-old son, regard must be had to his best interests. In this respect, the Court notes that the Swedish authorities have carefully considered the issue, both under domestic law and under the Convention. In particular, the Migration Agency took into account that the applicant's wife and son should have no difficulties to visit the applicant in Nigeria. Furthermore, regard must be had to the fact that the son lived together with the applicant in Sweden only for a period of little more than a year, until the autumn of 2016. There are therefore no exceptional circumstances at issue in the present case. Instead, the Court is satisfied that sufficient weight was attached to the best interests of the child in refusing the applicant a residence permit.

55. Having regard to the above considerations, the Court finds that the Swedish authorities, acting within their margin of appreciation, did not fail to strike a fair balance between the applicant's interests, on the one hand, and the State's interest in ensuring effective immigration control, on the other. Nor was their assessment disproportionate in pursuance of the legitimate aim under Article 8 of the Convention.

56. It follows that the application is manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention."

5.3.2.4.4. Ulovligt ophold

I sagen *Rodrigues da Silva and Hoogkamer v. the Netherlands (2006)* havde klageren på intet tidspunkt søgt om opholdstilladelse, men havde indledt et familieliv. Klageren havde dog, såfremt hun havde søgt om det, haft mulighed for at opnå en opholdstilladelse.

EMD udtalte i præmis 37-38, at:

"37. The Court observes at the outset that there can be no doubt that there is family life within the meaning of Article 8 of the Convention between the first applicant and her daughter Rachael, the second applicant: Rachael was born from a genuine relationship, in which her parents cohabited as if they were married.

38. Next, it observes that the present case concerns the refusal of the domestic authorities to allow the first applicant to reside in the Netherlands; although she has been living in that country since 1994, her stay there has at no time been lawful. Therefore, the impugned decision did not constitute interference with the applicants' exercise of the right to respect for their family life on account of the withdrawal of a residence status entitling the first applicant to remain in the Netherlands. Rather, the question to be examined in the present case is whether the Netherlands authorities were under a duty to allow the first applicant to reside in the Netherlands, thus enabling the applicants to maintain and develop family life in their territory. For this reason the Court agrees with the parties that this case is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation (see Ahmut v. the Netherlands, 28 November 1996, § 63, Reports of Judgments and Decisions 1996-VI).”

EMD udtalte i præmis 40-44, at:

”40. Turning to the circumstances of the present case, the Court notes that the first applicant moved from her native Brazil to the Netherlands in 1994 at the age of 22. Even though she has now been living in the latter country for a considerable time, she must still have links with Brazil, where she presumably grew up and underwent her schooling.

41. However, if the first applicant were to return to Brazil she would have to leave her daughter Rachael behind in the Netherlands. The Court observes in this connection that at the time the final decision on her application for a residence permit was taken on 12 February 1999, the first applicant no longer had parental authority over Rachael, the Supreme Court having quashed the decision of the Amsterdam Regional Court which had awarded her such authority (see paragraphs 19 and 20 above). It was Rachael's father, Mr Hoogkamer, to whom parental authority was subsequently, and finally, attributed. In its assessment of this issue, the Amsterdam Court of Appeal had regard to a report which had been drawn up by the Child Care and Protection Board in August 1997 – prior to the final decision in the residence proceedings – according to which it would be traumatic for Rachael if she had to leave the Netherlands in view, inter alia, of the strong bond she had with her paternal grandparents (see paragraph 14 above). Parental authority having been awarded to Mr Hoogkamer, the first applicant is thus simply not able to take Rachael with her without his permission which, as has not been disputed by the Government, will not be forthcoming.

In these circumstances, the Court considers that the Government's claim that the first applicant and Mr Hoogkamer might have agreed that Rachael would move to Brazil with her mother is untenable, bearing in mind that it was the Dutch courts, following the advice of the Dutch child welfare authorities, who concluded that it was in Rachael's best interests to stay in the Netherlands.

42. The Court further notes that, from a very young age, Rachael has been raised jointly by the first applicant and her paternal grandparents, with her father playing a less prominent role. She spends three to four days a week with her mother (see paragraphs 16 and 22 above), and, as confirmed by her grandparents (see paragraph 22 above), has very close ties with her. The refusal of a residence permit and the expulsion of the first applicant to Brazil would in effect break those ties as it would be impossible for them to maintain regular contact. This would be all the more serious given that Rachael was only three years old at the time of the final decision and needed to remain in contact with her mother (see Berrehab, cited above, § 29).

43. Whilst it does not appear that the first applicant has been convicted of any criminal offences (see Berrehab, cited above, § 29, and Cılız v. the Netherlands, no. 29192/95, § 69, ECHR 2000-VIII), she did not attempt to regularise her stay in the Netherlands until more than three years after first arriving in that country (see paragraphs 9 and 13 above) and her stay there has been illegal throughout. The Court reiterates that persons who, without complying with the regulations in force, confront the authorities of a Contracting State with their presence in the country as a fait accompli do not, in general, have any entitlement to expect that a right of residence will be conferred upon them (see Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003). Nevertheless, the Court finds relevant that in the present case the Government indicated that lawful residence in the Netherlands would have been possible on the basis of the fact that the first applicant and Mr Hoogkamer had a lasting relationship between June 1994 and January 1997 (see paragraph 34 above). Although there is no doubt that a serious reproach may be made of the first applicant's cavalier attitude to Dutch immigration rules, this case should be distinguished from others in which the Court considered that the persons concerned could not at any time have reasonably expected to be able to continue family life in the host country (see, for example, Solomon, cited above).

44. 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. Indeed, by attaching such paramount importance to this latter element, the authorities may be considered to have indulged in excessive formalism.

The Court concludes that a fair balance was not struck between the different interests at stake and that, accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Konstatinov v. the Netherlands (2007)* havde klageren fået opholdstilladelse i opholdslandet på baggrund af ægteskab med en derboende mand med ukendt statsborgerskab, men blev efterfølgende udvist fra opholdslandet. Parret fik et barn, og tre år efter sin udrejse indgav klageren på ny en ansøgning om opholdstilladelse, men blev meddelt afslag på denne, da hendes derboende ægtefælle ikke opfyldte et indkomstkrav, og da det var uvist, om parret havde været samboende. Det efterfølgende år indrejste klageren på ny og indgik på ny ægteskab med sin ægtefælle i opholdslandet. Klageren søgte endnu engang om familiesammenføring med sin ægtefælle. Denne ansøgning lå de næste syv år hen, mens klageren opholdt sig uden opholdstilladelse i opholdslandet. Klageren blev i mellemtiden dømt for seks tilfælde af tyveri og røveri og idømt fængselsstraffe på mellem seks uger til 12 måneder. Klageren bliver herefter udvist. Da EMD behandlede sagen, havde klagerens ægtefælle opholdt sig cirka 30 år i opholdslandet.

EMD udtalte i præmis 49-53:

"49. Turning to the circumstances of the present case, the Court notes that the applicant has never held a Netherlands provisional admission or residence title and that the relationships relied on by her were created at a time and developed during a period when the persons involved were aware that the applicant's immigration status was precarious and that, until Mr G. complied with the minimum income requirement under the domestic immigration rules, the persistence of that family life within the Netherlands would remain precarious. This is not altered by the fact that the applicant's second request for a residence permit for stay with Mr

G. filed on 1 November 1991 was left undetermined for a period of more than seven years because her file had been mislaid by the responsible immigration authorities, as – like in 1990 in respect of her first request for a residence permit for stay with Mr G. – one of the main reasons why this second request was rejected on 27 November 1998 by the Deputy Minister was because Mr G. failed to meet the minimum income requirement.

50. In principle, the Court does not consider unreasonable a requirement that an alien having achieved a settled status in a Contracting State and who seeks family reunion there must demonstrate that he/she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought. As to the question whether such a requirement was reasonable in the instant case, the Court considers that it has not been demonstrated that, between 1990 and 1998, Mr G. has in fact ever complied with the minimum income requirement or at least made any efforts to comply with this requirement whereas the applicant's claim that he is incapacitated for work has remained wholly unsubstantiated.

51. The Court further notes that, between 4 September 1992 and 8 November 2005, the applicant has amassed various convictions of criminal offences attracting a prison sentence of three years or more, thus rendering her immigration status in the Netherlands even more precarious as this entailed the risk of an exclusion order being imposed, which risk eventually materialised. On this point the Court reiterates that, where the admission of aliens is concerned, Contracting States are in principle entitled to expel an alien convicted of criminal offences (see Üner v. the Netherlands [GC], no. 46410/99, § 54, ECHR 2006-...).

52. As regards the question whether there are any insurmountable obstacles for the exercise of the family life at issue outside of the Netherlands, the Court notes that the applicant's son will come of age in April 2007 whereas, according to its well-established case-law under Article 8, relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see Ezzouhdi v. France, no. 47160/99, § 34, 13 February 2001). The Court considers the fact that the applicant's son is suffering from asthma does not constitute such a further element of dependency. The Court further notes that the applicant was born in Serbia where she lived until the age of seven, that she held a valid passport issued in Pančevo (Serbia) by the authorities of the former Socialist Federal Republic of Yugoslavia when she filed her second request for a Netherlands residence permit in 1991, and that her claim of having become stateless after the dissolution of this Federal Republic is no more than conjecture. The same applies to her claim that Mr G. is stateless and might be denied admission to her country of origin. In any event, the decision to declare the applicant an undesirable alien does not entail a permanent exclusion order, but an exclusion order of a temporary validity in the sense that – at the applicant's request – it can be lifted after a limited number of years of residency outside of the Netherlands.

53. The foregoing considerations are sufficient to enable the Court to conclude that it cannot be said that the Netherlands authorities have failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration and public expenditure and in the prevention of disorder or crime on the other. Consequently, there has been no violation of the applicant's right to respect for her rights guaranteed by Article 8 of the Convention."

I sagen *Jeunesse v. the Netherlands (2014)* var klageren indrejst i opholdslandet på et visum fra en tidligere hollandsk koloni og havde giftet sig med en statsborger i opholdslandet. Hun blev i landet efter udløbet af sit

visum og fik med sin ægtefælle tre børn, som alle var statsborgere i opholdslandet. Klageren søgte flere gange om opholdstilladelse, hvilket hver gang blev afslået, da klageren som udgangspunkt skulle søge fra hjemlandet. Efter 16 års ophold blev klageren forsøgt udsendt fra opholdslandet under henvisning til, at hun ikke havde et lovligt opholdsgrundlag. Børnene var på tidspunktet for Storkammerets afgørelse 14, knap ni og knap fire år.

EMD udtalte i præmis 115-123, at:

"115. The Court first and foremost takes into consideration the fact that all members of the applicant's family with the exception of herself are Netherlands nationals and that the applicant's spouse and their three children have a right to enjoy their family life with each other in the Netherlands. The Court further notes that the applicant held Netherlands nationality at birth. She subsequently lost her nationality when Suriname became independent. She then became a Surinamese national, not by her own choice but pursuant to Article 3 of the Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality (see paragraph 62 above). Consequently, her position cannot be simply considered to be on a par with that of other potential immigrants who have never held Netherlands nationality.

116. The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for more than sixteen years and that she has no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Netherlands authorities, while she repeatedly submitted residence requests and awaited the outcome of appeals. The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities.

117. Thirdly, the Court accepts, given the common background of the applicant and her husband and the relatively young age of their children, that there would appear to be no insurmountable obstacles for them to settle in Suriname. However, it is likely that the applicant and her family would experience a degree of hardship if they were forced to do so. When assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family.

118. The Court fourthly considers that the impact of the Netherlands authorities' decision on the applicant's three children is another important feature of this case. The Court observes that the best interests of the applicant's children must be taken into account in this balancing exercise (see above § 109). On this particular point, the Court reiterates 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 (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. For that purpose, in cases concerning family reunification, the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents (see Tuquabo-Tekle and Others v. the Netherlands, cited above, § 44).

119. Noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation. In this connection, the Court observes that the applicant's husband provides for the family by working full-time in a job that includes shift work. He is, consequently, absent from the home on some evenings. The applicant – being the mother and homemaker – is the primary and constant carer of the children who are deeply rooted in the Netherlands of which country – like their father – they are nationals. The materials in the case file do not disclose a direct link between the applicant's children and Suriname, a country where they have never been.

120. In examining whether there were insurmountable obstacles for the applicant and her family to settle in Suriname, the domestic authorities had some regard for the situation of the applicant's children (see paragraphs 23 (under 2.19 and 2.21), 28 and 34 (under 2.4.5) above). However, the Court considers that they fell short of what is required in such cases and it reiterates that national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any such removal in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (see above § 109). The Court is not convinced that actual evidence on such matters was considered and assessed by the domestic authorities. Accordingly, it must conclude that insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit."

121. The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. 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.

122. The Court, whilst confirming the relevant principles set out above (see paragraphs 106-109), finds that, on the basis of the above considerations (see paragraphs 115-120) and viewing the relevant factors cumulatively, the circumstances of the applicant's case must be regarded as exceptional. Accordingly, the Court concludes that a fair balance has not been struck between the competing interests involved. There has thus been a failure by the Netherlands authorities to secure the applicant's right to respect for her family life as protected by Article 8 of the Convention.

123. There has accordingly been a violation of Article 8 of the Convention."

5.3.2.4.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Berrehab. v. the Netherlands (1988)* opnåede klageren en opholdstilladelse på baggrund af ægteskab med en hollandsk statsborger. Parret fik en datter. Da klageren efterfølgende blev skilt fra sin ægtefælle,

nægtede de nationale myndigheder at forlænge hans opholdstilladelse, da denne var betinget af et bestående ægteskab. Klageren havde opholdt sig i hjemlandet de første 25 år af sit liv og havde derefter opholdt sig 11 år i opholdslandet. Klagerens datter var på tidspunktet for EMD's afgørelse ni år gammel.

EMD udtalte i præmis 20-21, at:

"20. The applicants asserted that the applicability of Article 8 (art. 8) in respect of the words 'right to respect for ... private and family life' did not presuppose permanent cohabitation. The exercise of a father's right of access to his child and his contributing to the cost of education were also factors sufficient to constitute family life. The Government challenged that analysis, whereas the Commission agreed with it.

21. The Court likewise does not see cohabitation as a sine qua non of family life between parents and minor children. It has held that the relationship created between the spouses by a lawful and genuine marriage - such as that contracted by Mr. and Mrs. Berrehab - has to be regarded as 'family life' (see the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 32, § 62). It follows from the concept of family on which Article 8 (art. 8) is based that a child born of such a union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to 'family life', even if the parents are not then living together.
Subsequent events, of course, may break that tie, but this was not so in the instant case. Certainly Mr. Berrehab and Mrs. Koster, who had divorced, were no longer living together at the time of Rebecca's birth and did not resume cohabitation afterwards. That does not alter the fact that, until his expulsion from the Netherlands, Mr. Berrehab saw his daughter four times a week for several hours at a time; the frequency and regularity of his meetings with her (see paragraph 9 in fine above) prove that he valued them very greatly. It cannot therefore be maintained that the ties of 'family life' between them had been broken."

EMD udtalte i præmis 28-29, at:

"28. In determining whether an interference was "necessary in a democratic society", the Court makes allowance for the margin of appreciation that is left to the Contracting States (see in particular the W v. the United Kingdom judgment of 8 July 1987, Series A no. 121-A, p. 27, §60 (b) and (d), and the Olsson judgment of 24 March 1988, Series A no. 130, pp. 31-32, § 67).

In this connection, it accepts that the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens. According to the Court's established case-law (see, inter alia, the judgments previously cited), however, "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.

29. *Having to ascertain whether this latter condition was satisfied in the instant case, the Court observes, firstly, that its function is not to pass judgment on the Netherlands' immigration and residence policy as such. It has only to examine the interferences complained of, and it must do this not solely from the point of view of immigration and residence, but also with regard to the applicants' mutual interest in continuing their relations. As the Netherlands Court of Cassation also noted (see paragraph 16 above), the legitimate aim pursued has to be weighed against the seriousness of the interference with the applicants' right to respect for their family life. As to the aim pursued, it must be emphasised that the instant case did not concern an alien seeking*

admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr. Berrehab already had real family ties there - he had married a Dutch woman, and a child had been born of the marriage. As to the extent of the interference, it is to be noted that there had been very close ties between Mr. Berrehab and his daughter for several years (see paragraphs 9 and 21 above) and that the refusal of an independent residence permit and the ensuing expulsion threatened to break those ties. That effect of the interferences in issue was the more serious as Rebecca needed to remain in contact with her father, seeing especially that she was very young. Having regard to these particular circumstances, the Court considers that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society. It thus concludes that there was a violation of Article 8 (art. 8)."

I sagen *Ciliz v. the Netherlands (2000)* havde klageren boet sammen med sit barn i 15 måneder før sin skilsmisse fra barnets mor. I en periode umiddelbart efter separationen tog han ikke skridt til at se sin søn, men senere søgte han om samværsret. Klagerens tidligere ægtefælle ønskede til at begynde med ikke at samarbejde om klagerens samvær med deres søn, men var senere gået med til, at klageren ved flere lejligheder havde kunnet se sin søn hos hendes forældre. Myndighederne fandt imidlertid ikke anledning til at etablere en formel samværsordning. Klageren havde på dette tidspunkt opholdstilladelse på baggrund af arbejdstilladelse, men da han i en periode var uden beskæftigelse, blev tilladelsen ikke forlænget. Myndighederne henviste i den forbindelse til, at klageren ikke havde regelmæssigt samvær med sin søn, hvorfor der ikke bestod et familieliv i artikel 8's forstand, og at det i den sammenhæng var uden betydning, at den manglende regelmæssige kontakt ikke skyldtes klageren.

EMD udtalte i præmis 59-60, at:

"59. Having regard to its previous case-law the Court observes that there can be no doubt that a bond amounting to family life within the meaning of Article 8 § 1 of the Convention exists between the parents and the child born from their marriage-based relationship, as was the case in the present application. Such natural family relationship is not terminated by reason of the fact that the parents separate or divorce as a result of which the child ceases to live with one of its parents (see the Berrehab judgment cited above, p. 14, § 21, and the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 19, § 50; see also Irlen v. Germany, application no. 12246/86, Commission decision of 13 July 1987, Decisions and Reports 53, p. 225).

60. Clearly, in the present case the relationship between the parents following their separation was not as harmonious with respect to the matter of the father's access to his child as in the case of Berrehab. Neither can it be said that the applicant demonstrated at all times to what extent he valued meetings with his son. It thus appears that during the period immediately following the separation, the applicant made no attempt to see his son and that, when he did express a desire to meet with him, he failed to keep appointments with the relevant authorities (see paragraphs 11-12 above).

Nevertheless, contact was re-established from February 1993 and there then followed a period during which meetings took place between the applicant and his son, if not on a regular basis, then at least with some frequency.

The applicant also applied to the courts on a number of occasions in order to have the matter of access determined, and in its decision of 24 January 1995 the Utrecht Regional Court indicated that it assumed that the existing contacts between the applicant and his son would continue (see paragraph 21 above).

In view of the above, the Court considers that the events subsequent to the separation of the applicant from his wife did not constitute exceptional circumstances capable of breaking the ties of 'family life' between the applicant and his son (see, amongst other authorities, the Ahmut v. the Netherlands judgment of 28 November 1996, Reports of Judgments and Decisions 1996-VI, p. 2030, § 60). Indeed, no argument to that effect has been put forward."

Efter at have gennemgået spørgsmålet om staternes positive og negative forpligtelser og konstateret, at indgrebet i klagerens ret til respekt for familieliv var hjemlet i lov og forfulgte et anerkendelsesværdigt hensyn, udtalte EMD i præmis 67-72:

"67. Turning to the circumstances of the present case, the Court has already noted (see paragraph 62 above) that two sets of proceedings were running concurrently. While the Utrecht Regional Court rejected the applicant's request for a formal access arrangement on 24 January 1995, the Hague Regional Court decided on 10 May 1995 on the question of the applicant's continued residence in the Netherlands. In its judgment, the Hague Regional Court referred to the decision whereby the applicant's request for the establishment of a formal access arrangement had been refused, but the stipulation of the Utrecht Regional Court that the existing contacts between the applicant and his son should continue was apparently not taken into consideration. Moreover, at that time, the applicant's appeal in the case pertaining to an access arrangement was pending before the Amsterdam Court of Appeal, before which court a hearing had taken place on 19 April 1995 (see paragraphs 21-23 above).

68. While the respondent Government argue that, prior to his expulsion, the applicant had had ample time to demonstrate that close ties existed between himself and his son and that he had failed to do so, the Court observes that the domestic courts dealing with the request for a formal access arrangement nevertheless deemed it appropriate to adopt a more cautious approach. Recognising that the applicant was in principle entitled to access to his son, the Amsterdam Court of Appeal ordered on 1 June 1995 that supervised trial meetings were to be organised by the Child Care and Protection Board in order to clarify the applicant's position vis-à-vis his son. This did not, however, prevent the Netherlands authorities from taking the applicant into detention on 31 October 1995 with a view to his expulsion without any such trial meeting having taken place (see paragraphs 25 and 27 above). The Court, like the Commission, observes that the delay in organising these trial meetings, which was due to the workload of the Child Care and Protection Board, can in no way be attributed to the applicant who in fact attempted to have matters expedited by requesting that an organisation other than that Board be appointed to make the necessary arrangements (see paragraph 26 above).

69. The Court notes in addition that the applicant was not convicted of any criminal offences warranting his removal from the Netherlands (see the Berrehab judgment cited above, p. 16, § 29).

70. The applicant was expelled shortly after a first trial meeting had taken place. He was then refused a visa to return to the Netherlands in order to attend either further trial meetings or the continuation of the access proceedings before the Amsterdam Court of Appeal. In its decision of 7 May 1998 not to establish an access arrangement the Amsterdam Court of Appeal took into account, inter alia, the fact that the applicant had not

seen his son since the trial meeting two and a half years previously, that no further trial meetings had taken place and that it was uncertain whether the applicant would be coming to the Netherlands again (see paragraph 35 above).

71. In the view of the Court, the authorities not only prejudged the outcome of the proceedings relating to the question of access by expelling the applicant when they did, but, and more importantly, they denied the applicant all possibility of any meaningful further involvement in those proceedings for which his availability for trial meetings in particular was obviously of essential importance. It can, moreover, hardly be in doubt that when the applicant eventually obtained a visa to return to the Netherlands for three months in 1999, the mere passage of time had resulted in a de facto determination of the proceedings for access which he then instituted (see the W. v. the United Kingdom judgment cited above, p. 29, § 65). The authorities, through their failure to coordinate the various proceedings touching on the applicant's family rights, have not, therefore, acted in a manner which has enabled family ties to be developed (see the Keegan judgment cited above, p. 19, § 50).

72. In sum, the Court considers that the decision-making process concerning both the question of the applicant's expulsion and the question of access did not afford the requisite protection of the applicant's interests as safeguarded by Article 8. The interference with the applicant's right under this provision was, therefore, not necessary in a democratic society. Accordingly, there has been a breach of that provision."

5.3.2.4.6. Familiesammenføring til udlændinge, der har børn med lovligt ophold i opholdslandet

Der er ved gennemgangen af praksis ikke fundet domme, hvor EMD har taget stilling til betydningen af karakteren og intensiteten af forholdet mellem klageren og barnet/børnene i sager om familiesammenføring.

5.3.2.5. Barnets tarv

Det fremgår af Guiden, punkt 323, at:

"According to well-established case-law, "in all decisions concerning children their best interests are of paramount importance. (...) It follows that there is an obligation on States to place the best interests of the child, and also those of children as a group, at the centre of all decisions affecting their health and development" (Vavřička and Others v. the Czech Republic [GC], §§ 287-288 and below, for instance, X v. Latvia [GC], § 96)."

EMD har i sager vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[45] af udlændinge udtalt, at hvor der er mindreårige børn, som bliver berørt af myndighedernes beslutning, skal hensynet til barnets tarv altid tillægges betydelig vægt i den samlede vurdering.

[45] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

Således supplerede EMD i Üner-dommen de kriterier, som den havde fastlagt i Boultif-dommen, se *Üner v. the Netherlands (2006)* i præmis 58:

"58. The Court would wish to make explicit two criteria which may already be implicit in those identified in Boultif:
– the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
– the solidity of social, cultural and family ties with the host country and with the country of destination.
As to the first point, the Court notes that this is already reflected in its existing case-law (see, for example, Şen v. the Netherlands, no. 31465/96, § 40, 21 December 2001, and Tuquabo-Tekle and Others v. the Netherlands, no. 60665/00, § 47, 1 December 2005) and is in line with the Committee of Ministers Recommendation Rec(2002)4 on the legal status of persons admitted for family reunification (see paragraph 38 above).
[…]"

I sagen *Maslov v. Austria (2008)* udtalte EMD i præmis 82:

"[…] The Court's case-law under Article 8 has given consideration to the obligation to have regard to the best interests of the child in various contexts (for instance in the field of childcare; see Scozzari and Giunta v. Italy [GC], nos. 39221/98 and 41963/98, § 148, ECHR 2000-VIII), including the expulsion of foreigners (see Üner, cited above, § 58). In Üner the Court had to consider the position of children as family members of the person to be expelled. It underlined that the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant were likely to encounter in the country to which the applicant was to be expelled, was a criterion to be taken into account when assessing whether an expulsion measure was necessary in a democratic society. The Court considers that the obligation to have regard to the best interests of the child also applies if the person to be expelled is himself or herself a minor, or if – as in the present case – the reason for the expulsion lies in offences committed when a minor. In this connection, the Court observes that European Union law also provides for particular protection of minors against expulsion (see paragraph 41 above, Article 28 § 3 (b) of Directive 2004/38/EC). Moreover, the obligation to have regard to the best interests of the child is enshrined in Article 3 of the United Nations Convention on the Rights of the Child (see paragraph 36 above)."

Se også sagen *Jeunesse v. the Netherlands (2014)*, præmis 109:

"Where children are involved, their best interests must be taken into account. On this particular point, the Court reiterates 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. Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it."

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[46] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

5.3.2.5.1. Alvorlig kriminalitet

I sagen *A.H. Khan v. the United Kingdom (2011)* var klageren indrejst i opholdslandet som syvårig og var tidligere blevet dømt for samleje med en mindreårig, to forsøg på røveri samt overfald. Som 30-årig blev han ydermere idømt fem års fængsel for røveri og udvist. Klageren blev udsendt ni år efter sin sidste dom. På tidspunktet for EMD´s afgørelse af sagen var han far til seks børn i alderen fra 12 til 17 år. Klageren var på daværende tidspunkt ikke i forhold med mødrene til sine børn.

EMD udtalte i præmis 37, at:

"[…] the Court finds that, on balance, the applicant lived in the United Kingdom from 1978, when he was aged seven, returning to Pakistan only for visits. It is therefore accepted that he has lived in the United Kingdom since an early age, a factor which means that serious reasons would be required before his deportation could be found to be proportionate (see Maslov v. Austria [GC], no. 1638/03, § 75, 23 June 2008)."

EMD fandt den af klageren begåede kriminalitet alvorlig og fremhævede, at det forhold, at han havde begået kriminalitet igen kort tid efter løsladelsen, viste, at han ikke var rehabiliteret og derfor fortsat udgjorde en fare for offentligheden, hvorfor der var gode grunde til at udsende ham.

EMD udtalte i præmis 39-41:

39. The Court must now consider the applicant's circumstances in the United Kingdom, with a view to determining whether his family and private life, and his consequent level of integration into British society, were such as to outweigh the seriousness of his criminal history. Looking first at the nationalities of the persons involved, the Court notes that, unlike the applicant, his mother and siblings are all now naturalised British citizens. The applicant's six children are also British citizens, as are their mothers. Finally, the applicant claimed to be in a relationship with a British citizen. The Court notes that, although this relationship apparently began in 2008, the applicant made no mention of this partner at his appeal hearing in 2009, when both of the mothers of his children were referred to as his current partners. The applicant appears to have mentioned his new partner for the first time in representations to the Secretary of State in November 2009, only a few months before he was deported. The applicant has not stated whether the relationship has still subsisted since his deportation. The Court cannot therefore attach much weight to this relationship, or find that it is a relationship akin to marriage.

[46] Samlebetegnelse for alle de situationer, hvor en medlemsstats myndigheder beslutter, at en udlænding, som hidtil har opholdt sig i medlemsstaten, ikke skal være i medlemsstaten længere (udvisning pga. kriminalitet, inddragelse pga. svig, inddragelse pga. ændrede forhold, bortfald, ulovligt ophold uden mulighed for (fornyet) opholdstilladelse, evt. andre, jf. nærmere nedenfor)

40. As regards the applicant's relationship with his children and their mothers, the Court notes that, as predicted by the Tribunal, neither woman chose to accompany the applicant to Pakistan and both remain in the United Kingdom with their children. The Court also notes that the extent of the applicant's relationship with his children and their mothers was limited even at the time of his deportation, given that he had not lived with them since 1999 or seen the children since 2000. The applicant had not therefore seen his children in the ten years prior to his deportation and the eldest child would only have been aged four the last time he or she had seen his or her father. There was also, as noted by the Tribunal, some doubt as to whether the applicant fulfilled a positive role in his children's lives, given that four of the six had, at various times, been on the social services' "at risk" register. Given the length of time since the applicant last had face-to-face contact with his children, as a result of his offending and consequent imprisonment, and the lack of evidence as to the existence of a positive relationship between the applicant and his children, the Court takes the view that the applicant has not established that his children's best interests were adversely affected by his deportation.

41. Finally, the Court turns to the question of the respective solidity of the applicant's ties to the United Kingdom and to Pakistan. The Court notes that, unlike his younger brother, the applicant returned to Pakistan for visits following his arrival in the United Kingdom and also married there. In the absence of any evidence to the contrary, the Court assumes that this marriage is still, legally at least, subsisting. The applicant therefore maintained some level of connection to his country of origin and was not deported as a stranger to the country. As regards his ties to the United Kingdom, the Court has addressed the question of his family life, both with his parents and siblings and with his various partners and children, above, and found it to be limited in its extent. Furthermore, the applicant's private life in the United Kingdom, as observed by the Tribunal, has been constrained by his convictions and spells in prison. Whilst he was mainly educated in the United Kingdom and has worked, he does not appear to have established a lengthy or consistent employment history. In short, and despite the length of his stay, the applicant did not achieve a significant level of integration into British society. The Court is aware that, as a settled migrant who spent much of his childhood in the United Kingdom, serious reasons would be required to render the applicant's deportation proportionate (see Maslov, cited above, § 75). However, having regard to his substantial offending history, including offences of violence and recidivism following the commencement of deportation proceedings against him, the Court is of the view that such serious reasons are present in the applicant's case. His private and family life in the United Kingdom were not such as to outweigh the risk he presented of future offending and harm to the public and his deportation was therefore proportionate to the legitimate aim of preventing crime. As such, the applicant's deportation to Pakistan did not amount to a violation of Article 8."

I sagen *Assem Hassan Ali v. Denmark (2018)* var klageren idømt fem års fængsel for narkokriminalitet og udvist for bestandig. Han havde på tidspunktet for udvisningen opholdt sig 20 år i opholdslandet og havde under sit ophold fået seks børn i alderen fra syv til 14 år med to forskellige kvinder. Alle børnene var danske statsborgere.

EMD gennemgik klagerens kriminelle forhold i præmis 46-47.

EMD udtalte i præmis 49-64, at:

"49. As to the solidity of social, cultural and family ties with the host country and with the country of destination, the Court observes that during the criminal proceedings leading to the expulsion order, in August 2008 the Immigration Service (Udlændingeservice) stated that the applicant spoke Arabic and only a little Danish.

An interpreter had been used during his interview with the Immigration Service. The applicant had never had a job in Denmark. The applicant's parents and siblings remained in Jordan, where the applicant had visited them a couple of years before. However, in the revocation proceedings leading to the High Court's decision of 27 January 2014, the applicant stated that he had broken off contact with his father and his eight siblings in Jordan in 2005. He did not develop this statement further and the Court does not attach any particular weight to this assertion.

50. As to the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life, the Court notes that the applicant's first wife, X, from his marriage in 1997, was a stateless Palestinian woman from Lebanon who had obtained Danish nationality. She and the applicant had three children together, born between 1997 and 2001. They had Danish nationality and their legal status was not affected by the applicant's expulsion order. After the divorce in 2001, the applicant maintained contact with X and his children. During the revocation proceedings in 2013, before the High Court, the applicant submitted that he and X planned to re-marry, but that it had not been decided whether she would follow him to Jordan in case of expulsion. At the relevant time, however, the applicant was serving his prison sentence and facing the implementation of the expulsion order. Thus, he could not have had a justified expectation that he would be able to exercise his right to a family life in Denmark with X. Moreover, there is no indication that they did remarry either before the applicant was deported on 14 April 2014 or thereafter. Accordingly, the criterion relating to the seriousness of the difficulties which spouse X is likely to encounter in the country to which the applicant is to be expelled does not apply.

51. The applicant's second wife, Y, from his marriage under Islamic law in 2002, was an Iraqi woman of Kurdish origin. They married before the offences at issue were committed. Thus, the criterion of whether the spouse knew about the offence at the time when he or she entered into a family relationship does not come into play in the present case. In respect of their marriage it is noteworthy, though, that they divorced in May 2013, before the District Court's decision of 3 June 2013 to refuse to revoke the expulsion order. Accordingly, the criterion relating to the seriousness of the difficulties which spouse Y is likely to encounter in the country to which the applicant is to be expelled does not apply. Y and the applicant had three children together, born between 2003 and 2009. The children had Danish nationality and their legal status was not affected by the applicant's expulsion order.

52. When in 2009 the applicant was convicted of a serious drug crime, sentenced to five years' imprisonment, and his expulsion ordered, it was a known fact that he had six children. In their judgments of 11 March 2009 and 25 November 2009, respectively, the District Court and the High Court did not expressly state whether they found that the applicant's then wife, Y, and their three children could follow him to Jordan or whether, in any event, a separation of the applicant from his then wife and children could not outweigh the other counterbalancing factors, notably that the applicant had committed a serious drugs crime (see paragraphs 14 and 15 above).

53. In the revocation proceedings, when examining whether material changes had occurred in the applicants' circumstances within the meaning of section 50, subsection 1, of the Aliens Act, the District Court, in its decision of 3 June 2013 stated, among other things, that "as material changes in his circumstances, the applicant has referred to the circumstances that the health of his children has deteriorated .... Since the High Court delivered its judgment [in 2009], the applicant has maintained contact with his wife and his children. However,

that circumstance cannot independently lead to the conclusion that there have been material changes in circumstances. In the assessment of the court, the information available does not provide any basis on which to conclude that there have been material changes in the health of his children. ...". The High Court concurred with this finding and added, in its decision of 27 January 2014 "that the information presented to the High Court ... on the intention of the applicant and his ex-wife to remarry cannot lead to a different outcome".

54. The remaining criterion in the case to be examined is "the best interests and well-being of the children, in particular the seriousness of the difficulties which any of the applicant's children are likely to encounter in the country to which the applicant is to be expelled".

55. In its judgment Jeunesse v. the Netherlands [GC], (no. 12738/10, § 109, 3 October 2014), which concerned family reunion, the Court reiterated "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 ... Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it."

56. Whilst this principle applies to all decisions concerning children, the Court notes that in the context of the removal of a non-national parent as a consequence of a criminal conviction, the decision first and foremost concerns the offender. Furthermore, as case-law has shown, in such cases the nature and seriousness of the offence committed or the offending history may outweigh the other criteria to take into account (see, for example, Cömert v. Denmark (dec.), 14474/03, 10 April 2006; Üner v. the Netherlands [GC], cited above, §§ 62-64; and Salem v Denmark, cited above, § 76).

57. In the present case, when the revocation proceedings were pending before the District Court in 2013, the applicant's children were approximately 14, 12, 11, 9, 8 and 7 years old. They would all remain in Denmark, so no question arose as to "the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled". The issue was rather which difficulties they would encounter in Denmark due to the separation from their father. The three eldest children would live with their mother, X, as they had done since their parents divorced in 2001. The eldest son was living part-time in an institution. The three youngest children would live with their mother, Y, as they had done since the applicant was detained in April 2008.

58. Both the District Court and the High Court found unsubstantiated the applicant's allegation that the children's health had deteriorated since the expulsion order was issued in 2009. The applicant's eldest son's medical condition was also known in 2009.

59. The domestic courts also stated that the fact that, while imprisoned, the applicant has maintained contact with his children since 2009, could not independently lead to the conclusion that there have been 'material changes in [the applicant's] circumstances' (see section 50 of the Aliens Act).

60. The domestic courts did not as such comment on X's allegation that 'It would be a disaster if her children were separated permanently from their father. They had lived in a strong hope that they would reunite with their father upon his release. She feared that her children would break down if [the applicant] were to be deported. It would become very difficult to integrate them into Danish society'. Nor did they take a stand on

Y's allegation that 'her eldest son had a support person. The reason was that he isolated himself. The reason why he isolated himself was that he missed being part of a whole family. It would help if he could be with [the applicant] ... It would also have a very negative impact on the children if their father were deported.'

61. Apart from observing that such statements cannot be considered established facts, on the basis of the other material before it, the Court is not convinced that the applicant's children's best interests were adversely affected by the applicant's deportation to such an extent that those should outweigh the other criteria to take into account (see, for example, A.H. Khan v. the United Kingdom, no. 6222/10, § 40, 20 December 2011).

62. The Court also notes that apart from financial restraints (see paragraph 17 above), the applicant has not pointed to any obstacles, at least for the five younger children to visit him in Jordan, or for them all to maintain contact with him in other ways.

63. In the light of the above, the Court recognises that the District Court and the High Court carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law, including the applicant's family situation. Moreover, having regard to the gravity of the drugs crime committed by the applicant, the Court finds that the interference was supported by relevant and sufficient reasons, and was proportionate in that a fair balance was struck between the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other hand (see, among many others, Salem v. Denmark, cited above, § 82; Hamesevic v. Denmark (dec.), no. 25748/15, § 43, 16 May 2017; Alam v. Denmark (dec.), no. 33809/15, § 35, 6 June 2017; and Ndidi v. the United Kingdom, no. 41215/14, § 76, 14 September 2017).

64. Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Unuane v. the United Kingdom (2020)* , havde klageren med sin ægtefælle i opholdslandet fået tre børn. Det yngste barn havde en alvorlig hjertesygdom og undergik flere operationer, ligesom det i fremtiden ville være nødvendigt med flere operationer. Både klageren og klagerens ægtefælle blev dømt for kriminalitet. Klageren blev idømt fem et halvt års fængsel for økonomisk kriminalitet og udvist. Til at begynde med blev hele familien henvist til at udleve familielivet i Nigeria, hvor begge ægtefæller var født. Da det ikke var muligt for klagerens yngste barn at modtage den nødvendige behandling i Nigeria, fik klagerens ægtefælle og øvrige børn imidlertid lov til at blive i medlemsstaten.

Efter at have gennemgået de generelle principper for udlændinges indrejse og ophold, kriterierne som udledt i Boultif- og Üner-dommene samt pricipperne for staternes margin of appreciation, udtalte EMD i præmis 84-90, at:

"84. In the context of the present case the Upper Tribunal neither made any substantial further findings adverse to the applicant nor conducted a separate balancing exercise as required by the Court's case law under Article 8. In fact, the Upper Tribunal merely noted that it "cannot allow his appeal" on the basis that paragraph 398 of the Immigration Rules "imposed requirements" to identify "very compelling circumstances" over and above the accepted genuine and subsisting parental relationship with the children, something which the applicant could not establish.

85. In light of the above, it therefore falls to the Court, in exercise of its supervisory jurisdiction, to give the final ruling on whether an expulsion measure is reconcilable with Article 8.

86. In this context, the Court notes that in November 2009 the applicant was convicted of offences relating to the falsification of some thirty applications for leave to remain in the United Kingdom for which he was sentenced to a period of five years and six months imprisonment (see paragraph 7 above). The offence was undoubtedly serious, as evidenced by the length of the prison sentence. Furthermore, it was not his first criminal conviction in the United Kingdom. In February 2005 he had been convicted of obtaining a money transfer by deception, for which he was sentenced to a period of unpaid work and ordered to pay a fine (see paragraph 7 above).

87. That being said, the Court has tended to consider the seriousness of a crime in the context of the balancing exercise under Article 8 of the Convention not merely by reference to the length of the sentence imposed but rather by reference to the nature and circumstances of the particular criminal offence or offences committed by the applicant in question and their impact on society as a whole. In that context, the Court has consistently treated crimes of violence and drug-related offences as being at the most serious end of the criminal spectrum (see, for example, Maslov, cited above, § 85; A.W. Khan v. the United Kingdom, no. 47486/06, § 40, 12 January 2010; Dalia v. France, 19 February 1998, § 54, Reports of Judgments and Decisions 1998 I; and Baghli v. France, no. 34374/97, § 48, ECHR 1999 VIII but see also Lukic v Germany, no, 25021/08, 20 September 2011 involving multiple convictions for fraud). In any event, the fact that the offence committed by an applicant was at the more serious end of the criminal spectrum is not in and of itself determinative of the case. Rather, it is just one factor which has to be weighed in the balance, together with the other criteria which emerge from the judgments in Boultif and Üner.

88. In the present case the Upper Tribunal did weigh those other criteria in the balance, albeit exclusively with reference to the applicant's partner. After all, having concluded that they had no hesitation in saying that it would be in the best interests of the children to remain in the United Kingdom with both of their parents and that it would be 'unduly harsh' to separate them, they allowed his partner's appeal and those of the minor children including under Article 8 of the Convention. Although many of the factors relevant to applicant's partner's appeal were essentially the same as those relevant to his own, his appeal was dismissed on the sole basis there were no 'very compelling circumstances' over and above those which had applied in respect of his partner.

89. In the Court's view, this conclusion is not reconcilable with Article 8 of the Convention. The Upper Tribunal itself acknowledged the strength of the applicant's ties to his partner and children, all of whom would stay in the United Kingdom. It also acknowledged that his partner and children needed him, and this need for parental support was particularly acute in the case of D on account of his medical condition and forthcoming surgery. Finally, it accepted that it was in the best interests of the children for him to remain in the United Kingdom, a factor which, according to the Court's case-law, must be accorded significant weight (see Krasniqi v. Austria, no. 41697/12, § 47 25 April 2017). Having regard to these careful and detailed findings by the Upper Tribunal, which must carry significant weight in the overall assessment of proportionality, the Court considers that in the circumstances of the present case the seriousness of the particular offence(s) committed by the applicant was not of a nature or degree capable of outweighing the best interests of the children so as to justify his expulsion. It therefore considers that the applicant's deportation was disproportionate to the legitimate aim pursued and as such was not "necessary in a democratic society".

90. There has accordingly been a violation of Article 8 of the Convention."

I sagen *Salem v. Denmark (2016)* blev klageren dømt for narkotikakriminalitet og andre alvorlige forhold og idømt fem års fængsel samt udvist betinget med indrejseforbud gældende i to år. Klageren var indrejst i opholdslandet i en alder af 23 år og var først blevet meddelt opholdstilladelse som familiesammenført til sin tidligere ægtefælle, hvorefter han efterfølgende blev meddelt opholdstilladelse på baggrund af asyl. På tidspunktet, hvor de nationale myndigheder afsagde endelig dom om udvisning (2011), havde klageren og hans tidligere ægtefælle otte børn, som var i alderen fra fem til 16 år, og som alle var danske statsborgere. EMD afgjorde sagen fem år efter de nationale myndigheder (2016).

EMD udtalte i præmis 77-83, at:

"77. In the present case, the applicant's eight children were between 5 and 16 years old when the deportation order became final. Before the Supreme Court the applicant's then wife stated that she would be unable to follow the applicant if he were deported from Denmark, and that the children would not manage outside Denmark. During the domestic proceedings, statements were obtained from the Children's Department at the municipality and the children's schools and day-care institutions, which recounted that several of the eight children had serious problems, including of a psychological and educational nature (see paragraph 25 above). Four of the children received special education and several of the children needed extra support and supervision in their schools and institutions. Massive public support measures had been provided due to a significant need to teach them normal social behaviour. Finally, the placement of some of the sons in public care was under consideration.

78. In the Court's view it is doubtful whether, on the basis of those statements, or on the material before it, the applicant has substantiated that he had a central role in the family (see paragraph 63 above) and that his children's best interests were adversely affected by his deportation (see, for example, A.W. Khan v. the United Kingdom, cited above, § 40).

79. The Supreme Court did not expressly state whether it found that there were no insurmountable obstacles for the applicant's wife and children to follow him. It rather appears that the majority found that in any event the separation of the applicant from his wife and children could not outweigh the other counterbalancing factors, notably that the applicant had a leading and central role in the commission of persistent, organised and aggravated drug crimes (see paragraph 39 above).

80. The Court notes in addition that it transpired from the statements mentioned above (see paragraphs 25 and 77) that several of the applicant's eight children had serious problems and therefore were being supported by various Danish authorities.

81. Finally, the Court notes that the applicant has not pointed to any obstacles for the children to visit him in Lebanon or for the family to maintain contact via the telephone or the internet.

82. In the light of the above, the Court recognises that the Supreme Court carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case law, including the applicant's family situation. Moreover, having regard to the gravity of the drug crimes committed by the applicant, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court finds that the interference was supported by relevant and sufficient reasons, and was proportionate in that a fair balance was struck between the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other hand.

83. Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Hussain and C. v. Norway (2000)* (afvisningsbeslutning) var klageren indrejst i opholdslandet som 16-årig. Han indledte et samliv med en kvinde fra opholdslandet. Klageren blev idømt ti års fængsel for narkotikakriminalitet og udvist for bestandig. Under klagerens afsoning giftede parret sig og fik to børn. På tidspunktet for klagerens udvisning havde klageren opholdt sig 19 år i opholdslandet. Da EMD behandlede sagen, var børnene ni og fem år. Klagerens ældste barn led af alvorlig eksem og allergi.

EMD udtalte, at:

"Although there were difficulties related to his wife and children settling in Pakistan, notably because of the second applicant's health problems, these were not described as insurmountable. In any event, it seems to be the case that it was possible, albeit limited by the costs involved, for the first applicant to maintain contacts by receiving his family for visits in Pakistan.

In these circumstances, the Court does not find that the first applicant's own interests in remaining in Norway outweigh the considerable public interest underlying his expulsion.

As regards the second applicant's situation the Court observes that, while the majority in the Supreme Court acknowledged that the balancing of interests was particularly difficult in the instant case, it attached decisive weight to the seriousness and gravity of the offence, whereas the minority found the interests of the family in the first applicant, the father, remaining in Norway to be preponderant. Furthermore, as already mentioned, the second applicant would have had difficulties in settling in Pakistan and would only occasionally be able to visit him there. Her bonds with her father had developed to a point where separation would normally be psychologically difficult for her and would affect the level of care provided at home. In the Court's view, the daughter's interest in her father being able to remain in Norway carries significant weight in the necessity test under Article 8.

However, having regard to the particularly serious nature of the offence committed by the first applicant, the Court considers that in concluding that the public interest in his expulsion from Norway to Pakistan was preponderant, the authorities of the respondent State acted within their margin of appreciation."

EMD afviste derefter sagen som *inadmissible.*

I sagen *Hamesevic v. Denmark (2017)* var klageren indrejst som 23-årig og fik det efterfølgende år opholdstilladelse som flygtning. Han blev i Danmark gift med en tidligere statsborger fra sit hjemland. Parret fik tre børn, som på tidspunktet for EMD´s behandling af sagen var 16, 18 og 19 år gamle. Efter 19 års ophold blev klageren idømt tre års fængsel for våbensmugling og udvist for bestandig. Klageren var fem år tidligere blevet skilt fra sin ægtefælle, og børnene boede hos hende. Klageren var under sin afsoning blevet gift på ny med en tidligere statsborger i sit hjemland og havde anmodet om genåbning af en faderskabssag vedrørende hendes yngste barn, som han sandsynligvis var far til. Klagerens ægtefælle havde derudover to mindreårige særbørn, der boede hos hende. Klageren havde fortsat familie i hjemlandet, hvor han ofte havde været på ferie, og hvor han også havde planlagt at købe et hus. Klageren havde endelig tidligere været i beskæftigelse i Danmark, men havde to år forud for sin fængsling modtaget offentlige ydelser, da han var i behandling for en depression.

EMD udtalte i præmis 34-40, at:

"34. The applicant had three children from his first marriage. They are all Danish nationals. The High Court noted, in its judgment of 20 January 2015, that they were approximately 19, 18 and 16 years old and lived with their mother. In respect of the two eldest, who were of age, the Court reiterates that relations between parents and adult children do not constitute family life for the purpose of Article 8 unless the applicant can demonstrate additional elements of dependence (see, for example, A.S. v. Switzerland, no. 39350/13, § 49, 30 June 2015 and F.N. v. the United Kingdom (dec.), no. 3202/09, § 36, 17 September 2013). The applicant did not point to such dependence. Nor did he point to any obstacle to his maintaining contact with his 16-year-old child remaining with his ex-wife in Denmark, via the telephone or the internet, or by visits to Bosnia and Herzegovina, the country of origin of both the applicant and the child's mother.

35. The applicant's wife, A, is a Danish national. She originated from Bosnia and Herzegovina. They married on 31 May 2013 after having lived together for some years. When they commenced their relationship she could not have known about the offences which would be committed in 2012. It is noteworthy, though, that she and the applicant committed the offences together and that A was sentenced to one year's imprisonment.

36. On 17 October 2013 it was established that the applicant was also father of E, born in 2007, who is also a Danish national. The Court notes, however, that R had been registered as E's father until 12 July 2013 (see paragraph 14 above) and that the applicant was detained from August 2012 until his deportation around June 2015.

37. A has four other children, who had close contact with their father, R, who lived in Denmark. Two of them were of age and had moved away from home. At the time of the applicant's deportation, A lived in an apartment with her three youngest children, including E, who were then 16, 14 and 8 years old. The children spoke Danish and Bosnian. A did not have a job.

38. The Court will examine together the questions of the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant was expelled, and the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant was expelled.

39. It points out that in its judgment Jeunesse v. the Netherlands [GC], (no. 12738/10, § 109, 3 October 2014), which concerned family reunion, the Court reiterated "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 ... Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it."

40. Whilst this principle applies to all decisions concerning children, the Court notes that in the context of the removal of a non-national parent as a consequence of a criminal conviction, the decision first and foremost concerns the offender. Furthermore, as case-law has shown, in such cases the nature and seriousness of the offence committed or the offending history may weigh heavy in the overall assessment (see, for example, Üner v. the Netherlands [GC], cited above, §§ 62-64 and Cömert v. Denmark (dec.), 14474/03, 10 April 2006)."

EMD udtalte i præmis 41-44, at:

"41. The applicant and A maintained that she and the children would have to stay in Denmark. Their main reasoning in this respect was that "they would not be able to cope in Bosnia and Herzegovina", that "they had nothing in Bosnia and Herzegovina", that "it would be very difficult for them to settle there", that "E and A's children with R could not live by themselves in Denmark", "that A could not envisage taking them to Bosnia and Herzegovina" and "that E would not be able to understand that she would no longer attend school in Denmark" (see paragraphs 16, 17 and 20 above).

42. In its judgment of 20 January 2015 the High Court gave weight to the fact that both the applicant and A were from Bosnia and Herzegovina and accordingly spoke Bosnian. Moreover, it noted that A had stated that her three youngest children, who lived with her, including E, spoke Danish and Bosnian. Therefore, the High Court found it established that it was possible for them to continue family life with the applicant in Bosnia and Herzegovina.

43. The Court finds no grounds for concluding that such a finding was arbitrary or manifestly unreasonable. In addition, it notes, as appeared from the first set of proceedings, that the applicant and A had actually planned to buy a house in Bosnia and Herzegovina (see paragraphs 9 and 10 above).

44. Moreover, if A were to choose to remain in Denmark with her youngest children, including E, the applicant has not pointed to any obstacles for them to visit him in Bosnia and Herzegovina or for the family to maintain contact via the telephone or the internet. 45. Finally, the Court observes that the applicant had strong ties with his country of origin. He only left Bosnia and Herzegovina when he was 23 years old. At that time his parents were still alive. During the two years before his arrest in 2012, he had been on vacation there about five times, and he had planned to buy there. The nature of the crimes committed also suggests that he had maintained such ties. 46. Having regard to the above, the Court is satisfied that the interference with the applicant's private life – the refusal to revoke his deportation order – was supported by relevant and sufficient reasons and that it was not disproportionate given all the circumstances of the case. 47. It follows that the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible."

I sagen *Otite v. the United Kingdom (2022)* blev klageren idømt fire år og otte måneders fængsel for økonomisk kriminalitet og udvist for bestandig. Klageren var indrejst som 31-årig som familiesammenført til sin ægtefælle, der havde oprindelse i samme land som klageren, og som ligesom parrets tre børn i alderen 12, 17 og 19 år var statsborger i opholdslandet. Klageren havde på tidspunktet for dommen opholdt sig i opholdslandet i 19 år. Han havde været på fri fod i 11 år og havde i fire af de 11 år været involveret i kriminalitet. Familien havde efter det oplyste ikke besøgt klageren under afsoningen.

I præmis 49 gennemgik EMD kriminalitetens alvor og lagde vægt på, at klageren over en fireårig periode havde drevet en dokumentfabrik, hvilket havde involveret et stort antal ofre og betragtelige pengebeløb, og at han ikke havde erkendt overtrædelsernes påvirkning og konsekvenser for ofrene og samfundet, ligesom der var betragtelig risiko for, at han ville fortsætte med at opføre sig som før.

Herefter udtalte EMD i præmis 51-54:

"*51. The third party intervenors suggest that in cases such as the present the bests [sic] interests of the children should be a primary consideration (see paragraphs 34-35 above). […]*

52. In the present case, while the applicant's deportation would undoubtedly be difficult for his wife and children, there is nothing to suggest that their need for his support is particularly acute. His children are now nineteen, seventeen and twelve years old. His eldest daughter has type 1 diabetes, but there is no evidence to suggest that the applicant's presence in the United Kingdom is important for her physical well-being. According to the evidence before the Upper Tribunal, the children did not have contact with him during the whole period while he was in prison (see paragraph 17 above). Following his custodial sentence he was detained in immigration detention (see paragraph 31 above). It is not known whether he returned to the family home following his release from detention.

53. Even if the applicant has returned to the family home, his wife has family in the United Kingdom and has established ties in the community (see paragraph 12 above). The family, which has already coped with his lengthy absence while in prison and immigration detention, would therefore have a support network in the event of his deportation. In addition, although the Upper Tribunal proceeded on the basis that the applicant's family would not return to Nigeria with him, there is no evidence to suggest that they could not do so. The applicant himself lived in Nigeria for the first thirty-one years of his life (see paragraph 5 above). Although his wife and children are British citizens, his wife is of Nigerian origin and his children would be entitled to Nigerian citizenship through him (see paragraph 12 above). The case is therefore readily distinguishable from that of Unuane, in which the applicant's partner and children had to stay in the United Kingdom as the eldest child was awaiting heart surgery, and the Upper Tribunal had itself acknowledged that they needed the applicant to be there with them to provide support (see Unuane, cited above, § 89).

54. The applicant has not brought forward any arguments which would speak against the possibility of his family visiting him in Nigeria and staying in contact via telephone and the internet (see Salem v. Denmark, no. 77036/11, § 81, 1 December 2016; see also Külekci, cited above, §49). Furthermore, the applicant only left Nigeria when he was thirty-one years old (see paragraph 5 above), and there is no evidence to suggest that he no longer has family, social, cultural and linguistic ties there (see, for example, Külekci, cited above, § 50)."

Efter i præmis 54, 2. punktum, at have konstateret, at der ikke var noget der tydede på, at klageren ikke længere havde bånd til hjemlandet, konkluderede EMD i præmis 56-57:

"*56. The foregoing considerations are sufficient to enable the Court to conclude that the strength of the applicant's family and private life in the United Kingdom is not such as to outweigh the public interest in his deportation.*

57. Accordingly, his deportation would not violate Article 8 of the Convention."

Der kan endvidere henvises til følgende sag:

- *Nguyen v. Denmark (2024).*

5.3.2.5.2. Mindre alvorlig kriminalitet

I sagen *M.P.E.V. and others v. Switzerland (2014)* , indrejste klageren med sin ægtefælle, hendes særbarn og parrets fællesbarn fra Ecuador og søgte asyl i opholdslandet. Familien fik over en årrække gentagne afslag på asyl. Klageren og hans ægtefælle valgte at bo hver for sig, men blev aldrig skilt. Parrets yngste barn boede hos klagerens ægtefælle, da klageren led af PTSD, skizofreni og depression. Klagerens ægtefælle og fællesbarn blev tildelt en midlertidig opholdstilladelse med henvisning til fællesbarnets tilknytning til Schweiz og ægtefællens særbarn blev tildelt opholdstilladelse af humanitære årsager og opnåede senere schweizisk

statsborgerskab. Klageren bevarede en tæt kontakt til både sin ægtefælle og barn. Klageren opnåede aldrig opholdstilladelse i opholdslandet og begik igennem en årrække mindre alvorlige berigelseskriminalitet, hvor den længste dom var på ni måneders betinget fængsel.

Efter at have gennemgået de generelle principper for udlændinges indrejse og ophold, kriterierne som udledt i Boultif- og Üner-dommene samt pricipperne for staternes margin of appreciation, udtalte EMD i præmis 54-59:

"54. The first factor which must be considered is the seriousness of the first applicant's offences. The Court notes that his criminal record between 2005 and 2009 consists of four convictions, three of which related to criminal offences against other people's property and the fourth to a traffic offence. The most severe sanction imposed on him for these offences was a ninemonth prison sentence, suspended on probation. Furthermore, it appears that he did not reoffend after 2009.

55. Turning to the first applicant's length of stay in Switzerland, the Court observes that he entered Swiss territory when he was an adult as an asylum seeker and never obtained a stable residence status. That being said, it must be noted that the asylum proceedings lasted for more than ten years until 7 September 2012, when the Federal Administrative Court gave its final decision on the applicant's asylum claim.

56. With regard to the first applicant's family situation, the Court has found above that he continues to have a relationship falling into the scope of Article 8 with the second applicant, who lends him support in coping with his illness, even after they separated in 2009 (see paragraph 34 above). In this context, the Court observes that the Federal Administrative Court expressly acknowledged that the first applicant's state of health gave reason for concern and that, according to his attending doctor, his return to Ecuador in itself was likely to jeopardise his health, irrespective of the medical treatment he received (see paragraphs 18 and 19 above).

57. With regard to the first applicant's relationship with his young daughter, the fourth applicant, the Court observes that he raised her with the second applicant and continued to involve himself in the child's upbringing following their separation, as is reflected in the extensive access rights accorded to him. The Court further observes that the Federal Administrative Court considered that, given her integration into Swiss society, lack of knowledge about her country of origin, where she never returned after having entered Switzerland at the age of two, and the fact that she hardly spoke Spanish, it would amount to an 'uprooting of excessive rigidity' to send her back to Ecuador (see paragraph 17 above). Under these circumstances, it can be expected that personal contact between the two applicants would, at the least, be drastically diminished if the first applicant were forced to return to Ecuador. The Court puts emphasis on the fact that the Federal Administrative Court, when considering the first applicant's case, did not make any reference to the child's best interests, because it did not consider that the relationship between them fell under the protection of 'family life' within the meaning of Article 8 of the Convention. Under these circumstances, the Court is not convinced that sufficient weight was attached to the child's best interests. Reference is made in this context also to Article 3 of the UN Convention on the Rights of the Child, in accordance with which the best interests of the child shall be a primary consideration in all actions taken by public authorities concerning children (see Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, § 135, ECHR 2010, and Nunez, cited above, § 84).

58. In the light of the above considerations, having regard to the moderate nature of the criminal offences committed by the applicant, his poor state of health and, in particular, the domestic authorities' failure to give consideration to the first and fourth applicants' mutual interest in remaining in close personal contact, the Court finds that the respondent State overstepped the margin of appreciation afforded to it in the present case.

59. Accordingly, there would be a violation of Article 8 of the Convention in the event of the first applicant's expulsion."

5.3.2.5.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Nunez v. Norway (2011)* havde klageren opnået sin opholdstilladelse på baggrund af svig. Da opholdstilladelsen blev inddraget, havde hun opholdt sig i opholdslandet i fem år fra hun var 21-26 år og havde stiftet familie i opholdslandet ved at gifte sig og få børn.

EMD slog indledningsvis fast, at forholdet mellem klageren og hendes børn udgjorde "familieliv" i artikel 8's forstand.

EMD udtalte i præmis 71-73, at henset til hensynene bag den nationale lovgivning og de nationale myndigheders afgørelse i sagen fandt EMD, at statens interesse i at udsende klageren vejede tungt i proportionalitetsafvejningen.

I præmis 74 konstaterede EMD, at klageren ved sin indrejse i opholdslandet var voksen:

"The Court further observes that when the applicant re-entered Norway in breach of the re-entry ban in July 1996, she was an adult and had no links to the country. Whilst aware that she had re-entered illegally, she married a Norwegian national in October 1996. In April 2001 they separated. From the spring 2001 she co-habited with Mr O. and two daughters were born by the couple in June 2002 and December 2003, respectively. In the Court's view, at no stage from her re-entering Norway illegally in July 1996 until being put on notice in January 2002 (see paragraph 11 above) could she reasonably had entertained any expectation of being able to remain in the country."

EMD udtalte i præmis 75-85, at:

"75. This is not altered by the fact that, following the couple's separation in October 2005, the applicant assumed the daily care of the children until May 2007, when the Oslo City Court granted the daily care and the sole parental responsibilities to the father, or by the extended contact rights to the children that she was granted from then onwards.

76. Moreover, when the applicant arrived in Norway at the age of twenty-one, she had lived all her life in the Dominican Republic. During her stay in Norway she co-habited from the spring of 2001 to October 2005 with Mr O. who was also a national of her home country. Her links to Norway could hardly be said to outweigh her attachment to her home country and, as noted above, had in any event been formed through unlawful residence and without any legitimate expectation of being able remain in the country.

77. It therefore matters little from the perspective of the applicant's Article 8 rights that the proceedings had been prolonged by the fact that the revocation of her work- and settlement permit and the expulsion order and re-entry ban had been processed, not in parallel, but separately.

78. However, the Court will examine whether particular regard to the children's best interest would nonetheless upset the fair balance under Article 8.

79. It is to be noted that from their birth in 2002 and 2003, respectively, until the City Court's judgment of 24 May 2007 in the custody case, the children had been living permanently with the applicant, who had also assumed their daily care since her separation from their father in October 2005. Thus, as noted by the Supreme Court's minority, the applicant was the children's primary care person from their birth and until their father was granted custody in 2007. The Court regards it as significant that by virtue of that judgment, which attached great weight to the decision to expel the applicant (see paragraph 18 above), the children were moved from her to live with their father, whilst she was granted extended rights of contact with them. As observed by the Supreme Court minority, together with the father, the applicant was the most important person in the children's lives.

80. Also, an equally important consequence of the said judgment of 24May 2007 was that the children, who had lived all their lives in Norway, would remain in the country in order to live with their father, a settled immigrant.

81. Moreover, in the assessment of the Supreme Court's minority, the children had experienced stress, presumably due to the risk of their mother's being expelled as well as disruption in their care situation, first by their parents' being separated, then by being moved from their mother's home to that of their father. They would have difficulty in understanding the reasons were they to be separated from their mother. Pending her expulsion and the two-year re-entry ban she would probably not return to Norway and it was uncertain whether they would be able to visit her outside Norway. The Court has taken note that, as observed by the Supreme Court's majority, Mr O. stated that, in the event that the applicant were to be expelled, he would facilitate contacts between the children and her, notably during summer and Christmas holidays. According to the Supreme Court's majority, there was no reason to assume that it would not be possible to maintain contact between the children and the applicant during the expulsion period. Nevertheless, the Court observes that, as a result of the decisions taken in the expulsion case and in the custody case, the children would in all likelihood be separated from their mother practically for two years, a very long period for children of the ages in question. There is no guarantee that at the end of this period the mother would be able to return. Whether their separation would be permanent or temporary is in the realm of speculation. In these circumstances, it could be assumed that the children were vulnerable, as held by the minority of the Supreme Court.

82. The Court observes furthermore that, although the unlawful character of the applicant's stay in Norway was brought to the authorities' attention in the summer of 2001 and she admitted this to the police in December 2001, it was not until 26 April 2005 that the Directorate of Immigration decided to order her expulsion with a prohibition on re-entering for two years. Although this state of affairs could to some extent be explained by the immigration authorities' choice to process the revocation of her work and settlement permit not in parallel but separately, it does not appear to the Court that the impugned measure to any appreciable degree fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose

of such administrative measures (see paragraph 50 of the Supreme Court's judgment quoted at paragraph 23 above).

83. In light of the above, the Court shares the view of the Supreme Court's minority that the applicant's expulsion with a two-year re-entry ban would no doubt constitute a very far-reaching measure vis-à-vis the children.

84. Having regard to all of the above considerations, notably the children's long lasting and close bonds to their mother, the decision in the custody proceedings, the disruption and stress that the children had already experienced and the long period that elapsed before the immigration authorities took their decision to order the applicant's expulsion with a re-entry ban, the Court is not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention. Reference is made in this context also to Article 3 of the UN Convention on the Rights of the Child, according to which the best interests of the child shall be a primary consideration in all actions taken by public authorities concerning children (see Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, § 135, ECHR 2010-...). The Court is therefore not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicant's need to be able to remain in Norway in order to maintain her contact with her children in their best interests, on the other hand.

85. In sum, the Court concludes that the applicant's expulsion from Norway with a two-year re-entry ban would entail a violation of Article 8 of the Convention."

I sagen *Antwi and others v. Norway (2012)* havde klageren ligeledes opnået sin opholdstilladelse på baggrund af svig. Klageren var i opholdslandet blevet gift og havde fået et barn. Syv år efter indrejsen fik opholdslandet kendskab til hans reelle identitet og året efter blev han udvist fra opholdslandet.

EMD udtalte i præmis 90:

"In applying the above principles [fra Nunez-dommen, red.] to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Nunez, cited above, § 71, and Darren Omoregie and Others v. Norway, no. 265/07, § 67, 31 July 2008; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Nunez and Darren Omoregie and Others, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Nunez, cited above, § 73)."

EMD udtalte i præmis 91-105 at:

"91. Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country.

92. Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any event been formed through unlawful r5esidence and without any legitimate expectation of being able to remain in the country.

93. Like the first applicant, the second applicant had grown up in Ghana. There she had lived until the age of seventeen when she was reunited with her father and siblings in Norway. Although she had become a Norwegian citizen and had family ties and employment links to Norway and probably would experience some difficulties in resettling in Ghana, there does not seem to be any particular obstacle preventing her from accompanying the first applicant to their country of origin. The Court has also taken note of her claim that, although aware that the first applicant originally had a Ghanaian background and had obtained a Ghanaian passport in connection with their marriage in Ghana on 11 February 2005, she should only have become aware of his true identity in this context. However, the above-mentioned factors cannot in the Court's view outweigh the public interest in sanctioning the first applicant's aggravated offences against the immigration rules with the impugned measure.

94. As to the third applicant, the Court notes that she is a Norwegian national who since birth has spent her entire life in Norway, is fully integrated into Norwegian society and, according to the material submitted to the Court, speaks Norwegian with her parents at home. In comparison, her direct links to Ghana are very limited, having visited the country three times (see paragraph 44 above) and having little knowledge of the languages practiced there.

95. Furthermore, as a result of the first applicant no longer holding a work permit and staying full-time at home and of the second applicant's being particularly occupied by her work, the first applicant assumes an important role in the third applicant's daily care and up-bringing. He is the parent who follows up her homework and parental contacts with her school and who facilitates her participation in sport activities. She is also at an age, ten years, when this kind of support would be valuable and she is strongly attached to her father as she is to her mother.

96. It would most probably be difficult for her to adapt to life in Ghana, were she and her mother to accompany the father to Ghana, and to readapt to Norwegian life later.

97. Against this background, the Court shares the High Court's view that the implementation of the expulsion order would not be beneficial to her.

98. However, the Court sees no reason to call into doubt the High Court's findings to the effect that, both parents having been born and brought up in Ghana and having visited the country three times with their daughter, there were no insurmountable obstacles in the way of the applicants settling together in Ghana or,

at the least, to maintaining regular contacts. As to the allegation that the third applicant's rashes had been aggravated by heat during her previous stays in Ghana, the High Court majority found that this had not been sufficiently documented and could not be relied upon. The minority agreed that the evidence submitted in support of this contention had been weak and observed that the information appeared to have originated from the first and the second applicants. In the proceedings before the Court, the applicants submitted no further evidence in support of this argument or placed emphasis on it.

99. As also observed by the High Court, it does not emerge that the third applicant had any special care needs or that her mother would be unable to provide satisfactory care on her own.

100. Moreover, the Court considers that there are certain fundamental differences between the present case and that of Nunez where it found that the impugned expulsion of an applicant mother would give rise to a violation of Article 8 of the Convention. In reaching this finding, the Court attached decisive weight to the exceptional circumstances pertaining to the applicant's children in that case, which were recapitulated in the following terms in its judgment (cited above, § 84): "Having regard to all of the above considerations, notably the children's long lasting and close bonds to their mother, the decision in the custody proceedings [to move the children to the father], the disruption and stress that the children had already experienced and the long period that elapsed before the immigration authorities took their decision to order the applicant's expulsion with a re-entry ban, the Court is not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention."

101. Unlike what had been the situation of the children of Mrs Nunez, the third applicant had not been made vulnerable by previous disruptions and distress in her care situation (compare Nunez, cited above, §§ 79 to 81).

102. Also, the duration of the immigration authorities' processing of the matter was not so long as to give reason to question whether the impugned measure fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures (compare Nunez, cited above, § 82). On the contrary, in October 2005, only a few months after the discovery of the first applicant's fraud in July 2005, he was put on notice that he might be expelled from Norway. In May 2006 the Directorate ordered his expulsion and prohibition on re-entry and gave him until 24 July 2006 to leave the country.

103. There being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion.

104. The above considerations are not altered by the duration of the prohibition on re-entry – five years. In this connection, the Court reiterates that in a comparable case, Darren Omoregie (cited above, §§ 63-68), it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case.

105. In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand.

Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban would not entail a violation of Article 8 of the Convention."

I sagen *Eze v. Sweden (2019)* havde klageren i forbindelse med en ansøgning om asyl opgivet et navn og fødedato. Han blev meddelt afslag på asyl, da de nationale myndigheder fandt, at han ikke havde sandsynliggjort sin identitet. Klageren giftede sig efterfølgende med en statsborger fra opholdslandet, og søgte på ny om opholdstilladelse på baggrund af ægteskabet. Han opgav her et andet navn og fødedato. Klageren blev meddelt en midlertidig opholdstilladelse, da han havde fremvist en fødselsattest, hvoraf navnet fremgik. Klageren søgte to år efter om forlængelse af sin opholdstilladelse, og indleverede i den forbindelse et forfalsket pas. Året efter indgivelsen af ansøgningen om forlængelse fik parret et barn. Klageren blev meddelt afslag på forlængelse af sin opholdstilladelse, da denne var opnået på baggrund af svig.

EMD udtalte i præmis 52-55, at:

"52. The Court acknowledges that the decision to refuse the applicant a permit to reside in Sweden will have a considerable impact on his family life, as his wife is a Swedish citizen and she and their common child are living in Sweden. However, there does not seem to be any insurmountable obstacles for them to move to the applicant in Nigeria. In any event, they have been visiting him there and could continue to do so.

53. Furthermore, an important factor in the present case is that the applicant and his wife created their family life at a time when the applicant had no residence permit. They started a relationship in mid-2011 when the applicant's asylum application had been rejected at first instance and married a year later when that application had been dismissed by a final decision and there was an enforceable deportation order against the applicant. Their son was born in June 2015, more than a year after the expiry of the applicant's temporary residence permit and following the Migration Agency's conclusion that the passport submitted in support of his application for an extension was a forgery. Thus, the applicant's family life was both established and extended at times when his immigration status was such that the persistence of that family life in Sweden was precarious. The applicant therefore had no reasonable expectation that he would be able to remain in the country and maintain his family life there.

54. In the above circumstances, the refused residence permit for the applicant could be incompatible with Article 8 only in exceptional circumstances. As the applicant and his wife have a four-year-old son, regard must be had to his best interests. In this respect, the Court notes that the Swedish authorities have carefully considered the issue, both under domestic law and under the Convention. In particular, the Migration Agency took into account that the applicant's wife and son should have no difficulties to visit the applicant in Nigeria. Furthermore, regard must be had to the fact that the son lived together with the applicant in Sweden only for a period of little more than a year, until the autumn of 2016. There are therefore no exceptional circumstances at issue in the present case. Instead, the Court is satisfied that sufficient weight was attached to the best interests of the child in refusing the applicant a residence permit.

55. Having regard to the above considerations, the Court finds that the Swedish authorities, acting within their margin of appreciation, did not fail to strike a fair balance between the applicant's interests, on the one hand, and the State's interest in ensuring effective immigration control, on the other. Nor was their assessment disproportionate in pursuance of the legitimate aim under Article 8 of the Convention."

Klagen blev fundet *inadmissible* som *manifestly ill-founded*.

I sagen *Alleleh a.o. v. Norway (2022)* havde den første klager opnået sin opholdstilladelse på baggrund af svig. Klagerens ægtefælle (anden klager) og deres fire børn, som på tidspunktet for dommen var 12, syv, syv og fire år gamle, (tredje – sjette klagere) var alle statsborgere i opholdslandet, ligesom hun selv havde opnået statsborgerskab i opholdslandet. 13 år efter indrejsen i opholdslandet blev myndighederne bekendt med klagerens rette identitet, hvorefter hendes statsborgerskab blev inddraget, og hun blev udvist med indrejseforbud i to år.

EMD udtalte i præmis 94-107:

"*94. The Court first notes that the decision to expel the first applicant and issue a two-year ban on re-entry was first taken by the Directorate of Immigration, and thereafter examined on appeal by the Immigration Appeals Board. Subsequently, a judicial review was carried out by three levels of court. During those proceedings, a psychologist was appointed to protect the best interests of the children, several witnesses were heard, and other pieces of evidence examined (see, in particular, paragraphs 22, 24 and 34 above). There is nothing to suggest that the expulsion case of the first applicant was not dealt with thoroughly and swiftly, enabling the decision makers to take into account all relevant circumstances, including those directly related to the situation of the four children.*

95. As one additional initial observation the Court observes that the Supreme Court's conclusion that there were no insurmountable obstacles to the family moving as a whole to Djibouti – which relates to an aspect that under the Court's case-law is highly relevant to the proportionality assessment under Article 8 § 2 of the Convention (see paragraph 90 above) – did not touch on the applicants' argument before the Court concerning the risk of genital mutilation. Based on the materials provided to the Court, that appears to have been connected to how the applicants had structured their pleadings before the Supreme Court. Given the applicants' own limited focus on and their apparent lack of attempts to substantiate that argument before the domestic authorities, and observing that the Supreme Court in any event, in its assessment of the proportionality of the expulsion, included the assumption that the family would decide that the father and the children would remain in Norway during the ban on re-entry imposed on the first applicant, the Court does not in the circumstances of the case find it appropriate to analyse the situation in Djibouti on the basis of new material or replace the assessment of the national courts by its own on that point. It is sufficient to observe that the applicants have not shown convincingly that the Supreme Court's finding that the second to sixth applicants could also in principle go to Djibouti – either to stay (see paragraph 63 above) or at least to visit the first applicant (see paragraph 70 above) – was arbitrary or otherwise manifestly deficient.

96. The Court moreover notes the Supreme Court's meticulous examination of the Court's case-law in order to infer relevant legal standards under Article 8 of the Convention and to apply them in a Convention–compliant manner when deciding the first applicant's expulsion case. Such an approach is crucial for the distribution of responsibility between the Court and the domestic courts, in order to ensure that the proper standards have been applied at domestic level (see, as a recent authority, Savran, cited above, §§ 188-89).

97. The Court also attaches importance to the Supreme Court's detailed reasoning with regard to its explanation of the weighty immigration policy arguments in favour of the expulsion of the first applicant. The Supreme Court made particular reference to the seriousness of her offences and that a sanction – as had also been emphasised by the legislature in the preparatory work to the Immigration Act (see, in particular, paragraphs

46-48 above) – in the form of expulsion was considered necessary in order to uphold respect for the immigration regulations and deter from future contraventions, that is to say for reasons of general deterrence (see, inter alia, paragraph 60 above). Indeed, as already found by the Court in a number of cases, a scheme of implementation of national immigration law which is based on administrative sanctions in the form of expulsion and a ban on re-entry does not as such raise an issue of failure to comply with Article 8 of the Convention (see, for example, Antwi and Others, cited above, § 90). Thus, the Court has in principle no objections to the Supreme Court's approach in this respect, bearing in mind, at the same time, that any such scheme must be construed and applied in a manner that is compatible with the Convention rights of all involved.

98. The Court furthermore observes that the Oslo City Court and the Borgarting High Court each examined the facts of the case with regard to what an expulsion would entail for each of the applicants, including the children (see paragraphs 26-33 and 36-42 above, respectively). The Borgarting High Court's findings as to the facts of the case, the children's situation included, formed the basis for the Supreme Court's assessment of the case within the scope of the appeal, the appeal having been limited to the High Court's application of the law. In this respect the Supreme Court considered that the proportionality analysis, unlike what had been done by the High Court (see paragraph 35 above), had to be conducted in the light of the Court's case-law according to which an expulsion of a person whose grounds for residence were precarious at the outset would only be disproportionate in "exceptional" circumstances (see, for example, paragraphs 52, 54 and 64 above). Moreover, the Supreme Court concluded that the facts of the case as established by the Borgarting High Court did not support the finding that such "exceptional circumstances" existed. In this connection the Supreme Court emphasised that there was nothing in the lower instances' findings of fact that stood out from what had generally to be assumed to follow from expulsion of one of the parents for a relatively short period (see paragraphs 66 and 71 above).

99. Regarding the Supreme Court's legal starting points under Article 8 of the Convention, the Court notes that the first applicant was not a "settled migrant" in Norway in so far as her stay there was based on repeatedly giving incorrect information over a long period and therefore had never had a valid legal basis. It was for that reason the Supreme Court proceeded on the basis that the expulsion was valid unless "exceptional circumstances" could be identified. Although the Court does not disagree with the Supreme Court regarding this being the starting point, the Court also notes the very particular aspect of the instant case that the sanction imposed on the first applicant impacted as much, if not more, on her family members, notably her children, all being Norwegian nationals who had been born and lived all their lives in Norway. Even if the other family members would follow the first applicant to Djibouti during the period when the ban on re-entry would be in force in order to preserve "family life", they would have to experience a considerable unwanted change in their "private life" in moving to a country with which they had no connection, including as concerned language. This contrasted with the first applicant's own situation, coming from Djibouti, speaking the language, having family there and even having visited there after she had arrived in Norway (see, inter alia, paragraph 26 above). The expulsion imposed on the first applicant to sanction her behaviour could thus, somewhat paradoxically, put an equally heavy if not heavier strain on the other family members. The Court observes in this context – as did the Supreme Court – that the Norwegian Parliament has requested that the Government consider an amendment of the Immigration Act to "make it possible for the immigration administration to supplement the use of expulsion and prohibition of entry with a broader set of sanctions where warranted by special circumstances such as the child's best interests" (see paragraph 57 above).

100. Furthermore, the Court understands the Supreme Court's role in being limited to correcting what had been an erroneous understanding of the law by the Borgarting High Court. Nonetheless, even an examination of whether any "exceptional circumstances" existed also required a concrete and broad examination of the whole case and how the whole family would be affected by the expulsion of one of them. It might even be particularly important that the Supreme Court demonstrate that concrete assessment in a situation where the lower court had, regardless of its misunderstanding of the law, given a detailed explanation of why it,

based on evidence that had been presented to it directly during its hearing, considered the expulsion to contradict the children's best interests, which in its assessment made the expulsion disproportionate vis-à-vis them (see paragraphs 36-42 above).

101. Turning, then, to the concrete proportionality assessment, the Court notes that the facts with regard to what impact an expulsion would have on the children had been established by way of a thorough process where an expert had been engaged and the children's views obtained in so far as possible based on their age and maturity (see, inter alia, paragraph 37 above). The factual findings on that point had also been set out in detail by the Borgarting High Court in its judgment, providing a basis for the Supreme Court in its application of the law (see paragraph 98 above).

102. Against that background, the Court does not consider that it has a basis for concluding that the Supreme Court erred in its assessment that there were no concrete facts in the case before it that gave grounds for characterising the children's situation as different from what would essentially always follow with the expulsion of a parent. The Court therefore understands the Supreme Court's reluctance to qualify the circumstances as "exceptional" within the meaning of the Court's case-law. The Court notes that the case differed from those of Nunez and Kaplan and Others (both cited above), where the Court found violations of Article 8 of the Convention. It refers to Antwi and Others (cited above, §§ 101-02), where a five-year re-entry ban was accepted by the Court with reference to the fact that the child in question, also a Norwegian national who since birth had spent her entire life in Norway, had not been made vulnerable by previous disruption and that the duration of the immigration authorities' processing of the matter had not been so long as to give reasons to question whether the impugned measure fulfilled the requirements of swiftness and efficiency, in contrast to what had been the situation in the case of Nunez. The applicant children in the instant case had not either been exposed to the same degree of disruption and stress as in the case of Nunez (cited above). Neither can the authorities be blamed for not having dealt with the expulsion case in a timely manner. The facts of the current case also clearly differ from those in the case of Butt (cited above).

103. Moreover, the Court observes that the Supreme Court stressed various aspects that mitigated the effects of the expulsion on the children. First of all, the Supreme Court emphasised that it was only out of consideration for the children that the ban on re-entry imposed on the first applicant had been limited to two years in the first place (see paragraph 70 above). The duration of the exclusion order is an important element in the proportionality assessment (see Savran, cited above, § 182), and the Court must take into account that it did not find re-entry bans of five years imposed on parents disproportionate in cases such as Antwi and Others (cited above, § 104) and Darren Omoregie and Others (cited above, § 67).

104. Furthermore, the Supreme Court emphasised the first applicant's possibility to apply to have the ban from re-entry revised (see paragraphs 57 and 71 above). Such a revision of the re-entry ban according to the second paragraph of section 71 of the Immigration Act (see paragraph 75 above) would enable the domestic authorities to take into account any subsequent negative development, such as the second applicant not being able to take adequately care of the four children, or any unforeseen change related to the children's health or overall situation. The Supreme Court also emphasised the first applicant's possibility to apply for access to Norway for brief visits during the two-year ban from re-entry (see paragraph 57 above). Lastly, the Court finds reasons to stress not only the importance of the fact that the ban from re-entry had been limited to two years (see paragraph 103 above), but that it proceeds on the basis that she will be allowed to resume her family life in Norway when the two years have passed.

105. Considering all of the above, the Court accepts that the present case disclosed no exceptional circumstances as such requiring the respondent State to withdraw the expulsion order so as to enable the applicants to maintain and continue to develop family life in Norway. Moreover, the Court accepts that the domestic authorities were faced with a balancing of interests that had to be done in a situation where particularly weighty interests in immigration control supported the first applicant's expulsion while at the same time an

expulsion would impose considerable difficulties on the other applicants. The Court also accepts that the domestic authorities, including the Supreme Court, sought to attend to the children's interests in so far they could be reconciled with the public interest reasons in sanctioning the first applicant's behaviour.

106. Therefore, as to the final conclusion that the expulsion was not disproportionate because it did not exceed the standards indicated by the Court in its case-law relevant to the case, the Court does not find that the authorities of the respondent State transgressed their margin of appreciation when, having carefully examined the facts and adequately balanced the interests in issue (see paragraphs 92-93 above), they decided to expel the first applicant and to prohibit her re-entry for two years. Neither are there any other reasons for the Court to substitute its own assessment for that of the competent national authorities, bearing in mind in particular the domestic courts' careful examination.

107. On the basis of the above, the Court concludes that there has been no violation of Article 8 of the Convention."

5.3.2.5.4. Ulovligt ophold

I sagen *Rodrigues da Silva and Hoogkamer v. the Netherlands (2006)*havde klageren på intet tidspunkt søgt om opholdstilladelse, men havde indledt et familieliv. Klageren havde dog, såfremt hun havde søgt om det, haft mulighed for at opnå en opholdstilladelse.

EMD udtalte i præmis 37-44, at:

"37. The Court observes at the outset that there can be no doubt that there is family life within the meaning of Article 8 of the Convention between the first applicant and her daughter Rachael, the second applicant: Rachael was born from a genuine relationship, in which her parents cohabited as if they were married.

38. Next, it observes that the present case concerns the refusal of the domestic authorities to allow the first applicant to reside in the Netherlands; although she has been living in that country since 1994, her stay there has at no time been lawful. Therefore, the impugned decision did not constitute interference with the applicants' exercise of the right to respect for their family life on account of the withdrawal of a residence status entitling the first applicant to remain in the Netherlands. Rather, the question to be examined in the present case is whether the Netherlands authorities were under a duty to allow the first applicant to reside in the Netherlands, thus enabling the applicants to maintain and develop family life in their territory. For this reason the Court agrees with the parties that this case is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation (see Ahmut v. the Netherlands, 28 November 1996, § 63, Reports of Judgments and Decisions 1996-VI).

39. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see Gül v. Switzerland, 19 February 1996, § 38, Reports 1996-I). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles to the family living in the country of origin of one or more of them and whether there are factors of

immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Solomon v. the Netherlands (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998, and Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999).

40. Turning to the circumstances of the present case, the Court notes that the first applicant moved from her native Brazil to the Netherlands in 1994 at the age of 22. Even though she has now been living in the latter country for a considerable time, she must still have links with Brazil, where she presumably grew up and underwent her schooling.

41. However, if the first applicant were to return to Brazil she would have to leave her daughter Rachael behind in the Netherlands. The Court observes in this connection that at the time the final decision on her application for a residence permit was taken on 12 February 1999, the first applicant no longer had parental authority over Rachael, the Supreme Court having quashed the decision of the Amsterdam Regional Court which had awarded her such authority (see paragraphs 19 and 20 above). It was Rachael's father, Mr Hoogkamer, to whom parental authority was subsequently, and finally, attributed. In its assessment of this issue, the Amsterdam Court of Appeal had regard to a report which had been drawn up by the Child Care and Protection Board in August 1997 – prior to the final decision in the residence proceedings – according to which it would be traumatic for Rachael if she had to leave the Netherlands in view, inter alia, of the strong bond she had with her paternal grandparents (see paragraph 14 above). Parental authority having been awarded to Mr Hoogkamer, the first applicant is thus simply not able to take Rachael with her without his permission which, as has not been disputed by the Government, will not be forthcoming.

In these circumstances, the Court considers that the Government's claim that the first applicant and Mr Hoogkamer might have agreed that Rachael would move to Brazil with her mother is untenable, bearing in mind that it was the Dutch courts, following the advice of the Dutch child welfare authorities, who concluded that it was in Rachael's best interests to stay in the Netherlands.

42. The Court further notes that, from a very young age, Rachael has been raised jointly by the first applicant and her paternal grandparents, with her father playing a less prominent role. She spends three to four days a week with her mother (see paragraphs 16 and 22 above), and, as confirmed by her grandparents (see paragraph 22 above), has very close ties with her. The refusal of a residence permit and the expulsion of the first applicant to Brazil would in effect break those ties as it would be impossible for them to maintain regular contact. This would be all the more serious given that Rachael was only three years old at the time of the final decision and needed to remain in contact with her mother (see Berrehab, cited above, § 29).

43. Whilst it does not appear that the first applicant has been convicted of any criminal offences (see Berrehab, cited above, § 29, and Cılız v. the Netherlands, no. 29192/95, § 69, ECHR 2000-VIII), she did not attempt to regularise her stay in the Netherlands until more than three years after first arriving in that country (see paragraphs 9 and 13 above) and her stay there has been illegal throughout. The Court reiterates that persons who, without complying with the regulations in force, confront the authorities of a Contracting State with

their presence in the country as a fait accompli do not, in general, have any entitlement to expect that a right of residence will be conferred upon them (see Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003). Nevertheless, the Court finds relevant that in the present case the Government indicated that lawful residence in the Netherlands would have been possible on the basis of the fact that the first applicant and Mr Hoogkamer had a lasting relationship between June 1994 and January 1997 (see paragraph 34 above). Although there is no doubt that a serious reproach may be made of the first applicant's cavalier attitude to Dutch immigration rules, this case should be distinguished from others in which the Court considered that the persons concerned could not at any time have reasonably expected to be able to continue family life in the host country (see, for example, Solomon, cited above).

44. 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. Indeed, by attaching such paramount importance to this latter element, the authorities may be considered to have indulged in excessive formalism.

The Court concludes that a fair balance was not struck between the different interests at stake and that, accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Kaplan and others v. Norway (2014)* var klageren, der var af kurdisk oprindelse, udrejst fra Tyrkiet i 1993 og havde herefter søgt asyl i flere nordeuropæiske lande, senest i 1998 i Norge. Klageren havde i sit hjemland en ægtefælle og to børn, der alle boede hos hans forældre. Klageren fik afslag på asyl og forblev i landet uden opholdsgrundlag. I december 1999 blev klageren idømt 90 dages fængsel for et voldeligt overfald. I maj 2003 indrejste klagerens ægtefælle og børn i Norge og søger asyl. Klagerens ægtefælle og børn blev alle meddelt afslag på asyl. I 2003 og 2005 blev klageren dømt for at have kørt for stærkt og uden kørekort og udvist af opholdslandet med indrejseforbud i fem år. Hverken klageren eller familien udrejste og parret fik endnu et barn, der led af alvorlig autisme. Det var i sagen oplyst, at klageren var den af forældrene, der var bedst til at varetage det yngste barns særlige behov. På baggrund af det yngste barns diagnose valgte de nationale myndigheder i 2008 at give klagerens ægtefælle og alle tre børn opholdstilladelse. De nationale myndigheder lagde i den forbindelse vægt på, at ægtefællen og børnene på daværende tidspunkt havde haft et længerevarende ophold i opholdslandet. De nationale myndigheder fastholdt dog fortsat beslutningen om ikke at meddele klageren opholdstilladelse. Sagen blev behandlet ved tre nationale domstole, hvor den nationale højesteret fandt, at et afslag på opholdstilladelse til klageren ikke var en krænkelse af artikel 8, da han kunne udøve sit familieliv på besøgsophold.

EMD udtalte i præmis 81-99:

"*81. On the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012): [citat af præmis 68-70 i Nunez-dommen, red.]*

82. The Court observes that the Immigration Appeals Board, upholding on 2 March 2007 the Directorate of Immigration's decision of 2 November 2006, had imposed the disputed expulsion and the prohibition on re-

entry on the first applicant in view of the gravity of his violations of the Immigration Act (see paragraph 17 above). Thereafter, on 28 February 2008, the Board had granted the second applicant, with the children, a residence- and work permit under section 8(2) of the Immigration Act 1988, attaching decisive weight on new information concerning the daughter's health together with the length of the children's residence in Norway (four years and nine months in the case of the sons, see paragraph 23 above). On 7 April 2008, as a consequence of these residence permits to the remainder of the family, the Board altered its decision of 2 March 2007 prohibiting the first applicant to return to Norway indefinitely so as to limit the duration of the prohibition to five years (see paragraphs 27 to 28 above). The question arises whether the first applicant's expulsion with a prohibition on re-entry for five years failed to strike a proper balance between the applicants' right to respect for family life, on the one hand, and the public interest in ensuring efficient immigration control, on the other hand.

83. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act (see paragraphs 26, 32 and 42 above). Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Antwi, cited above, § 90; Nunez, cited above, § 71, and Darren Omoregie and Others, cited above, § 67; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Antwi, Nunez and Darren Omoregie and Others, cited above, ibid.). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Antwi, cited above, § 90; Nunez, cited above, § 73).

84. Furthermore, the first applicant had grown up in Turkey, where he had spent his formative years and many years of adulthood before leaving in 1995 at the age of twenty-nine. He had no links to Norway when he arrived in 1998. The links that he had established there since could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country.

85. Like the first applicant, the second applicant had grown up in Turkey, where she had founded a family with the first applicant in the early 1990s before arriving in Norway in May 2003 at the age of twenty-seven. Although she had obtained a residence permit in Norway in January 2008, there was no particular obstacle preventing her from accompanying the first applicant and resettling in their country of origin.

86. Also their two sons, the third and fourth applicants, were born in Turkey, respectively in 1993 and 1995. They had spent most of their childhood years in that country before they arrived with their mother in Norway in May 2003. Weighty immigration policy considerations in any event militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that the parents exploit the situation of their children in order to secure a residence permit for themselves and for the children (see Butt v. Norway, no. 47017/09, § 79, 4 December 2012). Their family life had continued in Norway at a time when both their parents were aware that their immigration status in the country was such that the persistence of that family life would be precarious. Although their links to Norway appear to have been stronger than those to Turkey and they might have faced certain difficulties in integrating into normal life in Turkey, there were

no insurmountable obstacles in the way of them accompanying the first applicant in returning to Turkey in July 2011.

87. Similar considerations apply to the daughter, the fifth applicant, who was born in Norway in 2005, who was at an adaptable age and whose health problems did not seem to constitute a hindrance to hers accompanying the remainder of the family if resettling in Turkey (see paragraphs 27 and 45 above). In this regard, it may be reiterated that a decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling (see N. v. the United Kingdom [GC], no. 26565/05, §§ 32-51, ECHR 2008; compare D. v. the United Kingdom, 2 May 1997, §§ 53-54, Reports of Judgments and Decisions 1997-III). However, that does not appear to have been the situation in this case.

88. The Court will nonetheless consider whether the removal of the first applicant from Norway was incompatible with Article 8 of the Convention on account of exceptional circumstances pertaining in particular to the best interests of the youngest child (see Nunez, cited above, §§ 78 and 84; Antwi, cited above, §§ 100-101; Butt, cited above § 79).

89. In this connection, it is to be noted that in granting, on 28 February 2008, the second applicant, with the children, for one year a renewable residence- and work permit under section 8(2) (according to which such a permit could be granted if warranted by weighty humanitarian considerations or particular links to the country) of the Immigration Act 1988, the Board attached decisive weight to new information concerning the daughter's health together with the length of the children's residence in Norway (at that time four years and nine months in the case of the sons) and set as a condition that the mother continued to live in Norway.

90. Further details on the subject of the daughter were set out in the judgment of the High Court which found that the daughter's chronic and very serious degree of child autism and need for follow-up would affect the other family members strongly in the years to come and entail a burden on them far beyond the normal level. Her functional incapacity meant that she would always be dependent on her parents' resources. Her mother was exhausted and had a marginal level of functioning. It was the father who activated the daughter on a daily basis and she was particularly attached to him. Should he be expelled it was likely that the disturbance to her development would be aggravated and would cause a further burden to the mother, to the brothers and to others who assumed responsibilities for her (see paragraph 35 above).

91. The Supreme Court did not specifically disagree with the above-mentioned assessment but noted that, whilst the High Court had relied on the consideration that the daughter was suffering from a chronic and serious degree of child autism, the first applicant had submitted a medical statement of 27 October 2010 from which it appeared that her current diagnosis was "unspecified far-reaching developmental disturbance". She would not be able during her father's five year ban on reentry to receive any assistance from him in Norway and family contacts would then instead be maintained through visits in Turkey. However, his expulsion would not in the Supreme Court's view mean that she would be brought to bear an "extraordinary burden" (see paragraph 45 above).

92. The Court will not for the purposes of its examination of the present application pronounce any view on the appropriateness of the grant of a residence permit to the first applicant's wife and children, but notes that

the grounds pertaining to the fifth applicant were of a kind that the Norwegian immigration authorities were prepared to regard as covered by the statutory criterion of "weighty humanitarian considerations" (see paragraph 23 above). In the present context it suffices to reiterate that the decisive criterion according to the Court's case-law is whether there were exceptional circumstances (see paragraph 81 above).

93. In view of the above, in particular the High Court's assessment – with which the Supreme Court did not specifically disagree – regarding the adverse consequences of the measure for the youngest child (see paragraphs 90 and 91 above), the Court considers that the expulsion of the first applicant father with a five-year re-entry ban constituted a very far-reaching measure especially vis-à-vis her.

94. The Court has taken note of the first applicant's criminal conviction by the District Court on 7 December 1999 for aggravated assault. Whilst the nature of the offence was serious, the extent of injury caused on the victim had not been great and the latter's provocation was a factor taken into account in mitigation of the applicant's sentence – 90 days' imprisonment, of which 60 days were suspended. Although the said judgment was transmitted to the Directorate of Immigration for consideration of whether there was a ground for ordering his expulsion on 5 May 2000 the authorities took no specific measures to deport him for about six years (see below). In the Court's view, bearing also in mind that the first applicant had not reoffended since, apart from a few minor traffic offences (see paragraph 13 and 26 above), his conviction is not in itself a factor that ought to carry significant weight in the instant case (see Butt, cited above, § 89).

95. Moreover, in contrast to a number of comparable cases dealt with by the Court (see, for example, Darren Omoregie and Others, cited above, § 64 with further references), the applicant parents in the case now under review had established their family life primarily in their country of origin well before arriving in the respondent State (see paragraphs 6 to 8 above) and could not therefore be reproached for having confronted the authorities with a fait accompli (see, mutatis mutandis, Butt, cited above, § 82; and Rodrigues da Silva and Hoogkamer, § 43). They were nonetheless aware that after settling in Norway their family life there would become precarious due to their immigration status. Indeed, as already stated above, Article 8 of the Convention does not entail a general obligation for a Contracting Party to the Convention to respect immigrants' choice of country of residence and to authorise family reunion in its territory. However, in view of the long duration of the period that lapsed from 1999-2000 until the Immigration Appeals Board's warning to the first applicant on 31 October 2006 (see paragraphs 11 to 13 above), the Court is not persuaded that the impugned measure to any appreciable degree fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures (see Nunez, cited above, § 82; compare Antwi, cited above, § 102). It may further be noted that shortly after the warning, the Board decided – on 8 November 2006 – to stay the implementation of his expulsion pending the City Court's judgment in his case, which was delivered some two years and a half later, on 23 April 2009 (see paragraphs 19 and 29 above).

96. The Court also finds it significant that in the meantime, in January 2008, the wife and the couple's three children had been granted a residence permit, by which time the family had lived united in Norway for more than four and a half years (see paragraph 23 above). She obtained this permit in spite of having lived in Norway unlawfully for an important period, for nearly three years from the Immigration Appeals Board's final rejection on 25 February 2005 of her May 2003 asylum request (see paragraph 14 above), until the Board in January 2008 decided to grant a residence- and work permit to her with the children (see paragraph 23 above). It is true that the husband's unlawful residence in the country had been considerably longer, and that for periods he also worked there unlawfully. However, considering especially the immigration authorities'

unexplained inactivity practically for the entire period of his illegal stay in Norway, the Court is not convinced that these offences against the national immigration rules, by reason of their nature and degree, meant that the interests of the respondent State in ensuring efficient immigration control weighed more heavily in respect of the first applicant than they did for the second applicant so as to justify a differentiation between the parents for the purposes of the present proportionality assessment.

97. Thus, like in Nunez (cited above, § 79), the child in question in the present instance had strong bonds to both her mother and her father, albeit that she may have devoted more time than he in looking after the children at home because he was working as the family's only bread-winner outside the home. Moreover, as indicated above, her parents had founded their family primarily in their country of origin well before arriving in Norway rather than in a situation of unlawful residence. When the first applicant was expelled in July 2011, the family had lived united in the country for nearly eight years. The competent authorities expected that the family would be split as a result of the expulsion, at least temporarily for the five years period during which the first applicant was prohibited from re-entering the country and the youngest child was prevented from seeing him other than by visiting him Turkey (see paragraphs 27 and 45 above). However, in as much as the measure deprived her of the care she needed from her father it does not appear to have been accompanied by reasons that were sufficient to show that the disputed interference was necessary within the meaning of paragraph 2 of Article 8.

98. Having regard to all of the above considerations, notably the youngest child's long-lasting and close bonds to her father, her special care needs and the long period of inactivity before the immigration authorities issued a warning to the first applicant and took their decision to order his expulsion with a re-entry ban, the Court is not convinced in 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. The Court is therefore not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between, on the one hand, the first applicant's need to be able to remain in Norway in order to maintain his contact with his daughter in her best interest (see Nunez, § 84) and, on the other hand, its public interest in ensuring effective immigration control – namely, according to the Government, 'the interests of ... the economic well-being of the country' and 'the prevention of disorder or crime'.

99. Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban entailed a violation of Article 8 of the Convention."

I sagen *Jeunesse v. the Netherlands (2014)* var klageren indrejst i opholdslandet på et visum fra en tidligere hollandsk koloni og havde giftet sig med en statsborger i opholdslandet. Hun blev i landet efter udløbet af sit visum og fik med sin ægtefælle tre børn, som alle var statsborgere i opholdslandet. Klageren søgte flere gange om opholdstilladelse, hvilket hver gang blev afslået, da klageren som udgangspunkt skulle søge fra hjemlandet. Efter 16 års ophold blev klageren forsøgt udsendt fra opholdslandet under henvisning til, at hun ikke havde et lovligt opholdsgrundlag. Børnene var på tidspunktet for Storkammerets afgørelse 14, knap ni og knap fire år.

EMD udtalte i præmis 105, at:

"As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – albeit in the applicant's case after numerous applications for a residence permit and many years of actual

residence – are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with Article 8 cannot be transposed automatically to the situation of the applicant. Rather, the question to be examined in the present case is whether, having regard to the circumstances as a whole, the Netherlands authorities were under a duty pursuant to Article 8 to grant her a residence permit, thus enabling her to exercise family life on their territory. The instant case thus concerns not only family life but also immigration. For this reason, the case at hand is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation under Article 8 of the Convention (see Ahmut v. the Netherlands, 28 November 1996, § 63, Reports of Judgments and Decisions 1996-VI). As regards this issue, the Court will have regard to the following principles as stated most recently in the case of Butt v. Norway (no. 47017/09, § 78 with further references, 4 December 2012)."

EMD udtalte i præmis 113-123, at:

"113. The Court reiterates that the applicant's presence in the Netherlands has been irregular since she outstayed the 45-day tourist visa granted to her in 1997. It is true that at that time admission to the Netherlands was governed by the Aliens Act 1965 but the applicant's situation – in view of the reason why her request for a residence permit of 20 October 1997 was not processed (see paragraph 14 above) – is governed by the Aliens Act 2000. Having made numerous attempts to secure regular residence in the Netherlands and having been unsuccessful on each occasion, the applicant was aware – well before she commenced her family life in the Netherlands – of the precariousness of her residence status.

114. Where confronted with a fait accompli the removal of the nonnational family member by the authorities would be incompatible with Article 8 only in exceptional circumstances (see paragraph 108 above). The Court must thus examine whether in the applicant's case there are any exceptional circumstances which warrant a finding that the Netherlands authorities failed to strike a fair balance in denying the applicant residence in the Netherlands.

115. The Court first and foremost takes into consideration the fact that all members of the applicant's family with the exception of herself are Netherlands nationals and that the applicant's spouse and their three children have a right to enjoy their family life with each other in the Netherlands. The Court further notes that the applicant held Netherlands nationality at birth. She subsequently lost her nationality when Suriname became independent. She then became a Surinamese national, not by her own choice but pursuant to Article 3 of the Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality (see paragraph 62 above). Consequently, her position cannot be simply considered to be on a par with that of other potential immigrants who have never held Netherlands nationality.

116. The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for more than sixteen years and that she has no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Netherlands authorities, while she repeatedly submitted residence requests and awaited the outcome of appeals. The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and

develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities.

117. Thirdly, the Court accepts, given the common background of the applicant and her husband and the relatively young age of their children, that there would appear to be no insurmountable obstacles for them to settle in Suriname. However, it is likely that the applicant and her family would experience a degree of hardship if they were forced to do so. When assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family.

118. The Court fourthly considers that the impact of the Netherlands authorities' decision on the applicant's three children is another important feature of this case. The Court observes that the best interests of the applicant's children must be taken into account in this balancing exercise (see above § 109). On this particular point, the Court reiterates 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 (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. For that purpose, in cases concerning family reunification, the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents (see Tuquabo-Tekle and Others v. the Netherlands, cited above, § 44).

119. Noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation. In this connection, the Court observes that the applicant's husband provides for the family by working full-time in a job that includes shift work. He is, consequently, absent from the home on some evenings. The applicant – being the mother and homemaker – is the primary and constant carer of the children who are deeply rooted in the Netherlands of which country – like their father – they are nationals. The materials in the case file do not disclose a direct link between the applicant's children and Suriname, a country where they have never been.

120. In examining whether there were insurmountable obstacles for the applicant and her family to settle in Suriname, the domestic authorities had some regard for the situation of the applicant's children (see paragraphs 23 (under 2.19 and 2.21), 28 and 34 (under 2.4.5) above). However, the Court considers that they fell short of what is required in such cases and it reiterates that national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any such removal in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (see above § 109). The Court is not convinced that actual evidence on such matters was considered and assessed by the domestic authorities. Accordingly, it must conclude that insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit.

121. The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. 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.

122. The Court, whilst confirming the relevant principles set out above (see paragraphs 106-109), finds that, on the basis of the above considerations (see paragraphs 115-120) and viewing the relevant factors cumulatively, the circumstances of the applicant's case must be regarded as exceptional. Accordingly, the Court concludes that a fair balance has not been struck between the competing interests involved. There has thus been a failure by the Netherlands authorities to secure the applicant's right to respect for her family life as protected by Article 8 of the Convention.

123. There has accordingly been a violation of Article 8 of the Convention."

5.3.2.5.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Berrehab. v. the Netherlands (1988)* opnåede klageren en opholdstilladelse på baggrund af ægteskab med en hollandsk statsborger. Parret fik en datter. Da klageren efterfølgende blev skilt fra sin ægtefælle, nægtede de nationale myndigheder at forlænge hans opholdstilladelse, da denne var betinget af et bestående ægteskab. Klageren havde opholdt sig i hjemlandet de første 25 år af sit liv og havde derefter opholdt sig 11 år i opholdslandet. Klagerens datter var på tidspunktet for EMD's afgørelse ni år gammel.

EMD udtalte i præmis 20-21, at:

"20. The applicants asserted that the applicability of Article 8 (art. 8) in respect of the words 'right to respect for ... private and family life' did not presuppose permanent cohabitation. The exercise of a father's right of access to his child and his contributing to the cost of education were also factors sufficient to constitute family life. The Government challenged that analysis, whereas the Commission agreed with it.

21. The Court likewise does not see cohabitation as a sine qua non of family life between parents and minor children. It has held that the relationship created between the spouses by a lawful and genuine marriage - such as that contracted by Mr. and Mrs. Berrehab - has to be regarded as 'family life' (see the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 32, § 62). It follows from the concept of family on which Article 8 (art. 8) is based that a child born of such a union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to 'family life', even if the parents are not then living together.
Subsequent events, of course, may break that tie, but this was not so in the instant case. Certainly Mr. Berrehab and Mrs. Koster, who had divorced, were no longer living together at the time of Rebecca's birth and did not resume cohabitation afterwards. That does not alter the fact that, until his expulsion from the Nether-

lands, Mr. Berrehab saw his daughter four times a week for several hours at a time; the frequency and regularity of his meetings with her (see paragraph 9 in fine above) prove that he valued them very greatly. It cannot therefore be maintained that the ties of 'family life' between them had been broken."

EMD udtalte i præmis 28-29, at:

"28. In determining whether an interference was "necessary in a democratic society", the Court makes allowance for the margin of appreciation that is left to the Contracting States (see in particular the W v. the United Kingdom judgment of 8 July 1987, Series A no. 121-A, p. 27, §60 (b) and (d), and the Olsson judgment of 24 March 1988, Series A no. 130, pp. 31-32, § 67).

In this connection, it accepts that the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens. According to the Court's established case-law (see, inter alia, the judgments previously cited), however, "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.

29. *Having to ascertain whether this latter condition was satisfied in the instant case, the Court observes, firstly, that its function is not to pass judgment on the Netherlands' immigration and residence policy as such. It has only to examine the interferences complained of, and it must do this not solely from the point of view of immigration and residence, but also with regard to the applicants' mutual interest in continuing their relations. As the Netherlands Court of Cassation also noted (see paragraph 16 above), the legitimate aim pursued has to be weighed against the seriousness of the interference with the applicants' right to respect for their family life. As to the aim pursued, it must be emphasised that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr. Berrehab already had real family ties there - he had married a Dutch woman, and a child had been born of the marriage. As to the extent of the interference, it is to be noted that there had been very close ties between Mr. Berrehab and his daughter for several years (see paragraphs 9 and 21 above) and that the refusal of an independent residence permit and the ensuing expulsion threatened to break those ties. That effect of the interferences in issue was the more serious as Rebecca needed to remain in contact with her father, seeing especially that she was very young. Having regard to these particular circumstances, the Court considers that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society. It thus concludes that there was a violation of Article 8 (art. 8)."*

Se om vurderingen af barnets tarv i en sag, hvor barnets mor blev udvist og hendes opholdstilladelse inddraget under henvisning til den nationale sikkerhed Trapitsyna and Isaeva v. Hungary (2024).

5.3.2.5.6. Familiesammenføring med udlændinge, der har børn med lovligt ophold i opholdslandet

Der er ved gennemgangen af praksis ikke fundet domme, hvor EMD har taget stilling til betydningen af barnets tarv for så vidt angår børn med lovligt ophold i opholdslandet i sager om familiesammenføring.

5.4. Andre familierelationer

EMD har i flere domme taget stilling til, om forholdet mellem et barn og andre nærtstående end barnets forældre udgjorde "familieliv" i EMRK artikel 8's forstand.

5.4.1. Forholdet mellem bedsteforældre og børnebørn

Det fremgår af Jon Fridrik Kjølbros bog "Den Europæiske Menneskerettighedskonvention for praktikere" (2020), side 879, at:

"*Konventionens familiebegreb omfatter ikke kun forholdet mellem ægtefæller eller samlevende og mellem forældre og børn, men også andre forhold mellem nærtstående. Bedsteforældre kan f.eks. have et familieliv i forhold til børnebørn, der har boet sammen med bedsteforældrene. I forhold til børn/børnebørn nyder bedsteforældrenes ret til familieliv mindre beskyttelse end forældrenes ret, og bedsteforældrenes rettigheder vedrører navnlig samvær og kontakt, der i almindelighed finder sted med forældrenes accept*."

Tilsvarende fremgår det af Guiden, punkterne 382-384, at:

"382. The Court has stated that family life includes at least the ties between near relatives, for in-stance those between grandparents and grandchildren, since such relatives may play a considerable part in family life (Marckx v. Belgium, § 45; Bronda v. Italy, § 51; T.S. and J.J. v. Norway (dec.), § 23). The right to respect for family life of grandparents in relation to their grandchildren primarily entails the right to maintain a normal grandparent-grandchild relationship through contact between them (Kruškić v. Croatia (dec.), § 111; Mitovi v. the Former Yugoslav Republic of Macedonia, § 58). However, the Court considers that contact between grandparents and grandchildren normally take place with the agreement of the person who has parental responsibility, which means that access of a grandparent to his or her grandchild is normally at the discretion of the child's parents (Kruškić v. Croatia (dec.), § 112). Where a grandmother took care of her grandchild since her birth, and be-haved in all respects like her mother, the Court has accepted that the relationship between the applicant and her granddaughter was in principle of the same nature as the other family relationships protected by Article 8 (Terna v. Italy, § 64). The Court found that the failure to facilitate the applicant grandmother's right to contact, after the child was removed from her care, violated her right to re-spect for her "family life". Although the Court accepted that there were concerns about the risk of child abduction, it nevertheless found that the authorities had not made adequate and sufficient efforts to enforce the applicant's rights (§§ 72-76).

383. In Petithory Lanzmann v. France (dec.) the Court held that Article 8 does not grant a right to become a grandparent (§ 20).

384. The principle of mutual enjoyment by parent and child of each other's company also applies in cases involving relations between a child and its grandparents (L. v. Finland, § 101; Manuello and Nevi v. Italy, §§ 54, 58-59, as concerns a suspension of grandparents' contact rights with grand-daughter). Particularly where the natural parents are absent, family ties have been held to exist be-tween uncles and aunts and nieces and nephews (Butt v. Norway, §§ 4 and 76; Jucius and Juciuvienė v. Lithuania, § 27). However, in normal circumstances the relationship between grandparents and grandchildren is different in nature and degree from the

relationship between parent and child and thus by its very nature generally calls for a lesser degree of protection (Kruškić v. Croatia (dec.), § 110; Mitovi v. the Former Yugoslav Republic of Macedonia, § 58).”

I sagen *Marckx v. Belgium (1979)* udtalte EMD i præmis 45, at:

”In the Court’s opinion, ‘family life’, within the meaning of Article 8 (art. 8), includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life.
‘Respect’ for a family life so understood implies an obligation for the State to act in a manner calculated to allow these ties to develop normally (see, mutatis mutandis, paragraph 31 above). […]”

I sagen *Bronda v. Italy (1998)* blev klagerens barnebarn i en alder af fem år tvangsanbragt uden for hjemmet, da barnets mor havde psykiske problemer. Barnet havde hidtil boet sammen med sin mor hos sine bedsteforældre. Klageren ønskede, at barnet skulle hjemgives.

EMD udtalte i præmis 51, at:

”The Court recalls that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8. That principle applies, too, in cases like the present one in which the Court is concerned with the relations between a child and its grandparents, with whom it had lived for a time. It has not been contested that a failure to return the child to its original home clearly amounts to an interference with the applicants’ right to respect for their family life, as guaranteed by Article 8 § 1.”

EMD konkluderede i præmis 55*:*

"The Court observes that, as the Government and the Commission submitted, the provisions concerned were applied in order to protect the child and there is no reason to consider that, as the applicants alleged, the domestic courts relied on them with the aim of estranging S. from her original family. On the contrary, the wording of the decisions in issue clearly shows that the judges were guided by what was in S.’s interest and necessary to ensure her mental development.

Consequently, the interference pursued a legitimate aim, namely the protection of the rights and freedoms of others, in accordance with paragraph 2 of Article 8."

I sagen *L. v. Finland (2000)* blev to børn i en alder af syv og et år tvangsanbragt uden for hjemmet på grund af mistanke om seksuelt misbrug. Børnene blev anbragt i en plejefamilie. Forældrene blev bevilget to-tre timers overvåget samvær, men dette blev nægtet bedsteforældrene, da myndighederne på baggrund af bedsteforældrenes opførsel vurderede, at det ville forstyrre børnenes liv i plejefamilien.

EMD udtalte i præmis 101, at:

"The Court recalls that the mutual enjoyment by parent and child, as well as by grandparent and child, of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention (see, among others, the Johansen v. Norway judgment of 7 August 1996, Reports of Judgments and Decisions 1996-III, § 52). The impugned measures, as was not disputed, evidently amounted to interference with the applicants' right to respect for their family life as guaranteed by paragraph 1 of Article 8 of the Convention. Such interference constitutes a violation of this Article unless it is 'in accordance with the law', pursues an aim or aims that are legitimate under paragraph 2 of Article 8 and can be regarded as 'necessary in a democratic society'."

EMD udtalte i præmis 126-128, at:

"126. The Government emphasised that in the child psychiatric examinations the attitude and the reactions of P. to the contacts with the applicant father and the applicant grandfather had consistently been similar with those described in the documents of the social welfare authorities concerning restrictions of the right of access. S., who was 8 years old, had recently been heard concerning her wishes about the contacts with her parents and other relatives. She had considered that the number of visits of her father should not be increased, but that the quality of these visits could be improved. She did not want to see the parents of her father at all.

127. In determining whether the impugned measures could be regarded as 'necessary in a democratic society', the Court recalls the abovementioned considerations (see § 118 above). The Court notes that in the period between 8 June 1993 and 31 December 1994 the applicant father seems to have met the children altogether seven times. While originally only five meetings were envisaged for the whole year of 1995, the County Administrative Court, upon the applicant father's appeal, increased the meetings by ordering, on 25 April 1995, that from 1 May to 31 December 1995 the applicant father could see the children once a month in their foster home. He met them once a month also in 1996. This increase of the meetings, however, seems to have met with the resistance of P. who expressed the wish of not having to meet her father so often. This in turn led the authorities to organise a child psychiatric examination in which P. told that she had been subjected to sexual abuse. After this, the Social Welfare Board restricted the applicant father's access to the children so that he could see them in their foster family four times in both 1997 and 1998. The decision was upheld by the County Administrative Court. The Court notes that while the applicant father's access has been considerably restricted, he has been able to meet the children regularly. Moreover, his right to see the children was increased by the County Administrative Court in 1995, only to be decreased again in the light of the child psychiatric examination suggesting sexual abuse of P. While such abuse has never been confirmed by a judicial finding, the Court concludes that the children's interest made it justifiable for the Finnish authorities to reduce the right of access of the applicant father. In these circumstances the decisions concerning the applicant father's access can be regarded as fulfilling the principle of proportionality and therefore as necessary in a democratic society. The applicant grandfather has been suspected of the sexual abuse of P. since the children were taken into care. Both children, P. and S., have later indicated that they do not wish to meet him at all. The applicant grandfather indeed has been denied any access to the children. While this restriction is very drastic even in case of a child/ grandparent relationship, the Court accepts that in the circumstances of the present case the national authorities could reasonably consider that restriction to be necessary in a democratic society.

128. In view of the reasons set out in paragraphs 126 and 127 above, the Court thus considers that the national authorities acted within the margin of appreciation afforded to them in such matters. The Court is also satisfied that the appeals which were open to the applicants before the County Administrative Court met the conditions of Article 13 of the Convention. Accordingly, these measures did not constitute a violation of Articles 8 and 13 of the Convention."

I sagen *Bogonosovy v. Russia (2019)* udtalte EMD om forholdet mellem bedsteforældre og børnebørn i præmis 79-86:

"79. The Court reiterates that there may be "family life" within the meaning of Article 8 of the Convention between grandparents and grandchildren where there are sufficiently close family ties between them. While cohabitation is not a prerequisite, as close relationships created by frequent contact also suffice, relations between a child and his or her grandparents with whom he or she had lived for a time will normally be considered to fall within that category (see Kruškić v. Croatia (dec.), no. 10140/13, § 108, 25 November 2014).

80. In the present case the second applicant had been taking care of his granddaughter M. for five years from May 2008, when she had moved in with him together with her mother at age one year and eight months, through her mother's serious illness and death in April 2011, and until July 2013, when the girl moved out to live with her future adoptive parents Mr and Ms Z. He had also been M.'s guardian between May 2011 and December 2013. The Court is satisfied that there was family life between the second applicant and the child within the meaning of Article 8 of the Convention. This has not been disputed by the parties.

81. The Court will next examine whether there has been a failure to respect the second applicant's family life.

82. The Court notes that where the existence of a family tie has been established, the State must in principle act in a manner calculated to enable that tie to be maintained. The relationship between grandparents and grandchildren is different in nature and degree from the relationship between parent and child and thus by its very nature generally calls for a lesser degree of protection. The right to respect for family life of grandparents in relation to their grandchildren primarily entails the right to maintain a normal grandparent-grandchild relationship through contact between them, even though that contact normally takes place with the agreement of the person who has parental responsibility (see Mitovi v. the former Yugoslav Republic of Macedonia, no. 53565/13, § 58, 16 April 2015).

83. The Court is mindful, however, that the adoption terminates the legal relationship between the child and his or her natural parents and family of origin and, therefore, the Convention obligation to enable the family tie to be maintained will necessarily change (see paragraph 54 above).

84. The Court observes that in the present case the issue of post-adoption contact, thus the issue of whether a family tie between the second applicant and his granddaughter should be maintained after her adoption was not examined as such by the domestic courts in the course of the adoption proceedings.

85. The Court notes that the Government acknowledged that there had been an interference with the second applicant's right to respect for his family life within the meaning of Article 8 § 1 of the Convention in connection with the termination of family ties with his granddaughter after her adoption.

86. The Court reiterates that an interference breaches Article 8 unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is, in addition, "necessary in a democratic society" to achieve those aims. The Court will therefore proceed with examining whether the interference in question was carried out in accordance with the law."

Efter at have gennemgået adoptionsprocedurerne og adoptionssagsforløbet i den konkrete sag, udtalte EMD i præmis 92-95:

"92. Having regard to the foregoing, a question arises as to whether the domestic law governing the issue of post-adoption contact between the adopted child and his or her relatives was clear enough and foreseeable in its application in so far as it did not expressly provide that the rights of relatives of the adopted child were transferred to the adoptive parents or otherwise ceased on adoption, unless an application by relatives had been made in the course of the adoption proceedings for continued relations, including contact, and specific provision made for them to this effect in the adoption judgment.

93. Presuming, however, that this was implied in the relevant provisions of the domestic law (see paragraph 88 above), once the second applicant's request for restoration of the procedural time-limit for lodging his appeal against the adoption judgment had been granted by the District Court it was then for the City Court dealing with the second applicant's appeal to examine the issue of whether he should have post-adoption contact with the child, in particular by deciding whether this corresponded to the child's interests, and if so, to include the relevant provision in the operative part of the adoption judgment. Instead the City Court upheld the adoption judgment and led the second applicant to believe that it was open to him to have the issue of his post-adoption contact with his granddaughter settled after the termination of the adoption proceedings pursuant to the procedure provided by Article 67 of the Family Code. In reality, though, no such remedy was available to him because, as the City Court and the District Court found in the Article 67 proceedings, in the absence of a specific provision as to continued post-contact in the adoption judgment, no application for contact could be made.

94. Thus, as a result of the way the City Court interpreted and applied the relevant provisions of domestic law in the re-opened adoption proceedings, the second applicant was entirely and automatically excluded from his granddaughter's life after her adoption even though the issue of post-adoption contact was before the City Court.

95. Having regard to the foregoing and proceeding on the assumption of sufficient clarity of domestic law governing the subject of post-adoption contact between the adopted child and his or her relatives, the Court considers that the failure of the City Court to examine the merits of the issue of the second applicant's post-adoption contact with his granddaughter amounted to disrespect for the second applicant's family life. There has accordingly been a violation of Article 8 of the Convention."

5.4.2. Forholdet mellem onkler/tanter og niecer/nevøer

Det fremgår af Guiden, punkt 380, at:

"380. Family life can also exist between siblings (Moustaquim v. Belgium, § 36; Mustafa and Ar-mağan Akın v. Turkey, § 19) and aunts/uncles and nieces/nephews (Boyle v. the United Kingdom, §§ 41-47). However, the traditional approach is that close relationships short of family life generally fall within the scope of private life (Znamenskaya v. Russia, § 27 and the references cited therein)."

I sagen *X. v. the Federal Republic of Germany (1968)* havde faren til to børn pålagt klageren (børnenes onkel) at opdrage børnene. Børnene havde aldrig boet hos klageren.

Kommissionen udtalte, at:

"Whereas, as in his previous application, the applicant first complains generally that, although being the uncle of the two children and having been specifically entrusted with their education by their father, Abad X., he was not awarded guardianship over them; whereas the Commission has examined this complaint under Article 8 (Art. 8) of the Convention which guarantees everyone the right to respect for the family life; whereas, in order that this provision should be applicable, it must be shown that such a link existed between the applicant and the two children as can be considered to establish family life within the meaning of Article 8 (Art. 8); whereas the Commission finds that, in the circumstances of the present case, the relationship between the uncle and nephew and niece cannot be said to amount to such a link; whereas in this respect it is particularly observed that the applicant and his brother's children are not, and have not been, living together in the same household; Whereas in these circumstances the decision concerning the guardianship of the children did not affect the applicant's family life within the meaning of Article 8 (Art. 8); whereas consequently there is no appearance of a violation of Article 8 (Art. 8);"

I sagen *Boyle v. the United Kingdom (1993)* havde klageren siden sin nevøs fødsel set ham næsten dagligt, ligesom nevøen ofte havde overnattet hos klageren i weekenderne. Da klagerens nevø var ni år gammel, blev han anbragt uden for hjemmet på grund af mistanke om seksuelle overgreb i hjemmet. Klageren søgte og fik samvær med sin nevø, da det blev vurderet, at klageren havde fungeret som en faderfigur for barnet. Samværet blev imidlertid kort tid efter indstillet, da klageren fortsat benægtede, at der havde fundet seksuelle overgreb sted i nevøens hjem.

Kommissionen udtalte i præmis 41-47, at:

"41. The Commission has first examined whether the relationship which the applicant enjoyed with his nephew M. falls within the scope of 'family life' as protected by the above provision.

42. The applicant submits that he enjoyed a very close relationship with M. and that as a result of the absence of C.'s father, he was in effect a 'father figure' to the boy. The Government submit that the applicant and C. have never co-habited and that the bonds of the uncle-nephew relationship are insufficient in themselves to constitute 'family life'.

43. The Court in the Marckx case stated that 'family life' within the meaning of Article 8 (Art. 8) includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relations may play a considerable part in family life (Eur. Court H.R., Marckx judgment of 13 June 1979, Series A no. 31 p. 21 para. 45). In the Commission's view, cohabitation is however not a prerequisite for the maintenance of family ties which are to fall within the scope of the concept of 'family life'. Cohabitation is a factor amongst many others, albeit often an important one, to be taken into account when considering the existence or otherwise of family ties (see eg. No. 12402/86, Dec. 9.3.88, D.R. 55 p. 224-234).

44. The Commission recalls in this case that the applicant had frequent contact with C. from the time of C.'s birth and spent considerable time with him. While it appears the two families did not share the same household, they lived in close proximity and C. often made 'weekend stays' at the applicant's home. The Commission further notes that the guardian ad litem in the care proceedings described the applicant as a 'good father figure' to C.

45. In these circumstances, and having regard to the absence of C.'s father, the Commission finds there was a significant bond between the applicant and C., and that this relationship fell within the scope of the concept of 'family life'.

46. Where a parent is denied access to a minor child take into care, there is in general an interference with the parent's right to respect for family life as protected by Article 8 para. 1 (Art. 8-1) of the Convention. This however is not necessarily the case where other close relatives are concerned (No. 12402/86, loc. cit. at p. 234). Access by relatives to a child is normally at the discretion of the child's parents and, where a care order has been made in respect of the child, this control of access passes to the local authority. A restriction of access which does not deny a reasonable opportunity to maintain the relationship will not of itself show a lack of respect for family life.

47. The Commission recalls however with regard to the present applicant that apart from one visit in September 1989, all contact with C. was prohibited thereby preventing any continuance of the applicant's relationship with him. It finds that this amounts to an interference with the applicant's right to respect for his 'family life' as guaranteed by Article 8 para. 1 (Art. 8-1) of the Convention."

I sagen *Lazoriva v. Ukraine (2018)* var klageren blevet udpeget som juridisk værge for sin søsters datter på grund af omsorgssvigt. Datteren, der var vokset op hos sine bedsteforældre, ønskede som 14-årig at bo hos sin mor, da bedsteforældrene flyttede langt væk. Moren fik samtidig en søn, der som helt lille flere gange blev anbragt uden for hjemmet, indtil han til sidst blev bortadopteret. Klageren havde kort tid forinden ansøgt om også at blive nevøens juridiske værge. Klageren havde for EMD anført, at myndighedernes bortadoption af hendes nevø havde bevirket, at der var sket en krænkelse af hendes ret til familieliv med nevøen, jf. EMRK artikel 8. Klageren havde flere gange besøgt nevøen sammen med hans ældre søster og bedsteforældre.

EMD udtalte i præmis 65, at:

"As to the first question, the Court notes that the applicant's argument that she had established a family relationship or ties with her nephew is not supported by sufficient evidence or persuasive arguments. The child had not lived with the applicant and she referred to only one visit that she had paid to him in about five years, between 2007 and 2012 (see paragraph 12 above and compare and contrast with, for instance, Moretti and Benedetti v. Italy, no. 16318/07, §§ 49-50, 27 April 2010, and Harroudj v. France, no. 43631/09, § 46, 4 October 2012; see also Boyle v. the United Kingdom, no. 16580/90, Commission report of 9 February 1993, §§ 41-47, and Zampieri v. Italie (dec.), no, 58194/00, 3 June 2004, where frequent contact between the applicants and their siblings' children and the fact that they had spent numerous weekends and (in the case of Zampieri) part of school holidays together were taken as principal grounds for the Commission and the Court, respectively, to conclude that there were family ties between them). Thus, the applicant's relationship or link with her nephew is not of a kind falling within the concept of 'family life'. Furthermore, as regards her possible intention to establish 'family life' with her nephew by becoming his legal tutor, the Court reiterates that Article 8 does not guarantee the right to found a family."

I sagen *Pormes v. the Netherlands (2020)* , var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Da klageren var 17 år gammel, fandt man ud af, at han ikke havde opholdstilladelse. Han blev efterfølgende nægtet opholdstilladelse under henvisning til gentagen kriminalitet.

EMD udtalte i præmis 45-50:

"45. The Court notes at the outset that it is not in dispute between the parties that the applicant had a private life in the Netherlands. The Court sees no reason to disagree with the parties on this point, given that the applicant lived in the Netherlands from when he was almost four years old until he was 29, that he spoke Dutch fluently, and that he received all his schooling and spent most of his formative years there. It further appears that he took part in everyday life in the same way as his Dutch-national contemporaries (see paragraph 17 above). However the parties' opinion differed as to whether the applicant had a family life to be protected under Article 8 (see paragraphs 40 and 43 above).

46. In accordance with its established case-law, the Court determines the question whether an applicant had "family life" within the meaning of Article 8 in the light of the position when the impugned decision became final (see Maslov v. Austria [GC], no. 1638/03, § 61, ECHR 2008, with further references). In the present case the Court observes that the applicant was 26 years of age when the domestic proceedings came to an end in November 2013 (see paragraph 23 above).

47. The Court has further laid down as a general rule that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties (see, for instance, Konstatinov v. the Netherlands, no. 16351/03, § 52, 26 April 2007, and Z. and T. v. the United Kingdom (dec.), no. 27034/05, ECHR 2006-III). However, it has not insisted on such further elements of dependency in a number of cases concerning young adults who were still living with their

parents and had not yet started a family of their own (see Bouchelkia v. France, 29 January 1997, § 41, Reports of Judgments and Decisions 1997-I; Ezzouhdi v. France, no. 47160/99, § 26, 13 February 2001; Maslov, cited above, §§ 62 and 64; Osman v. Denmark, no. 38058/09, §§ 55-56, 14 June 2011; and Yesthla v. the Netherlands (dec.), no. 37115/11, § 32, 15 January 2019).

48. Even if a person of 26 years of age could still be considered a "young adult", the Court notes that at least in 2011 the applicant was not living full-time with his foster parents anymore (see paragraph 21 above). Moreover, it has not been argued and there is no indication that there are any further elements of dependency between the applicant and his foster parents.

49. The above notwithstanding, the Court deems it not necessary to decide on the question whether or not the ties between the applicant and his foster parents constituted family life within the meaning of Article 8. It reiterates that, in practice, the factors to be examined in order to assess the compatibility with Article 8 of a denial of a right of residence – in so far as those factors are relevant in a particular case – are the same regardless of whether family or private life is engaged (see, mutatis mutandis, A.A. v. the United Kingdom, no. 8000/08, §§ 49 and 57, 20 September 2011).

50. Having regard to the specific circumstances of the present case, the Court considers it appropriate to focus mainly on the aspect of "private life" (see Maslov, cited above, § 63)."

5.4.3. Forholdet mellem søskende

Det fremgår af Guiden, punkterne 380, 381 og 385, at*:*

"380. Family life can also exist between siblings (Moustaquim v. Belgium, § 36; Mustafa and Ar-mağan Akın v. Turkey, § 19) and aunts/uncles and nieces/nephews (Boyle v. the United Kingdom, §§ 41-47). However, the traditional approach is that close relationships short of family life generally fall within the scope of private life (Znamenskaya v. Russia, § 27 and the references cited therein).

381. The Court has recognised the relationship between adults and their parents and siblings as constituting family life protected under Article 8 even where the adult did not live with his parents or siblings (Boughanemi v. France, § 35) and the adult had formed a separate household and family (Moustaquim v. Belgium, §§ 35 and 45-46; El Boujaïdi v. France, § 33).

[…]

385. In more recent jurisprudence, the Court has stated that family ties between adults and their parents or siblings attract lesser protection unless there is evidence of further elements of depend-ency, involving more than the normal emotional ties (Benhebba v. France, § 36; Mokrani v. France, § 33; Onur v. the United Kingdom, § 45; Slivenko v. Latvia [GC], § 97; A.H. Khan v. the United King-dom, § 32)."

I sagen *Z & T v. the United Kingdom (2006)* udtalte EMD om familieliv mellem et voksent søskendepar og deres forældre og mellem søskendeparret og deres søster og bror at:

"The Court notes that the present applicants are adults, with families of their own, and that they were living separately from their parents and siblings when the 2001 attack on the Bahawalpur Church occurred. They continued living in Pakistan for three years after their parents and brother left. In the circumstances the Court discerns no elements of dependency involving more than the normal emotional ties between the applicants and the members of their family now living in the United Kingdom.

It follows that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention."

I sagen *Miah v. the United Kingdom (2010)* udtalte EMD i præmis 16 om familieliv mellem voksne søskende:

"The Court notes that the Asylum and Immigration Tribunal found that the applicant´s deportation would not interfere with either his private or family life in the United Kingdom. It also recalls that in immigration cases it has held that there will be no family life between parents and adult children unless they can demonstrate additional elements of dependence. The same considerations must also apply to adult siblings."

Se tilsvarende sagen *Levakovic v. Denmark (2018)*, præmis 35.

Se om forholdet mellem mindreårige søskende sagen *A.J. v. Greece (2022)*. I denne sag indrejste fire mindreårige søskende på 13, 12, 11 og seks år sammen med deres far i opholdslandet, hvor de alle fik asyl. Børnenes mor opholdt sig fortsat i hjemlandet, hvor hun ventede parrets femte barn. Børnenes far led af epilepsi, havde et alkoholproblem og var voldelig over for børnene, hvorfor de sociale myndigheder i Grækenland traf afgørelse om at anbringe børnene uden for hjemmet. Da de mulige anbringelsessteder var opdelt efter køn og alder, blev de fire søskende adskilt og anbragt forskellige steder, idet klagerens søskende var blevet anbragt i Athen, mens klageren var blevet anbragt i Thessaloniki over 500 km væk.

I forhold til klagernes påstand om, at der var sket en krænkelse af artikel 8 som følge af klageren A.J.'s adskillelse fra sine søskende, udtalte EMD i præmis 79-80:

"79. Noting that the existence of family life in the present case has not been disputed, the Court will proceed to examine whether the applicant's right to respect for his family life has been adequately protected.

80. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There are also positive obligations inherent in effective "respect" for family life. In the context of both negative and positive obligations, regard must be had to the fair balance that has to be struck between the competing interests, and in both contexts the State enjoys a certain margin of appreciation […]."

Herefter udtalte EMD i præmis 82-85, at:

"82. According to the information provided by the Government, the children could not be placed in the same reception facility, as the existing facilities for unaccompanied minors were intended for children of the same sex and were separated into two age groups, 8 to 12 years old and 12 to 18 years old (see paragraph 16 above). The Court does not find it unreasonable that the domestic authorities separated the existing facilities, and therefore accepts that not all the siblings could be accommodated in the same facility for reasons linked to the fact that the establishments were organized according to the age and gender of the children. It thus

remains to be examined whether the placement of the children in facilities in different cities, which seems to be the applicant's main complaint, violated Article 8 of the Convention.

83. In this regard, the Court considers that the decision of EKKA to place the children in reception facilities in different cities constituted an interference with the applicant's right to respect for his family life. Noting that the applicant's complaint mainly focuses on the alleged lack of regular contact with his siblings, rather than their separation and placement in different facilities, the Court deems it appropriate to examine whether the respondent State complied with its positive obligation to ensure such contact between the applicant and his siblings and whether the authorities acted with a view to maintaining and developing their family ties.

84. The Court observes that the applicant's separation from two of his siblings started in December 2017 and that he was separated from all of them in May 2018. This situation lasted until 21 September 2018, when he was transferred to an accommodation facility in Athens (see paragraph 29 above).

85. The Court acknowledges that the ties between members of a family and the prospects of their successful reunification will per force be weakened if impediments are placed in the way of their having easy and regular access to each other. The very placement of the applicant away from his siblings must have adversely affected the possibility of contact between them […]. However, while the applicant's gradual separation from his brothers and sister lasted from December 2017 to 21 September 2018, some nine months in total, he was completely separated from them only for a relatively short period of some four months starting in May 2018. Before the separation the first of the five siblings, his older brother, was also accommodated in a reception facility in Thessaloniki. They could thus more easily maintain a certain family relationship, which certainly attenuated the applicant's situation. In addition, it appears that there was regular contact between the siblings, which was facilitated by the competent authorities and the volunteer hosting the applicant's sister (see paragraph 16 above). The Court does not have information as to how many meetings took place, but from the documents provided to it, it appears that there was at least one visit between 24 and 26 December 2017. It also notes that the placement of the siblings in different cities was regarded as a temporary measure, as shown by the older brother's transfer from Thessaloniki to Athens and the applicant's eventual placement in a facility in Athens and that it appears that in the meantime the authorities facilitated their contact. As soon as the issue of the four siblings' return to the Occupied Palestinian Territory was clarified, the authorities took the necessary steps to achieve the ultimate aim of reuniting the children."

86. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3(a) and 4 of the Convention."

5.5. Tidspunktet for etablering af familielivet (berettiget forventning)

I en række sager, hvor EMD har fundet, at en udsendelse[47] af en udlænding vil indebære et indgreb i retten til familieliv, har EMD inddraget de nærmere omstændigheder ved og særligt tidspunktet for familielivets etablering i sin vurdering af, om indgrebet vil udgøre en krænkelse af EMRK artikel 8.

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323. According to well-established case-law, "in all decisions concerning children their best interests are of paramount importance. (...) It follows that there is an obligation on States to place the best interests of the child, and also those

EMD har således i sagen *Boultif v. Switzerland (2001)*, der angik alvorlig kriminalitet, i præmis 48 som et af de såkaldte Boultif-kriterier angivet *"whether the spouse knew about the offence at the time when he or she entered into a family relationship"*. Udover at henvise til Boultif-kriterierne har EMD i flere domme udtalt:

"Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court's well-established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8."

Der kan herved blandt andet henvises til *Jeunesse v. the Netherlands (2014)*, præmis 108, og *Pormes v. the Netherlands (2020)* , præmis 57, der begge angik ulovligt ophold, samt *Nunez v. Norway (2011)*, præmis 70, der angik opholdstilladelse opnået på baggrund af svig.

EMD's praksis vedrørende indgreb i retten til privat- og/eller familieliv i forbindelse med udsendelse[48] af udlændinge vedrører i vidt omfang sager om udvisning som følge af kriminalitet begået i opholdslandet. Der er således i forbindelse med udarbejdelsen af nærværende notat alene fundet et mindre antal artikel 8-afgørelser om udsendelse af udlændinge, som ikke (primært) vedrører kriminalitet.

5.5.1. Alvorlig kriminalitet

I sagen *Sezen v. the Netherlands (2006)* var den første klager indrejst i opholdslandet som 23-årig og havde fået opholdstilladelse som familiesammenført til sin ægtefælle (den anden klager), som havde boet i opholdslandet siden hun var syv år, og deres fælles barn. Tre år efter indrejsen blev den første klager idømt fire års fængsel for narkotikakriminalitet. Efter løsladelsen genoptog han samlivet med ægtefælle og barn, men fraflyttede senere det fælles hjem i en periode på omkring syv måneder. Knap fire måneder efter genoptagelse af samlivet fik klagerne endnu et barn. Den første klagers opholdstilladelse som familiesammenført blev omkring otte måneder senere nægtet forlænget under henvisning til samlivsafbrydelsen og straffedommen.

EMD udtalte i præmis 43-50, at:

"43. The Court will first consider the nature and seriousness of the offence committed by the first applicant in the present case. It observes in this context that in 1993 he was convicted of a drug offence, namely the possession of large quantities of heroin. As the Court has held on previous occasions, it understands – in view of the devastating effects drugs have on people's lives – why the authorities show great firmness to those who actively contribute to the spread of this scourge (see Baghli v. France, no. 34374/94, § 48, ECHR 1999-VIII). The fact that it concerned a first conviction does not, in the Court's view, detract from the seriousness

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of children as a group, at the centre of all decisions affecting their health and development" (Vavřička and Others v. the Czech Republic [GC], §§ 287-288 and below, for instance, X v. Latvia [GC], § 96). a. Mutual enjoymen[47]

[48] 323. According to well-established case-law, "in all decisions concerning children their best interests are of paramount importance. (...) It follows that there is an obligation on States to place the best interests of the child, and also those of children as a group, at the centre of all decisions affecting their health and development" (Vavřička and Others v. the Czech Republic [GC], §§ 287-288 and below, for instance, X v. Latvia [GC], § 96). a. Mutual enjoymen

and gravity of the crime (see Bouchelkia v. France, judgment of 29 January 1997, Reports 1997-I, p. 65, § 51, and Amrollahi v. Denmark, no. 56811/00, § 37, 11 July 2002).

44. At the time the first applicant was arrested, i.e. on 31 July 1992, he had been residing lawfully in the Netherlands for less than one and a half years, having been granted a residence permit in February 1991. Applying the "sliding scale" principle, the authorities of the respondent State attached weight to this undeniably short duration of the first applicant's lawful stay in the Netherlands before he committed the offence. It is nevertheless to be noted that, following his conviction on 20 January 1993, it was not until more than four years later, namely on 5 June 1997, that the decision was taken to refuse the first applicant continued residence. Following his early release from prison in April 1995, the first applicant had thus been allowed to build up even closer ties with the Netherlands for a further two years. In addition, it appears that the first applicant has not re-offended and that he has been gainfully employed ever since his release from prison.

45. As to the first applicant's connections with his country of origin, the Court considers that his situation is not comparable to that of a second-generation immigrant, given that he arrived in the Netherlands at the age of twenty-three. Not having been informed otherwise, the Court assumes that he received his schooling in Turkey and that he is conversant with the Turkish language. Thus, he undoubtedly has ties with Turkey. His ties to the Netherlands are mainly connected to his wife – the second applicant – and their two children.

46. The Court notes with some concern that none of the domestic authorities involved in the decision-making process appear to have paid any attention to the possible effects which the refusal of continued residence would have on the first applicant's family life (see Yıldız v. Austria, no. 295/97, § 43, 31 October 2002). It is true that the Regional Court of The Hague, sitting in Amsterdam, quashed the decision to impose an exclusion order on the first applicant for the reason that the Deputy Minister had failed to accord insufficient weight to the interests of the applicants and their children (see paragraph 19 above). However, the Regional Court upheld the decision not to prolong the first applicant's residence permit, and its reasoning on the subject did not refer to the consequences of that decision on his family life. In this context it is further to be noted that the Government assume that both the second applicant and the children speak Turkish (see paragraph 38 above). Had this matter been addressed in the course of the domestic proceedings, the authorities would have been aware of the fact that the children speak Dutch and Kurdish, but not Turkish.

47. Unlike the first applicant, his wife – the second applicant – may be considered a second-generation immigrant, having moved to the Netherlands at the age of seven and having lawfully resided there ever since. It is submitted, and has not been disputed, that all her relatives are also living in the Netherlands and that she does not have any family in Turkey. Although the parties disagree as to whether the second applicant was aware of the criminal activities of her husband, the fact remains that he had not yet committed the offence at the time they married and she entered into a family relationship with him, which is the relevant criterion in this context (see Boultif, cited above, § 48). Furthermore, the couple's two children were born in the Netherlands: Adem in 1990 and Mahsun in 1996. These two children have always lived in the Netherlands and its cultural and linguistic environment, and attend school there. Consequently, they can only have minimal ties, if any, to their parents' country of origin (see Şen v. the Netherlands, no. 31465/96, § 40, 21 December 2001) and, as noted above (paragraphs 32 and 46), they do not speak Turkish. In these circumstances, the Court accepts that following the first applicant to Turkey would mean a radical upheaval for the second applicant and in particular for the couple's children (see Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, p. 1971, § 36; see also Recommendation 1504 (2001) of the Parliamentary Assembly of the Council

of Europe on the non-expulsion of long-term immigrants), and it finds that they cannot realistically be expected to do so.

48. The principal element which strikes the Court in the present case, however, is the fact that the applicants' marriage was deemed to have permanently broken down when the couple had merely ceased cohabiting for some six months in 1995/1996 and despite them making it clear to the authorities of the respondent State that cohabitation had been resumed and that there was no question of their marriage having broken down. Dutch law did not permit the first applicant's residence permit to be revoked or an exclusion order to be imposed at the time of his conviction, since he had held a strong residence status at that time (see Yılmaz v. Germany, no. 52853/99, § 48, 17 April 2003). Yet by ruling – four years after that conviction (paragraph 44 above) and notwithstanding the fact that a child had been conceived during the time the spouses were not living together – that the marriage had permanently broken down, the authorities were able to conclude that the first applicant had lost his indefinite right to remain and, subsequently, to refuse him continued residence on the basis of the criminal conviction. By that time the first applicant had served his sentence and, as illustrated by the fact that he obtained gainful employment and that a second child was born to him and his wife, had begun rebuilding his life.

49. It is true that, in theory at least, the first applicant is entitled to make occasional visits to the Netherlands, due to the fact that the exclusion order that was initially imposed on him was ultimately withdrawn without having been enforced (paragraph 20 above). However, in this context the Court notes that the present case does not concern a divorced father with an access arrangement, but a functioning family unit where the parents and children are living together. The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 of the Convention and that to split up a family is an interference of a very serious order (see Mehemi v. France (no. 2), no. 53470/99, § 45, ECHR 2003-IV). Having regard to its finding at paragraph 47 above that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same as long as the first applicant continues to be denied the right to reside in the Netherlands. In this context the Court notes the Government's submission that the first applicant's criminal record would normally militate against a new residence permit being issued to him for a period of ten years. Although they also argued that Article 8 of the Convention would be taken into account in assessing whether his conviction would still be held against him, the Government failed to indicate when, and under what conditions, such an assessment would lead to a positive decision being taken on any future request for a residence permit being lodged by the first applicant.

50. In conclusion, the Court is of the opinion that, in the particular circumstances of the present case, the respondent State failed to strike a fair balance between the applicants' interests on the one hand and its own interest in preventing disorder or crime on the other. There has, accordingly, been a violation of Article 8 of the Convention."

I sagen *Loy v. Germany (2014)* var klageren indrejst i opholdslandet som femårig. Som 26-årig blev han idømt fire måneders betinget fængsel for vold mod sine børns mor og tre år senere blev han idømt et års betinget fængsel for vold på en natklub. To år senere blev han idømt to et halvt års fængsel for narkotikakriminalitet. Det år, han fyldte 32 år, blev klageren udvist af opholdslandet med indrejseforbehold uden fastsat tidsbegrænsning, og to år senere blev han udsendt til hjemlandet. På udvisningstidspunktet var klageren skilt fra sin tidligere ægtefælle, som var statsborger i opholdslandet, og med hvem klageren havde fået to børn, som

ligeledes var statsborgere i opholdslandet og 21 og 17 år gamle på tidspunktet for klagerens udvisning. Han giftede sig igen efter udvisningsdommen.

EMD konstaterede i præmis 28, at indgrebet var i overensstemmelse med lovgivningen og tjente et legitimt formål. Til brug for vurderingen af, om indgrebet var nødvendigt i et demokratisk samfund og proportionalt med det forfulgte hensyn, gennemgik EMD i præmis 30 kriterierne som sammenfattet i Üner- og Maslov-dommene og konstaterede derefter i præmis 31, at den af klageren begåede kriminalitet, som også omfattede narkotikakriminalitet, var alvorlig. I præmis 32 konstaterede EMD, at klageren havde boet næsten 30 år i opholdslandet og havde tidsubgrænset opholdstilladelse, da udvisningsafgørelsen blev endelig.

I præmis 34-35 gennemgik EMD klagerens forhold til sine børn og konstaterede, at familiebåndet ikke var særlig udviklet.

EMD udtalte i præmis 36, at:

"As to the applicant's family life with his spouse, the Court notes that when the applicant contacted the registry office in June 2006 (when the applicant was still in prison), the expulsion order had already been served, and by the time they married in February 2007, the applicant's first appeal against the expulsion order had been dismissed. Their family life, such as it was, was thus always against the background of pending expulsion proceedings. They separated soon after the marriage. In these circumstances, no decisive weight can be attached to the family relationship with his spouse (see A.W. Khan v. the United Kingdom, no. 47486/06, §§ 46, 47, 12 January 2010)."

Herefter udtalte EMD i præmis 37 om klagerens tilknytning til opholdslandet:

"The Court also looks for significant relations within the society of the host country (see Trabelsi, cited above, § 62; Mutlag, cited above, § 58; Lukic v. Germany (dec.), no. 25021/08, 20 September 2011) and notes that apart from mentioning that he went to school and completed a vocational training in Germany in his submissions the applicant submits nothing by way of evidence of his participation in social life apart from the length of his residence. Apart from referring to his children and his former spouse he made reference to the fact that his father, stepmother and siblings live in Germany. He claims that he has contact with his sister, but gives no further details. No information on other social contacts was provided. Therefore, in the present case only few significant relations can be established."

I præmis 38 gennemgik EMD klagerens tilknytning til hjemlandet og konstaterede, at han havde boet der, til han var fem år gammel, og at han angiveligt talte noget serbisk. I præmis 39 konstaterede EMD, at indrejseforbuddet ikke nødvendigvis behøvede at være permanent, idet klageren kunne søge om at få det tidsbegrænset.

I præmis 40 udtalte EMD, at:

"Against the background of the gravity of the applicant's drug related offence, together with the earlier crimes of violence committed by the applicant, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family and his private life reasonably against the State's interest in preventing disorder and crime. Appreciating the consequences of the expulsion for the applicant, the Court

cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to impose this measure."

EMD afviste derefter sagen som *inadmissible*, idet klagen blev vurderet *manifestly ill-founded*.

I sagen *Salija v. Switzerland (2017)* var klageren indrejst i opholdslandet som niårig. Som 20-årig havde han begået manddrab med indirekte hensigt (homicide with indirect intent) i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren med sin deltagelse bevidst havde taget risikoen for at dræbe passageren og havde udvist en høj grad af hensynsløshed, og han blev idømt en fængselsstraf på fem år og tre måneder. Kort før klagerens prøveløsladelse blev hans opholdstilladelse inddraget, og et år senere – omkring ti år efter begåelsen af kriminaliteten – blev udvisningsbeslutningen endelig. Klageren havde på dette tidspunkt opholdt sig i opholdslandet i mere end 20 år, havde været gift i 11 år og havde to børn på fem og ni år. Klagerens ægtefælle var ligesom han selv statsborger i det tidligere Jugoslavien og var indrejst i opholdslandet som 12-årig.

I præmis 44 gennemgik EMD den af klageren begåede kriminalitet og konstaterede, at fængselsstraffen på fem år og tre måneder vidnede om alvoren af lovovertrædelsen.

EMD udtalte i præmis 48-50, at:

"48. As regards the applicant's family situation, he has been married to his wife since 1999 and it has, explicitly, not been contested by the respondent Government that real and effective family existed between the applicant, his wife and their two children. It has to be noted that the applicant's wife could not know about the offences at issue at the time when she entered into a family relationship with the applicant, as the couple married in 1999 and thus prior to the commission of the offences in 2000. It has to be noted that the applicant, with the exception of the purchase and consumption of marihuana, for which he was fined in 2007, committed the criminal offences prior to the birth of his children.

49. The Court observes that the applicant's wife is a national of "the former Yugoslav Republic of Macedonia", i.e. of the country to which the applicant was expelled. The applicant's wife, who was born in 1978, lived there until 1990 and knows Albanian and the country's culture. She has relatives there and visits the country every year. The domestic courts considered that she could reintegrate in "the former Yugoslav Republic of Macedonia" without encountering serious difficulties, despite having lived in Switzerland for the past twenty years. The Court notes that the applicant's wife chose to follow him to Macedonia in 2011 and lived with him *there until 2015, despite the fact that she could have remained in Switzerland as a holder of a permanent residence permit and maintained contact with the applicant through visits and means of telecommunication.*

50. The Court observes that the couple's children, born in 2001 and in 2005, are likewise the nationals of "the former Yugoslav Republic of Macedonia". At the time the expulsion order became binding, the elder child was in primary school, whereas the younger one was in kindergarten. They were, thus, still of an adaptable age. While the Court accepts that the economic living conditions in "the former Yugoslav Republic of Macedonia" are less favourable than in Switzerland, it also notes that the former is a Contracting State of the Council of Europe. It further accepts that the children knew the country's culture to a certain extent due to visits they had made together with their mother. While it is not clear to what extent the children knew Albanian, it does not appear arbitrary to accept that the presence of their parents, who both originate from the country, as well as further relatives from their mother's side, would alleviate their difficulties in integrating in "the former

Yugoslav Republic of Macedonia". Moreover, it has to be noted that the children were not forced to move there, but could have remained in Switzerland with their mother as holders of permanent residence permits and maintained contact with the applicant through visits and means of telecommunication."

Betydningen af længden af klagerens ophold blev gennemgået i præmis 51 og 52, hvor EMD vurderede hans tilknytning til henholdsvis opholdslandet og hjemlandet:

"51. As to the solidity of the applicant's social, cultural and family ties with the host country, the Court notes that the applicant had lived in Switzerland for over twenty years, which had thus become the centre of his life. His parents and siblings live there. While the level of the applicant's social and cultural integration is in in dispute, it has to be noted that he worked in different jobs, with only brief periods of unemployment, prior to and following his imprisonment, and that he speaks German.

52. As to the applicant's ties to the country of destination, the Court notes that the applicant was born in 'the former Yugoslav Republic of Macedonia' and spent the first nine years of his life there. While he does not have any relatives of his own there, his wife does. Likewise, even though he claims that he could not write well in Albanian and last visited the country in 2004, he still had considerable cultural and social ties to 'the former Yugoslav Republic of Macedonia'."

EMD udtalte herefter i præmis 53-55:

"53. Moreover, the Court notes that the applicant's expulsion from Swiss territory is not permanent, as the entry ban against him is limited to seven years. While the entry ban is thus, without any doubt, of a long duration, it should be noted that the applicant could ask for its temporary suspension for short periods of time in order to visit his wife and children in Switzerland (see relevant domestic law and practice paragraph 26 above). What is more, the applicant's wife and the couple's children relocated to "the former Yugoslav Republic of Macedonia" in late 2011 and enjoyed their family life with the applicant there until returning to Switzerland in August 2015 to avoid the expiry of their permanent residence permit (see paragraphs 22 and 24 above). In other words, the applicant's expulsion and the entry ban against him did not preclude him from enjoying family life with his wife and children for seven years, but rather shifted the family's country of residence to "the former Yugoslav Republic of Macedonia" for almost four years. Hence, the applicant and his wife and children were, respectively are, geographically separated for a period of a little over three years in total, during which the applicant could ask for a permission to visit his wife and children in Switzerland for short periods of time.

54. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities reviewed all factors mentioned above in detail. Against the background of the gravity of the applicant's offence, the ties both the applicant and his wife have to "the former Yugoslav Republic of Macedonia" as well as the adaptable age of their children, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family life reasonably against the State's interests in public safety and in preventing disorder and crime. It cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to revoke the applicant's permanent residence permit and order his expulsion to "the former Yugoslav Republic of Macedonia". The Court finds, therefore, that the respondent State has not overstepped the margin of appreciation afforded to it in the present case.

55. There has accordingly been no violation of Article 8 of the Convention."

I sagen *A.W. Khan v. the United Kingdom (2010)* var klageren indrejst i opholdslandet som treårig og var meddelt tidsubegrænset opholdstilladelse. Han blev som 28-årig idømt syv års fængsel for narkotikakriminalitet, men blev løsladt efter tre år på grund af god opførsel. Myndighederne traf efterfølgende afgørelse om udvisning på baggrund af den begåede kriminalitet. Klageren havde dels sin mor og sine søskende i opholdslandet, dels en kæreste, som han havde fået et barn med. På tidspunktet for sagens behandling for EMD var klageren 34 år gammel.

I præmis 31-32 gennemgik EMD klagerens forhold til sin mor og sine søskende, som fandtes at udgøre privatliv. I præmis 33-35 gennemgik EMD klagerens forhold til sin kæreste og deres fælles barn, som fandtes at udgøre familieliv. Herefter konkluderede EMD i præmis 36, at der var tale om et ingreb både i klagerens privatliv og hans familieliv.

Herefter gennemgik EMD i præmis 37-42 om indgrebet var i overensstemmelse med loven, om det skete til varetagelse af et af de legitime hensyn og om det var nødvendigt i et demokratisk samfund. EMD henviste i denne forbindelse til de relevante kriterier som sammenfattet i Üner-dommen og udtalte i præmis 40-43:

"40. The Court reiterates that in view of the devastating effects of drugs on people's lives, it understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge (Dalia v France, cited above, § 54; Bhagli v France, cited above, § 48). The applicant's offence was particularly serious as it involved the importation of a significant quantity of heroin. The severity of the offence is reflected in the fact that the applicant was sentenced to seven years' imprisonment, taking account of his decision to plead guilty at a very early stage. The severity of this offence must therefore weigh heavily in the balance.

41. Nevertheless, the Court must also take into account the fact that the applicant had not previously committed any serious criminal offences in the United Kingdom, and has committed no further offences following his release in June 2006. Under the approach taken in the Boultif judgment (cited above, §51), the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has a certain impact on the assessment of the risk which the applicant poses to society.

42. As regards the applicant's private life, the Court accepts that the applicant has lived most of his life in the United Kingdom, having arrived there at the age of three, and no longer has any real social, cultural or family ties to Pakistan. The applicant has not returned to Pakistan, even for a short visit, and he has no immediate family in Pakistan.

43. In the United Kingdom the applicant has established close ties with his mother and two brothers, with whom he has lived for most of his life. The relationship clearly entails an additional degree of dependence which results from the relative ill-health of all of the parties. Although there is no evidence to suggest that the family would not be able to cope without the applicant, his removal would likely cause greater difficulties than would otherwise be the case."

EMD udtalte i præmis 44-47, at:

"44. With regard to the applicant's family life, the Court notes that the applicant has submitted that he and his girlfriend are in a stable relationship, and although they cannot live together as a family unit, the applicant enjoys regular contact with his girlfriend and their daughter. The applicant's girlfriend is a British citizen, who states that she has never lived anywhere other than the United Kingdom. She does not speak Urdu or Punjabi and has no family or friends in Pakistan. The applicant's girlfriend has therefore indicated that she would not be prepared to move to Pakistan if he were to be deported, although no circumstances have been identified which would inherently preclude her from living there.

45. Although the Court has no reason to doubt the applicant's claims, it observes that he has not sought to make fresh representations to the Home Office on the basis of his family life. In particular, the Court notes that despite making fresh representations to the Home Office in August 2008, the applicant did not mention that he had a pregnant girlfriend even though he must have known of the pregnancy at the time.

46. Moreover, the Court notes that the applicant's relationship with his girlfriend began in August 2005, while he was still serving his prison sentence. She was therefore fully aware of his criminal record at the beginning of the relationship.

47. Accordingly, no decisive weight can be attached to this family relationship."

I præmis 48 udtalte EMD, at der også måtte tages hensyn til varigheden af indrejseforbuddet, som var højst ti år.

Herefter udtalte EMD i præmis 50-51:

"50. In light of the above, having particular regard to the length of time that the applicant has been in the United Kingdom and his very young age at the time of his entry, the lack of any continuing ties to Pakistan, the strength of his ties with the United Kingdom, and the fact that the applicant has not reoffended following his release from prison in 2006, the Court finds that the applicant's deportation from the United Kingdom would not be proportionate to the legitimate aim pursued and would therefore not be necessary in a democratic society.

51. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Pakistan."

I sagen *El Boujaïdi v. France (1997)* var klageren indrejst i opholdslandet som syvårig. Han blev idømt seks års fængsel og udvist med indrejseforbud for bestandig for narkotikakriminalitet begået da han var 19 år. Efter at være blevet løsladt da han var 24 år, blev klageren på ny anholdt og idømt et års fængsel for forsøg på røveri og for ikke at være udrejst i overensstemmelse med udvisningen. Klageren blev udsendt, da han var 26 år gammel. På dette tidspunkt boede han sammen med en statsborger i opholdslandet, med hvem han havde fået et barn nogle måneder forud for udsendelsen.

EMD udtalte i præmis 33:

"The question whether the applicant had a private and family life within the meaning of Article 8 must be determined by the Court in the light of the position when the exclusion order became final (see, mutatis mutandis, the Bouchelkia v. France judgment of 29 January 1997, Reports of Judgments and Decisions 1997-I, p.

63, § 41). That means at the beginning of 1989, since the last judgment relating to the applicant's conviction was the Lyons Court of Appeal's judgment of 12 January 1989 (see paragraph 11 above). Mr El Boujaïdi cannot therefore plead his relationship with Mrs M. and the fact that he is the father of her child, since these circumstances came into being long after that date (see paragraphs 17 and 19 above). However, the Court observes that he arrived in France in 1974 at the age of 7 and lived there until 26 August 1993. He received most of his schooling there and worked there for several years. In addition, his parents, his three sisters and his brother – with whom it was not contested that he had remained in contact – live there (see paragraph 7 above). Consequently, the Court is in no doubt that enforcement of the exclusion order amounted to interference with the applicant's right to respect for his private and family life."

Ved vurderingen af, om indrejseforbuddet var nødvendigt i et demokratisk samfund, udtalte EMD i præmis 40-41:

"40. The Court's task therefore consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

The Court notes that Mr El Boujaïdi arrived in France at the age of 7 and lived there lawfully from 1974 until 19 June 1991 (the date of his release – see paragraph 13 above). He received most of his education there, he worked there and his parents, his three sisters and his brother live there (see paragraph 7 above).

However, while he asserted that he had no close family in Morocco, he did not claim that he knew no Arabic or that he had never returned to Morocco before the exclusion order was enforced. It also seems that he has never shown any desire to acquire French nationality. Accordingly, even though most of his family and social ties are in France, it has not been established that he has lost all links with his country of origin other than his nationality. In addition, the applicant had a previous conviction – a sentence of thirty months' imprisonment having been imposed on him by the Annecy Criminal Court for heroin dealing in 1987 – when the Lyons Court of Appeal sentenced him to six years' imprisonment and ordered his permanent exclusion from French territory for drug use and drug trafficking (see paragraphs 10 and 11 above). Once he was released, and at a time when he was unlawfully present in France, he continued to lead a life of crime and committed an attempted robbery (see paragraph 13 above). The seriousness of the offence on account of which the measure in issue was imposed on the applicant and his subsequent conduct count heavily against him.

41. Having regard to the foregoing, the Court does not find that enforcement of the order for the applicant's permanent exclusion from French territory was disproportionate to the legitimate aims pursued. There has accordingly been no breach of Article 8."

I sagen *Dalia v. France (1998)* var klageren indrejst i opholdslandet i 1976 eller 1977 i en alder af 17-18 år for at slutte sig til sine forældre og søskende. I 1985 blev hun idømt et års fængsel for narkokriminalitet og udvist fra opholdslandet for bestandig. Hun udrejste til hjemlandet i 1987 og tog ophold hos en tante. I 1989 genindrejste hun i opholdslandet på et gyldigt visum og tog ophold hos sin mor. I 1990 fødte hun et barn med statsborgerskab i både opholdslandet og hjemlandet.

EMD udtalte i præmis 53-55, at:

"53. The Court notes, as the Commission did, that the applicant arrived in France at the age of 17 or 18 to join the rest of her family and lived there until 1987. She returned in July 1989 with a visa valid for thirty days, on expiry of which she remained in France. Her mother and her seven brothers and sisters live in France. In 1986 she married a French national, by whom she did not have any children; the marriage was dissolved in 1989. In 1990, when the exclusion order was still in force, she gave birth to a child of French nationality. Mrs Dalia's family ties are therefore essentially in France. Nevertheless, having lived in Algeria until the age of 17 or 18, for two years without her parents (see paragraph 7 above), she has maintained certain family relations, spoken the local language and established social and school relationships. In those circumstances, her Algerian nationality is not merely a legal fact but reflects certain social and emotional links. In short, the interference in issue was not so drastic as that which may result from the expulsion of applicants who were born in the host country or first went there as young children (see the C. v. Belgium judgment of 7 August 1996, Reports 1996-III, p. 924, § 34).

54. The Court notes further that, as the Government pointed out, the French legislature, in restricting (other than in the exceptional cases provided for in section 28 bis of the Ordinance of 1945) relief from exclusion orders to aliens who had complied with such an order, had wished to remove the benefit of such relief from those who remained in France unlawfully. Applying this rule of procedure – which has a legitimate aim – to the applicant cannot in itself entail a breach of Article 8. In support of her application to have the exclusion order lifted, Mrs Dalia relied mainly on the fact that she was the mother of a French child. The evidence shows that the applicant formed this vital family link when she was in France illegally. She could not be unaware of the resulting insecurity. In the Court's view, this situation, which was created at a time when she was excluded from French territory, cannot therefore be decisive. Furthermore, the exclusion order made as a result of her conviction was a penalty for dangerous dealing in heroin. In view of the devastating effects of drugs on people's lives, the Court understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge. Irrespective of the sentence passed on her, the fact that Mrs Dalia took part in such trafficking still weighs as heavily in the balance.

55. Having regard to the foregoing, the Court considers that the refusal to lift the exclusion order made against the applicant cannot be regarded as disproportionate to the legitimate aim pursued. There has therefore been no violation of Article 8."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måne-

der, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

EMD udtalte i præmis 57, at:

"*Another important consideration has also been found to be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has held that where this is the case it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see Rodrigues da Silva and Hoogkamer, cited above, § 39, ECHR 2006-I; Nunez, cited above, § 36; and Jeunesse, cited above, § 108). Thus, a distinction must be drawn between those seeking entry into a country to pursue their newly established family life; those who had an established family life before one of the spouses obtained settlement in another country; and those who seek to remain in a country where they have already established close family life and other ties for a reasonable period of time (see Priya v. Denmark (dec.), no. 13594/03, 6 July 2006). In addition, the Court has accepted that weighty immigration policy considerations militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that the parents exploit the situation of their children in order to secure a residence* permit for themselves and for the children (see Butt v. Norway, no. 47017/09, § 79, 4 December 2012)."

EMD udtalte i præmis 59-61:

"59. The Court notes that the applicant arrived in the Netherlands in April 1991 when he was not yet four years old and that he thus spent most of his childhood and youth in that country (see paragraphs 5-6 above). However, after his short-term tourist visa had expired in August 1991, his residence in the Netherlands was at no time lawful. He was thus not a "settled migrant" as this notion has been used in the Court's case-law (see paragraph 52 above). Therefore, the domestic authorities' refusal to grant him a residence permit did not require the "very serious reasons" that would be needed to justify the expulsion of a settled migrant who had arrived in the Netherlands at around the same age (see paragraph 52 above).

60. At the same time, the Court cannot accept the Government's submission that, as the applicant had established his private life in the Netherlands whilst he was residing in the country unlawfully, the refusal to admit him would be contrary to Article 8 of the Convention in exceptional circumstances only (see paragraph 43 above). As set out above (see paragraph 58 in fine), that principle applies if it is known to the person concerned from the moment he or she starts a private life in the host country that his or her immigration status may well stand in the way of the continuation of that private life. In the present case, the Court observes that when the applicant started to build up his ties with the Netherlands he was completely unaware that neither his presumed father nor his foster parents had taken steps to regularise his stay in the country. Having regard to his young age when he came to the Netherlands and the other circumstances of the case, the Court considers that this cannot be held against the applicant. In that latter context, and with reference to paragraph 57 in fine above, the Court finds, moreover, that the applicant cannot be identified with any omission on the part of his foster parents to ensure that his stay in the Netherlands had a lawful basis since, as Dutch nationals

(see paragraph 5 above), their right of residence in the Netherlands was not dependent on whether or not the applicant would be granted a residence permit – as was also recognised by the Administrative Jurisdiction Division of the Council of State (see point 2.5 in paragraph 23 above).

61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless,

he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

Der kan endvidere henvises til følgende sager:

- *Sharifi v. Denmark (2023)*.
- *Al-Masudi v. Denmark (2023)*.

5.5.2. Mindre alvorlig kriminalitet

I sagen *Jakupovic v. Austria (2003)* blev klageren to gange idømt fængselsstraf af henholdsvis fem måneders og ti ugers varighed, begge udsat i en prøveperiode på tre år, for mindre alvorlig kriminalitet, herunder indbrud og tyveri. Han blev endvidere udvist med indrejseforbud i ti år. Klageren var indrejst i opholdslandet som 11-årig og var på tidspunktet, hvor udvisningsafgørelsen blev endelig, 16 år. Han blev udsendt det samme år, som han fyldte 18 år.

I præmis 28-32 udtalte EMD:

"28. The Court observes that at the time of the expulsion the applicant had not been in Austria for a long time – just four years. Furthermore his situation was not comparable to that of a second generation immigrant, as he had arrived in Austria at the age of eleven, had previously attended school in his country of origin and must therefore have been well acquainted with its language and culture. However, the residence prohibition seriously upset his private and family life: he had arrived in Austria with his brother to join his mother and the new family she had founded there and has apparently no close relatives in Bosnia. The applicant's father remained in Bosnia, a fact which is emphasised by the Government, but the applicant points out that he last saw his father in 1988 and the father has been reported missing since the end of the armed conflict in that country.

29. Thus, the Court considers that very weighty reasons have to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which has recently experienced a period of armed conflict with all its adverse effects on living conditions and with no evidence of close relatives living there.

30. The Government rely in this respect on the applicant's criminal record. The Court finds that this record, which is the essential element of justification for the expulsion, must be examined very carefully. It consists of two convictions for burglary. The Court cannot find that these convictions – even taking into account a further set of criminal proceedings which were discontinued after the victim had been compensated by the applicant – for which the Austrian courts had only imposed conditional sentences of imprisonment can be considered particularly serious as these offences did not involve elements of violence. The only element which may indicate any tendency of the applicant towards violent behaviour was a prohibition to possess arms issued in May 1995. Although the seriousness of such a measure should not be underestimated, it cannot be compared to a conviction for an act of violence, and there is no indication that such charges have ever been brought against the applicant.

31. However, the Court does not consider the applicant's relation to Mrs A.S. a weighty element to be taken into account when balancing the interests at issue, because the applicant has not argued that he had entered into this relationship before September 1995, when the residence prohibition was issued against him and after this time he must have been aware that his further stay in Austria was unlawful.

32. Taking all the above elements into account, the Court finds that by imposing the residence prohibition in the particular circumstances of the case, the Austrian authorities have overstepped their margin of appreciation under Article 8 as the reasons in support of the necessity of the residence prohibition are not sufficiently weighty. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued."

5.5.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Nunez v. Norway (2011)* havde klageren opnået sin opholdstilladelse på baggrund af svig. Da opholdstilladelsen blev inddraget, havde hun opholdt sig i opholdslandet i fem år fra hun var 21-26 år og havde stiftet familie i opholdslandet ved at gifte sig og få børn.

EMD slog indledningsvis fast, at forholdet mellem klageren og hendes børn udgjorde "familieliv" i artikel 8's forstand.

EMD udtalte i præmis 70:

"The Court further reiterates that Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see Gül, cited above, § 38; and Rodrigues da Silva and Hoogkamer, cited above, § 39). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of

immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Rodrigues da Silva and Hoogkamer, cited above, ibid.; Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999; Solomon v. the Netherlands (dec.), no. 44328/98, 5 September 2000). Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious (see Jerry Olajide Sarumi v. the United Kingdom (dec.), no. 43279/98, 26 January 1999; Andrey Sheabashov c. la Lettonie (dec.), no. 50065/99, 22 May 1999). Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances (see Abdulaziz, Cabales and Balkandali, cited above, § 68; Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998, and Ajayi and Others, cited above; Rodrigues da Silva and Hoogkamer, cited above, ibid.)."

EMD udtalte i præmis 72-85, at:

"72. Nor does the Court see any reason to disagree with the assessment made by the national immigration authorities and courts (see paragraphs 47 to 51 of the Supreme Court's judgment) as to the aggravated character of the applicant's administrative offences under the Immigration Act. In July 1996 she had returned to Norway in breach of the two-year-prohibition on re-entry imposed in March 1996. She had given misleading information about her identity, her previous stay in Norway and her criminal conviction. By having intentionally done so she had obtained residence and work permits, which were renewed a number of times, then a settlement permit, none of which she had been entitled to. She had thus lived and worked in the country unlawfully throughout and the seriousness of her offences does not seem to have diminished with time.

73. In these circumstances, the Court considers that the public interest in favour of ordering the applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention.

74. The Court further observes that when the applicant re-entered Norway in breach of the re-entry ban in July 1996, she was an adult and had no links to the country. Whilst aware that she had re-entered illegally, she married a Norwegian national in October 1996. In April 2001 they separated. From the spring 2001 she co-habited with Mr O. and two daughters were born by the couple in June 2002 and December 2003, respectively. In the Court's view, at no stage from her re-entering Norway illegally in July 1996 until being put on notice in January 2002 (see paragraph 11 above) could she reasonably had entertained any expectation of being able to remain in the country.

75. This is not altered by the fact that, following the couple's separation in October 2005, the applicant assumed the daily care of the children until May 2007, when the Oslo City Court granted the daily care and the sole parental responsibilities to the father, or by the extended contact rights to the children that she was granted from then onwards.

76. Moreover, when the applicant arrived in Norway at the age of twenty-one, she had lived all her life in the Dominican Republic. During her stay in Norway she co-habited from the spring of 2001 to October 2005 with Mr O. who was also a national of her home country. Her links to Norway could hardly be said to outweigh her attachment to her home country and, as noted above, had in any event been formed through unlawful residence and without any legitimate expectation of being able remain in the country.

77. It therefore matters little from the perspective of the applicant's Article 8 rights that the proceedings had been prolonged by the fact that the revocation of her work- and settlement permit and the expulsion order and re-entry ban had been processed, not in parallel, but separately.

78. However, the Court will examine whether particular regard to the children's best interest would nonetheless upset the fair balance under Article 8.

79. It is to be noted that from their birth in 2002 and 2003, respectively, until the City Court's judgment of 24 May 2007 in the custody case, the children had been living permanently with the applicant, who had also assumed their daily care since her separation from their father in October 2005. Thus, as noted by the Supreme Court's minority, the applicant was the children's primary care person from their birth and until their father was granted custody in 2007. The Court regards it as significant that by virtue of that judgment, which attached great weight to the decision to expel the applicant (see paragraph 18 above), the children were moved from her to live with their father, whilst she was granted extended rights of contact with them. As observed by the Supreme Court minority, together with the father, the applicant was the most important person in the children's lives.

80. Also, an equally important consequence of the said judgment of 24May 2007 was that the children, who had lived all their lives in Norway, would remain in the country in order to live with their father, a settled immigrant.

81. Moreover, in the assessment of the Supreme Court's minority, the children had experienced stress, presumably due to the risk of their mother's being expelled as well as disruption in their care situation, first by their parents' being separated, then by being moved from their mother's home to that of their father. They would have difficulty in understanding the reasons were they to be separated from their mother. Pending her expulsion and the two-year re-entry ban she would probably not return to Norway and it was uncertain whether they would be able to visit her outside Norway. The Court has taken note that, as observed by the Supreme Court's majority, Mr O. stated that, in the event that the applicant were to be expelled, he would facilitate contacts between the children and her, notably during summer and Christmas holidays. According to the Supreme Court's majority, there was no reason to assume that it would not be possible to maintain contact between the children and the applicant during the expulsion period. Nevertheless, the Court observes that, as a result of the decisions taken in the expulsion case and in the custody case, the children would in all likelihood be separated from their mother practically for two years, a very long period for children of the ages in question. There is no guarantee that at the end of this period the mother would be able to return. Whether their separation would be permanent or temporary is in the realm of speculation. In these circumstances, it could be assumed that the children were vulnerable, as held by the minority of the Supreme Court.

82. The Court observes furthermore that, although the unlawful character of the applicant's stay in Norway was brought to the authorities' attention in the summer of 2001 and she admitted this to the police in December 2001, it was not until 26 April 2005 that the Directorate of Immigration decided to order her expulsion with a prohibition on re-entering for two years. Although this state of affairs could to some extent be explained by the immigration authorities' choice to process the revocation of her work and settlement permit not in parallel but separately, it does not appear to the Court that the impugned measure to any appreciable degree fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose

of such administrative measures (see paragraph 50 of the Supreme Court's judgment quoted at paragraph 23 above).

83. In light of the above, the Court shares the view of the Supreme Court's minority that the applicant's expulsion with a two-year re-entry ban would no doubt constitute a very far-reaching measure vis-à-vis the children.

84. Having regard to all of the above considerations, notably the children's long lasting and close bonds to their mother, the decision in the custody proceedings, the disruption and stress that the children had already experienced and the long period that elapsed before the immigration authorities took their decision to order the applicant's expulsion with a re-entry ban, the Court is not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention. Reference is made in this context also to Article 3 of the UN Convention on the Rights of the Child, according to which the best interests of the child shall be a primary consideration in all actions taken by public authorities concerning children (see Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, § 135, ECHR 2010-...). The Court is therefore not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicant's need to be able to remain in Norway in order to maintain her contact with her children in their best interests, on the other hand.

85. In sum, the Court concludes that the applicant's expulsion from Norway with a two-year re-entry ban would entail a violation of Article 8 of the Convention."

I sagen *Antwi and others v. Norway (2012)* havde klageren ligeledes opnået sin opholdstilladelse på baggrund af svig. Klageren var i opholdslandet blevet gift og havde fået et barn. Syv år efter indrejsen fik opholdslandet kendskab til hans reelle identitet og året efter blev han udvist fra opholdslandet.

EMD udtalte i præmis 90-93, at:

"90. In applying the above principles [fra Nunez-dommen, red.] to the present case, the Court notes in the first place that the impugned expulsion and five-year prohibition on re-entry had been imposed on the first applicant in view of the gravity of his violations of the Immigration Act. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act. Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Nunez, cited above, § 71, and Darren Omoregie and Others v. Norway, no. 265/07, § 67, 31 July 2008; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Nunez and Darren Omoregie and Others, cited above, ibidem). In the Court's view, the public interest in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Nunez, cited above, § 73).

91. Moreover, when the first applicant initially settled in Norway in the autumn of 1999, he had no other links to the country than the second applicant who had invited him and with whom he started cohabiting soon after his arrival. Whilst aware that his application for an EEA residence permit in 1999 had been granted on the basis of misleading information that he had provided about his identity and country of origin, he had a child with the second applicant in September 2001 and they got married in February 2005. At no stage from when he entered Norway in the autumn of 1999 until being put on notice on 12 October 2005 could he reasonably have entertained any expectation of being able to remain in the country.

92. Furthermore, the first applicant had grown up in Ghana, where his family lived, and had arrived in Norway at an adult age. His links to Norway could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country.

93. Like the first applicant, the second applicant had grown up in Ghana. There she had lived until the age of seventeen when she was reunited with her father and siblings in Norway. Although she had become a Norwegian citizen and had family ties and employment links to Norway and probably would experience some difficulties in resettling in Ghana, there does not seem to be any particular obstacle preventing her from accompanying the first applicant to their country of origin. The Court has also taken note of her claim that, although aware that the first applicant originally had a Ghanaian background and had obtained a Ghanaian passport in connection with their marriage in Ghana on 11 February 2005, she should only have become aware of his true identity in this context. However, the above-mentioned factors cannot in the Court's view outweigh the public interest in sanctioning the first applicant's aggravated offences against the immigration rules with the impugned measure."

Efter at have gennemgået datterens forhold, udtalte EMD i præmis 103-105:

"103. There being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion.

104. The above considerations are not altered by the duration of the prohibition on re-entry – five years. In this connection, the Court reiterates that in a comparable case, Darren Omoregie (cited above, §§ 63-68), it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case.

105. In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand.

Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban would not entail a violation of Article 8 of the Convention."

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende klagernes opholdstilladelse, da de var blevet myndige.

EMD udtalte i præmis 76:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012): [citat af præmis 68-70 i Nunez-dommen, red.]"

EMD udtalte i præmis 79-87, at:

"79. In this regard the Court has noted the general approach of the Borgarting High Court that strong immigration policy considerations would in principle militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that parents exploited the situation of their children in order to secure a residence permit for themselves and for the children (see paragraph 34 above). The Court, seeing no reason for disagreeing with this general approach, observes that during a police interview on 15 November 1996 the applicants' mother conceded that she had previously given incorrect information to the police and other institutions about her own and her children's stay in Pakistan during this period. Thus, it seems that her children's family life was created in Norway at a time when she was aware that their immigration status in the country was such that the persistence of that family life would, since their return in 1996, be precarious (see Nunez, cited above, §§ 71-76). That was also the case of their private life in the country. From the above considerations, it follows that the removal of the applicants would be incompatible with Article 8 only in exceptional circumstances.

80. In assessing whether there were such exceptional circumstances, the Court observes in the first place that, as also held by the High Court, the need to identify children with the conduct of their parents could not always be a decisive factor; in the concrete case there had been no such risk of exploitation as mentioned above since the applicants had reached the age of majority and their mother had died (see paragraph 34 above).

81. Furthermore, already in connection with the application for family reunion, submitted by applicant's father in 1996, the immigration authorities were informed of the mother and the applicants' stay in Pakistan for most of the period from the summer of 1992 to early 1996. During the said police interview of 15 November 1996 the mother conceded that she had previously given incorrect information to the police and to other institutions about this in 1996 (see paragraph 79 above). However, without enquiring into the justification for the Directorate of Immigration's decision of January 1999 (upheld by the Immigration Appeals Board in August 1999) to revoke the applicants' and their mother's settlement permit, the Court has noticed the lapse of time between the said discovery in 1996 and the revocation of the permit in 1999 (see Nunez, cited above, paragraph 82).

82. Moreover, as found by the High Court, it was not until their arrest in May 2001 that the applicants had become aware of the irregular character of their residence status and, presumably also, that they had exceed the timelimit for their voluntary repatriation (see paragraphs 29 to 31 above). It thus appears that their family- and other social ties in the host State had already been formed when it was brought to their attention that the persistence of those ties would be precarious. Therefore, at least until then, they cannot be reproached, as suggested by the Government, for having confronted the authorities with a fait accompli (compare Darren Omoregie and Others, cited above, § 64).

83. On the contrary, as noted by the High Court, since the applicants' mother had gone into hiding, the immigration police shortly after their arrest released the applicants, who were then minors, and refrained from implementing the deportation without their mother. The authorities omitted to take any steps to arrange for the applicants' obtaining the passports required for their travelling. Because their mother had gone under ground, the applicants had been dependent on such assistance until they passed the age of majority. The Court sees no reason for disagreeing with the High Court's assessment that until they reached the age of majority – in 2003 and 2004, respectively – the applicants could reasonably perceive the situation as one

where the authorities did not expect them to leave the country on their own and that it was difficult to ascribe any responsibility to them for not having taken any steps to do so while their mother had gone into hiding from the police (see paragraphs 31 and 33 above).

84. Nor is it apparent that the applicants could no longer reasonably entertain the same perception after they reached the age of majority. The authorities did not make any attempt to implement the deportation when, after having found their mother in September 2005, they forcibly sent her to Pakistan. The stated reason was to enable the applicants to attend a hearing due to open later in the same month before the Oslo City Court (see paragraph 32 above), the outcome of which went in their favour (see paragraph 12 above).

85. Also, the Court cannot but note the observation made by the High Court (in 2008) that, in view of the unusually long duration of the applicants' unlawful stay in Norway, it was questionable whether general immigration policy considerations would carry sufficient weight to regard the refusal of residence "necessary in a democratic society" (see paragraph 37 above).

86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 og 89 gennemgik EMD klagernes tilknytning til hjemlandet og betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

5.5.4. Ulovligt ophold

I sagen *Darren Omoregie a.o. v. Norway (2008)* var klageren indrejst som 22-årig og havde fået afslag på asyl, men undlod at efterkomme udrejsebeslutningen og arbejdede endvidere ulovligt i opholdslandet. Nogle måneder senere giftede han sig med en statsborger fra opholdslandet og søgte om familiesammenføring, hvilket blev afslået, og klageren blev på ny pålagt at udrejse, hvilket han ikke efterkom. Der blev endvidere truffet afgørelse om at udvise klageren med indrejseforbud i fem år med mulighed for genindrejse efter ansøgning allerede efter to år. Under domstolsbehandlingen af udvisningsafgørelsen blev klagerens ægtefælle

gravid med deres fælles barn, som blev født fem år efter klagerens indrejse. Klageren fik på ny afslag på familiesammenføring og efter fem et halvt års ophold blev han udsendt.

I præmis 59-64 udtalte EMD, at:

"59. The first and second applicants met in October 2001 and started cohabiting in March 2002. Already from the beginning of their relationship it must have been clear to them both that their prospects of being able to settle as a couple in Norway were precarious. The first applicant's asylum request was rejected, first by the Directorate of Immigration on 22 May 2002, and then by the Immigration Appeals Board on 11 September 2002, giving him until 30 September 2002 to leave the country. No judicial appeal was lodged against these decisions, which became final. Nevertheless, the first applicant opted to evade his duty to leave and stayed in Norway unlawfully.

60. On 2 February 2003, while the first applicant was staying illegally in Norway, he got married to the second applicant. Because of his lack of residence status the marriage had not been contracted in accordance with domestic law, though this shortcoming did not deprive the marriage of its validity.

61. In the Court's view, at no stage prior to their marriage on 2 February 2003 could the first and the second applicants have reasonably held any expectation that he would be granted leave to remain in Norway.

62. This state of affairs was not changed, but was confirmed rather, by the developments in the case in the ensuing period. On 14 February 2003 the first applicant made a new request on the ground of family reunification with the second applicant, but again his request was rejected and he was ordered to leave the country, in a decision of 26 April 2003, notified to him on 7 May 2003. Therefore the applicant could not reasonably expect a right to reside in Norway based on these proceedings.

63. Moreover, on account of the first applicant's unlawful stay in Norway for four months and a half from September 2002 to February 2003 and for his having worked there unlawfully without a work permit for nine months from September 2002 to July 2003, the Directorate of Immigration decided on 26 August 2003 firstly that he should be expelled pursuant to section 29(1)(a) of the Immigration Act and secondly be prohibited to reenter Norway for five years (with a possibility of re-entry on applicationnormally after two years). To the Court's understanding, the first part of the decision represented hardly anything new but was rather a renewed response to the first applicant's failure to comply with previous orders to leave the country. The decision of 26 August 2003 was upheld by the Immigration Appeals Board on 21 July 2004 and by the appellate courts respectively on 27 February and 14 June 2006. At each level (including the City Court which held in his favour on 15 February 2005) it was found established that the basic condition for expelling the first applicant – that he had seriously or repeatedly violated the Immigration Act or had defied implementation of the decision that he should leave the country – had been fulfilled. It is true that the City Court found the measure disproportionate but that finding was not final and was overturned by the High Court and leave to appeal was refused by the Appeals Leave Committee of the Supreme Court.

64. Against this background the Court does not consider that the first and second applicants, by confronting the Norwegian authorities with the first applicant's presence in the country as a fait accompli, were entitled to expect that any right of residence would be conferred upon him (see Roslina Chandra and Others v. the

Netherlands (dec.), no. 53102/99, 13 May 2003; Yash Priya v. Denmark (dec.) 13594/03; 6 July 2006; cf. Rodrigues da Silva and Hoogkamer, cited above, § 43)."

I sagen *Jeunesse v. the Netherlands (2014)* var klageren indrejst i opholdslandet på et visum fra en tidligere hollandsk koloni og havde giftet sig med en statsborger i opholdslandet. Hun blev i landet efter udløbet af sit visum og fik med sin ægtefælle tre børn, som alle var statsborgere i opholdslandet. Klageren søgte flere gange om opholdstilladelse, hvilket hver gang blev afslået, da klageren som udgangspunkt skulle søge fra hjemlandet. Efter 16 års ophold blev klageren forsøgt udsendt fra opholdslandet under henvisning til, at hun ikke havde et lovligt opholdsgrundlag. Børnene var på tidspunktet for Storkammerets afgørelse 14, knap ni og knap fire år.

EMD udtalte i præmis 103:

"Where a Contracting State tolerates the presence of an alien in its territory thereby allowing him or her to await a decision on an application for a residence permit, an appeal against such a decision or a fresh application for a residence permit, such a Contracting State enables the alien to take part in the host country's society, to form relationships and to create a family there. However, this does not automatically entail that the authorities of the Contracting State concerned are, as a result, under an obligation pursuant to Article 8 of the Convention to allow him or her to settle in their country. In a similar vein, confronting the authorities of the host country with family life as a fait accompli does not entail that those authorities are, as a result, under an obligation pursuant to Article 8 of the Convention to allow the applicant to settle in the country. The Court has previously held that, in general, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them (see Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003; Benamar v. the Netherlands (dec.), no. 43786/04, 5 April 2005; Priya v. Denmark (dec.) no. 13594/03, 6 July 2006; Rodrigues da Silva and Hoogkamer v. the Netherlands, no. 50435/99, § 43, ECHR 2006-I; Darren Omoregie and Others v. Norway, no. 265/07, § 64, 31 July 2008; and B.V. v. Sweden (dec.), no. 57442/11, 13 November 2012)."

EMD udtalte i præmis 108, at:

"Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court's well- established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A no. 94, p. 94, § 68; Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998; Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999; M. v. the United Kingdom (dec.), no. 25087/06, 24 June 2008; Rodrigues da Silva and Hoogkamer v. the Netherlands, cited above, § 39; Arvelo Aponte v. the Netherlands, cited above, §§ 57-58; and Butt v. Norway, cited above, § 78)."

EMD udtalte i præmis 113-123, at:

"113. The Court reiterates that the applicant's presence in the Netherlands has been irregular since she outstayed the 45-day tourist visa granted to her in 1997. It is true that at that time admission to the Netherlands

was governed by the Aliens Act 1965 but the applicant's situation – in view of the reason why her request for a residence permit of 20 October 1997 was not processed (see paragraph 14 above) – is governed by the Aliens Act 2000. Having made numerous attempts to secure regular residence in the Netherlands and having been unsuccessful on each occasion, the applicant was aware – well before she commenced her family life in the Netherlands – of the precariousness of her residence status.

114. Where confronted with a fait accompli the removal of the nonnational family member by the authorities would be incompatible with Article 8 only in exceptional circumstances (see paragraph 108 above). The Court must thus examine whether in the applicant's case there are any exceptional circumstances which warrant a finding that the Netherlands authorities failed to strike a fair balance in denying the applicant residence in the Netherlands.

115. The Court first and foremost takes into consideration the fact that all members of the applicant's family with the exception of herself are Netherlands nationals and that the applicant's spouse and their three children have a right to enjoy their family life with each other in the Netherlands. The Court further notes that the applicant held Netherlands nationality at birth. She subsequently lost her nationality when Suriname became independent. She then became a Surinamese national, not by her own choice but pursuant to Article 3 of the Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality (see paragraph 62 above). Consequently, her position cannot be simply considered to be on a par with that of other potential immigrants who have never held Netherlands nationality.

116. The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for more than sixteen years and that she has no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Netherlands authorities, while she repeatedly submitted residence requests and awaited the outcome of appeals. The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities.

117. Thirdly, the Court accepts, given the common background of the applicant and her husband and the relatively young age of their children, that there would appear to be no insurmountable obstacles for them to settle in Suriname. However, it is likely that the applicant and her family would experience a degree of hardship if they were forced to do so. When assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family.

118. The Court fourthly considers that the impact of the Netherlands authorities' decision on the applicant's three children is another important feature of this case. The Court observes that the best interests of the applicant's children must be taken into account in this balancing exercise (see above § 109). On this particular point, the Court reiterates 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 (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. For that purpose, in cases concerning

family reunification, the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents (see Tuquabo-Tekle and Others v. the Netherlands, cited above, § 44).

119. Noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation. In this connection, the Court observes that the applicant's husband provides for the family by working full-time in a job that includes shift work. He is, consequently, absent from the home on some evenings. The applicant – being the mother and homemaker – is the primary and constant carer of the children who are deeply rooted in the Netherlands of which country – like their father – they are nationals. The materials in the case file do not disclose a direct link between the applicant's children and Suriname, a country where they have never been.

120. In examining whether there were insurmountable obstacles for the applicant and her family to settle in Suriname, the domestic authorities had some regard for the situation of the applicant's children (see paragraphs 23 (under 2.19 and 2.21), 28 and 34 (under 2.4.5) above). However, the Court considers that they fell short of what is required in such cases and it reiterates that national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any such removal in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (see above § 109). The Court is not convinced that actual evidence on such matters was considered and assessed by the domestic authorities. Accordingly, it must conclude that insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit.

121. The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. 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.

122. The Court, whilst confirming the relevant principles set out above (see paragraphs 106-109), finds that, on the basis of the above considerations (see paragraphs 115-120) and viewing the relevant factors cumulatively, the circumstances of the applicant's case must be regarded as exceptional. Accordingly, the Court concludes that a fair balance has not been struck between the competing interests involved. There has thus been a failure by the Netherlands authorities to secure the applicant's right to respect for her family life as protected by Article 8 of the Convention.

123. There has accordingly been a violation of Article 8 of the Convention."

I sagen *Solomon v. the Netherlands (2000)* (afvisningsbeslutning) havde klageren fået afslag på sin asylansøgning i 1994. I 1994 eller 1995 indledte klageren et forhold en kvinde, som han fik et barn med.

EMD udtalte, at:

"In the present case the Court takes into consideration that the applicant was never given any assurances that he would be granted a right of residence by the competent Netherlands authorities. He was allowed to await the Deputy Minister's decision on his asylum request in the Netherlands. After asylum was denied him, his request for a stay of expulsion was refused by the competent court on 22 December 1994. From then onwards, the applicant's residence in the Netherlands, which was already precarious, lost what little foundation it had had until then. Family life between the applicant and his Netherlands national partner – and later, with their child – was developed after this date. The Court is of the opinion that in these circumstances the applicant could not at any time reasonably expect to be able to continue this family life in the Netherlands."

EMD afviste sagen som *inadmissible*.

I sagen *Rodrigues da Silva and Hoogkamer v. the Netherlands (2006)* havde klageren på intet tidspunkt søgt om opholdstilladelse, men havde indledt et familieliv. Klageren havde dog, såfremt hun havde søgt om det, haft mulighed for at opnå en opholdstilladelse.

EMD udtalte i præmis 43-44:

"43.Whilst it does not appear that the first applicant has been convicted of any criminal offences (see Berrehab, cited above, § 29, and Cılız v. the Netherlands, no. 29192/95, § 69, ECHR 2000-VIII), she did not attempt to regularise her stay in the Netherlands until more than three years after first arriving in that country (see paragraphs 9 and 13 above) and her stay there has been illegal throughout. The Court reiterates that persons who, without complying with the regulations in force, confront the authorities of a Contracting State with their presence in the country as a fait accompli do not, in general, have any entitlement to expect that a right of residence will be conferred upon them (see Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003). Nevertheless, the Court finds relevant that in the present case the Government indicated that lawful residence in the Netherlands would have been possible on the basis of the fact that the first applicant and Mr Hoogkamer had a lasting relationship between June 1994 and January 1997 (see paragraph 34 above). Although there is no doubt that a serious reproach may be made of the first applicant's cavalier attitude to Dutch immigration rules, this case should be distinguished from others in which the Court considered that the persons concerned could not at any time have reasonably expected to be able to continue family life in the host country (see, for example, Solomon, cited above).

44. 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. Indeed, by attaching such paramount importance to this latter element, the authorities may be considered to have indulged in excessive formalism.

The Court concludes that a fair balance was not struck between the different interests at stake and that, accordingly, there has been a violation of Article 8 of the Convention."

I sagen *Kaplan and others v. Norway (2014)* var klageren, der var af kurdisk oprindelse, udrejst fra Tyrkiet i 1993 og havde herefter søgt asyl i flere nordeuropæiske lande, senest i 1998 i Norge. Klageren havde i sit hjemland en ægtefælle og to børn, der alle boede hos hans forældre. Klageren fik afslag på asyl og forblev i landet uden opholdsgrundlag. I december 1999 blev klageren idømt 90 dages fængsel for et voldeligt overfald. I maj 2003 indrejste klagerens ægtefælle og børn i Norge og søger asyl. Klagerens ægtefælle og børn blev alle meddelt afslag på asyl. I 2003 og 2005 blev klageren dømt for at have kørt for stærkt og uden kørekort og udvist af opholdslandet med indrejseforbud i fem år. Hverken klageren eller familien udrejste og parret fik endnu et barn, der led af alvorlig autisme. Det var i sagen oplyst, at klageren var den af forældrene, der var bedst til at varetage det yngste barns særlige behov. På baggrund af det yngste barns diagnose valgte de nationale myndigheder i 2008 at give klagerens ægtefælle og alle tre børn opholdstilladelse. De nationale myndigheder lagde i den forbindelse vægt på, at ægtefællen og børnene på daværende tidspunkt havde haft et længerevarende ophold i opholdslandet. De nationale myndigheder fastholdt dog fortsat beslutningen om ikke at meddele klageren opholdstilladelse. Sagen blev behandlet ved tre nationale domstole, hvor den nationale højesteret fandt, at et afslag på opholdstilladelse til klageren ikke var en krænkelse af artikel 8, da han kunne udøve sit familieliv på besøgsophold.

EMD udtalte i præmis 81-99, at:

"81. On the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012): [citat af præmis 68-70 i Nunez-dommen, red.]

82. The Court observes that the Immigration Appeals Board, upholding on 2 March 2007 the Directorate of Immigration's decision of 2 November 2006, had imposed the disputed expulsion and the prohibition on re-entry on the first applicant in view of the gravity of his violations of the Immigration Act (see paragraph 17 above). Thereafter, on 28 February 2008, the Board had granted the second applicant, with the children, a residence- and work permit under section 8(2) of the Immigration Act 1988, attaching decisive weight on new information concerning the daughter's health together with the length of the children's residence in Norway (four years and nine months in the case of the sons, see paragraph 23 above). On 7 April 2008, as a consequence of these residence permits to the remainder of the family, the Board altered its decision of 2 March 2007 prohibiting the first applicant to return to Norway indefinitely so as to limit the duration of the prohibition to five years (see paragraphs 27 to 28 above). The question arises whether the first applicant's expulsion with a prohibition on re-entry for five years failed to strike a proper balance between the applicants' right to respect for family life, on the one hand, and the public interest in ensuring efficient immigration control, on the other hand.

83. The Court sees no reason to question the assessment of the national immigration authorities and courts as to the aggravated character of the first applicant's administrative offences under the Act (see paragraphs 26, 32 and 42 above). Moreover, as already held on previous occasions, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act (see Antwi, cited above, § 90; Nunez, cited above, § 71, and Darren Omoregie and Others, cited above, § 67; see also Kaya v. the Netherlands (dec.) no 44947/98, 6 November 2001). A scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention (see Antwi, Nunez and Darren Omoregie and Others, cited above, ibid.). In the Court's view, the public interest

in favour of ordering the first applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention (see Antwi, cited above, § 90; Nunez, cited above, § 73).

84. Furthermore, the first applicant had grown up in Turkey, where he had spent his formative years and many years of adulthood before leaving in 1995 at the age of twenty-nine. He had no links to Norway when he arrived in 1998. The links that he had established there since could not be said to outweigh those of his home country and had in any event been formed through unlawful residence and without any legitimate expectation of being able to remain in the country.

85. Like the first applicant, the second applicant had grown up in Turkey, where she had founded a family with the first applicant in the early 1990s before arriving in Norway in May 2003 at the age of twenty-seven. Although she had obtained a residence permit in Norway in January 2008, there was no particular obstacle preventing her from accompanying the first applicant and resettling in their country of origin.

86. Also their two sons, the third and fourth applicants, were born in Turkey, respectively in 1993 and 1995. They had spent most of their childhood years in that country before they arrived with their mother in Norway in May 2003. Weighty immigration policy considerations in any event militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that the parents exploit the situation of their children in order to secure a residence permit for themselves and for the children (see Butt v. Norway, no. 47017/09, § 79, 4 December 2012). Their family life had continued in Norway at a time when both their parents were aware that their immigration status in the country was such that the persistence of that family life would be precarious. Although their links to Norway appear to have been stronger than those to Turkey and they might have faced certain difficulties in integrating into normal life in Turkey, there were no insurmountable obstacles in the way of them accompanying the first applicant in returning to Turkey in July 2011.

87. Similar considerations apply to the daughter, the fifth applicant, who was born in Norway in 2005, who was at an adaptable age and whose health problems did not seem to constitute a hindrance to hers accompanying the remainder of the family if resettling in Turkey (see paragraphs 27 and 45 above). In this regard, it may be reiterated that a decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling (see N. v. the United Kingdom [GC], no. 26565/05, §§ 32-51, ECHR 2008; compare D. v. the United Kingdom, 2 May 1997, §§ 53-54, Reports of Judgments and Decisions 1997-III). However, that does not appear to have been the situation in this case.

88. The Court will nonetheless consider whether the removal of the first applicant from Norway was incompatible with Article 8 of the Convention on account of exceptional circumstances pertaining in particular to the best interests of the youngest child (see Nunez, cited above, §§ 78 and 84; Antwi, cited above, §§ 100-101; Butt, cited above § 79).

89. In this connection, it is to be noted that in granting, on 28 February 2008, the second applicant, with the children, for one year a renewable residence- and work permit under section 8(2) (according to which such a permit could be granted if warranted by weighty humanitarian considerations or particular links to the country) of the Immigration Act 1988, the Board attached decisive weight to new information concerning the

daughter's health together with the length of the children's residence in Norway (at that time four years and nine months in the case of the sons) and set as a condition that the mother continued to live in Norway.

90. Further details on the subject of the daughter were set out in the judgment of the High Court which found that the daughter's chronic and very serious degree of child autism and need for follow-up would affect the other family members strongly in the years to come and entail a burden on them far beyond the normal level. Her functional incapacity meant that she would always be dependent on her parents' resources. Her mother was exhausted and had a marginal level of functioning. It was the father who activated the daughter on a daily basis and she was particularly attached to him. Should he be expelled it was likely that the disturbance to her development would be aggravated and would cause a further burden to the mother, to the brothers and to others who assumed responsibilities for her (see paragraph 35 above).

91. The Supreme Court did not specifically disagree with the above-mentioned assessment but noted that, whilst the High Court had relied on the consideration that the daughter was suffering from a chronic and serious degree of child autism, the first applicant had submitted a medical statement of 27 October 2010 from which it appeared that her current diagnosis was "unspecified far-reaching developmental disturbance". She would not be able during her father's five year ban on reentry to receive any assistance from him in Norway and family contacts would then instead be maintained through visits in Turkey. However, his expulsion would not in the Supreme Court's view mean that she would be brought to bear an "extraordinary burden" (see paragraph 45 above).

92. The Court will not for the purposes of its examination of the present application pronounce any view on the appropriateness of the grant of a residence permit to the first applicant's wife and children, but notes that the grounds pertaining to the fifth applicant were of a kind that the Norwegian immigration authorities were prepared to regard as covered by the statutory criterion of "weighty humanitarian considerations" (see paragraph 23 above). In the present context it suffices to reiterate that the decisive criterion according to the Court's case-law is whether there were exceptional circumstances (see paragraph 81 above).

93. In view of the above, in particular the High Court's assessment – with which the Supreme Court did not specifically disagree – regarding the adverse consequences of the measure for the youngest child (see paragraphs 90 and 91 above), the Court considers that the expulsion of the first applicant father with a five-year re-entry ban constituted a very far-reaching measure especially vis-à-vis her.

94. The Court has taken note of the first applicant's criminal conviction by the District Court on 7 December 1999 for aggravated assault. Whilst the nature of the offence was serious, the extent of injury caused on the victim had not been great and the latter's provocation was a factor taken into account in mitigation of the applicant's sentence – 90 days' imprisonment, of which 60 days were suspended. Although the said judgment was transmitted to the Directorate of Immigration for consideration of whether there was a ground for ordering his expulsion on 5 May 2000 the authorities took no specific measures to deport him for about six years (see below). In the Court's view, bearing also in mind that the first applicant had not reoffended since, apart from a few minor traffic offences (see paragraph 13 and 26 above), his conviction is not in itself a factor that ought to carry significant weight in the instant case (see Butt, cited above, § 89).

95. Moreover, in contrast to a number of comparable cases dealt with by the Court (see, for example, Darren Omoregie and Others, cited above, § 64 with further references), the applicant parents in the case now under

review had established their family life primarily in their country of origin well before arriving in the respondent State (see paragraphs 6 to 8 above) and could not therefore be reproached for having confronted the authorities with a fait accompli (see, mutatis mutandis, Butt, cited above, § 82; and Rodrigues da Silva and Hoogkamer, § 43). They were nonetheless aware that after settling in Norway their family life there would become precarious due to their immigration status. Indeed, as already stated above, Article 8 of the Convention does not entail a general obligation for a Contracting Party to the Convention to respect immigrants' choice of country of residence and to authorise family reunion in its territory. However, in view of the long duration of the period that lapsed from 1999-2000 until the Immigration Appeals Board's warning to the first applicant on 31 October 2006 (see paragraphs 11 to 13 above), the Court is not persuaded that the impugned measure to any appreciable degree fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures (see Nunez, cited above, § 82; compare Antwi, cited above, § 102). It may further be noted that shortly after the warning, the Board decided – on 8 November 2006 – to stay the implementation of his expulsion pending the City Court's judgment in his case, which was delivered some two years and a half later, on 23 April 2009 (see paragraphs 19 and 29 above).

96. The Court also finds it significant that in the meantime, in January 2008, the wife and the couple's three children had been granted a residence permit, by which time the family had lived united in Norway for more than four and a half years (see paragraph 23 above). She obtained this permit in spite of having lived in Norway unlawfully for an important period, for nearly three years from the Immigration Appeals Board's final rejection on 25 February 2005 of her May 2003 asylum request (see paragraph 14 above), until the Board in January 2008 decided to grant a residence- and work permit to her with the children (see paragraph 23 above). It is true that the husband's unlawful residence in the country had been considerably longer, and that for periods he also worked there unlawfully. However, considering especially the immigration authorities' unexplained inactivity practically for the entire period of his illegal stay in Norway, the Court is not convinced that these offences against the national immigration rules, by reason of their nature and degree, meant that the interests of the respondent State in ensuring efficient immigration control weighed more heavily in respect of the first applicant than they did for the second applicant so as to justify a differentiation between the parents for the purposes of the present proportionality assessment.

97. Thus, like in Nunez (cited above, § 79), the child in question in the present instance had strong bonds to both her mother and her father, albeit that she may have devoted more time than he in looking after the children at home because he was working as the family's only bread-winner outside the home. Moreover, as indicated above, her parents had founded their family primarily in their country of origin well before arriving in Norway rather than in a situation of unlawful residence. When the first applicant was expelled in July 2011, the family had lived united in the country for nearly eight years. The competent authorities expected that the family would be split as a result of the expulsion, at least temporarily for the five years period during which the first applicant was prohibited from re-entering the country and the youngest child was prevented from seeing him other than by visiting him Turkey (see paragraphs 27 and 45 above). However, in as much as the measure deprived her of the care she needed from her father it does not appear to have been accompanied by reasons that were sufficient to show that the disputed interference was necessary within the meaning of paragraph 2 of Article 8.

98. Having regard to all of the above considerations, notably the youngest child's long-lasting and close bonds to her father, her special care needs and the long period of inactivity before the immigration authorities issued

a warning to the first applicant and took their decision to order his expulsion with a re-entry ban, the Court is not convinced in 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. The Court is therefore not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between, on the one hand, the first applicant's need to be able to remain in Norway in order to maintain his contact with his daughter in her best interest (see Nunez, § 84) and, on the other hand, its public interest in ensuring effective immigration control – namely, according to the Government, 'the interests of ... the economic well-being of the country' and 'the prevention of disorder or crime'.

99. Accordingly, the Court concludes that the first applicant's expulsion from Norway with a five-year re-entry ban entailed a violation of Article 8 of the Convention."

I sagen *Konstatinov v. the Netherlands (2007)* havde klageren fået opholdstilladelse i opholdslandet på baggrund af ægteskab med en derboende mand med ukendt statsborgerskab, men blev efterfølgende udvist fra opholdslandet. Parret fik et barn, og tre år efter sin udrejse indgav klageren på ny en ansøgning om opholdstilladelse, men blev meddelt afslag på denne, da hendes derboende ægtefælle ikke opfyldte et indkomstkrav, og da det var uvist, om parret havde været samboende. Det efterfølgende år indrejste klageren på ny og indgik på ny ægteskab med sin ægtefælle i opholdslandet. Klageren søgte endnu engang om familiesammenføring med sin ægtefælle. Denne ansøgning lå de næste syv år hen, mens klageren opholdt sig uden opholdstilladelse i opholdslandet. Klageren blev i mellemtiden dømt for seks tilfælde af tyveri og røveri og idømt fængselsstraffe på mellem seks uger til 12 måneder. Klageren bliver herefter udvist. Da EMD behandlede sagen, havde klagerens ægtefælle opholdt sig cirka 30 år i opholdslandet.

EMD udtalte i præmis 48-53, at:

"48. Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would be precarious from the outset. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8.

49. Turning to the circumstances of the present case, the Court notes that the applicant has never held a Netherlands provisional admission or residence title and that the relationships relied on by her were created at a time and developed during a period when the persons involved were aware that the applicant's immigration status was precarious and that, until Mr G. complied with the minimum income requirement under the domestic immigration rules, the persistence of that family life within the Netherlands would remain precarious. This is not altered by the fact that the applicant's second request for a residence permit for stay with Mr G. filed on 1 November 1991 was left undetermined for a period of more than seven years because her file had been mislaid by the responsible immigration authorities, as – like in 1990 in respect of her first request for a residence permit for stay with Mr G. – one of the main reasons why this second request was rejected on 27 November 1998 by the Deputy Minister was because Mr G. failed to meet the minimum income requirement.

50. In principle, the Court does not consider unreasonable a requirement that an alien having achieved a settled status in a Contracting State and who seeks family reunion there must demonstrate that he/she has

sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought. As to the question whether such a requirement was reasonable in the instant case, the Court considers that it has not been demonstrated that, between 1990 and 1998, Mr G. has in fact ever complied with the minimum income requirement or at least made any efforts to comply with this requirement whereas the applicant's claim that he is incapacitated for work has remained wholly unsubstantiated.

51. The Court further notes that, between 4 September 1992 and 8 November 2005, the applicant has amassed various convictions of criminal offences attracting a prison sentence of three years or more, thus rendering her immigration status in the Netherlands even more precarious as this entailed the risk of an exclusion order being imposed, which risk eventually materialised. On this point the Court reiterates that, where the admission of aliens is concerned, Contracting States are in principle entitled to expel an alien convicted of criminal offences (see Üner v. the Netherlands [GC], no. 46410/99, § 54, ECHR 2006-...)."

52. The Court further notes that the applicant was born in Serbia where she lived until the age of seven, that she held a valid passport issued in Pančevo (Serbia) by the authorities of the former Socialist Federal Republic of Yugoslavia when she filed her second request for a Netherlands residence permit in 1991, and that her claim of having become stateless after the dissolution of this Federal Republic is no more than conjecture.

53. The foregoing considerations are sufficient to enable the Court to conclude that it cannot be said that the Netherlands authorities have failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration and public expenditure and in the prevention of disorder or crime on the other. Consequently, there has been no violation of the applicant's right to respect for her rights guaranteed by Article 8 of the Convention."

I sagen *Pormes v. the Netherlands (2020)* var klageren indrejst i opholdslandet som knap fire-årig sammen med sin angivelige far, der var nederlandsk statsborger, efter at hans mor, der var indonesisk statsborger, var død. Klageren indrejste på et indonesisk pas isat turistvisum. Klageren blev i perioder overladt til sin onkel og tante, som var nederlandske statsborgere. Otte år efter klagerens indrejse i Nederlandene døde faren, og klageren fortsatte med at bo hos sin onkel og tante, som han opfattede som sine plejeforældre. Som 17-årig indgik klageren et udenretligt forlig om samfundstjeneste for overfald. Samme år fandt man ud af, at klageren ikke var registreret i folkeregistret, og at han ikke havde lovligt ophold i Nederlandene. Som 19-årig blev han idømt blandt andet betinget fængselsstraf i seks måneder for et nyt overfald og flere forsøg på overfald. Samme år søgte han om familiesammenføring med sin plejefar og oplyste i den forbindelse, at han altid havde antaget, at han var nederlandsk statsborger. Klageren blev meddelt afslag på opholdstilladelse, hvilken afgørelse han påklagede, og inden der var truffet afgørelse i klagesagen, blev han idømt fængsel i 15 måneder, hvoraf fem blev gjort betinget, for nye overfald og forsøg på overfald. Afgørelsen om afslag på opholdstilladelse blev opretholdt blandt andet under henvisning til den begåede kriminalitet, herunder det forhold at den var begået, selvom klageren var vidende om, at han ikke havde en opholdstilladelse. Da afgørelsen blev endelig, var klageren 26 år gammel.

EMD udtalte i præmis 57, at:

"Another important consideration has also been found to be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of

that family life within the host state would from the outset be precarious. The Court has held that where this is the case it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see Rodrigues da Silva and Hoogkamer, cited above, § 39, ECHR 2006-I; Nunez, cited above, § 36; and Jeunesse, cited above, § 108). Thus, a distinction must be drawn between those seeking entry into a country to pursue their newly established family life; those who had an established family life before one of the spouses obtained settlement in another country; and those who seek to remain in a country where they have already established close family life and other ties for a reasonable period of time (see Priya v. Denmark (dec.), no. 13594/03, 6 July 2006). In addition, the Court has accepted that weighty immigration policy considerations militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that the parents exploit the situation of their children in order to secure a residence permit for themselves and for the children (see Butt v. Norway, no. 47017/09, § 79, 4 December 2012)."

EMD udtalte i præmis 59-61:

"59. The Court notes that the applicant arrived in the Netherlands in April 1991 when he was not yet four years old and that he thus spent most of his childhood and youth in that country (see paragraphs 5-6 above). However, after his short-term tourist visa had expired in August 1991, his residence in the Netherlands was at no time lawful. He was thus not a "settled migrant" as this notion has been used in the Court's case-law (see paragraph 52 above). Therefore, the domestic authorities' refusal to grant him a residence permit did not require the "very serious reasons" that would be needed to justify the expulsion of a settled migrant who had arrived in the Netherlands at around the same age (see paragraph 52 above).

60. At the same time, the Court cannot accept the Government's submission that, as the applicant had established his private life in the Netherlands whilst he was residing in the country unlawfully, the refusal to admit him would be contrary to Article 8 of the Convention in exceptional circumstances only (see paragraph 43 above). As set out above (see paragraph 58 in fine), that principle applies if it is known to the person concerned from the moment he or she starts a private life in the host country that his or her immigration status may well stand in the way of the continuation of that private life. In the present case, the Court observes that when the applicant started to build up his ties with the Netherlands he was completely unaware that neither his presumed father nor his foster parents had taken steps to regularise his stay in the country. Having regard to his young age when he came to the Netherlands and the other circumstances of the case, the Court considers that this cannot be held against the applicant. In that latter context, and with reference to paragraph 57 in fine above, the Court finds, moreover, that the applicant cannot be identified with any omission on the part of his foster parents to ensure that his stay in the Netherlands had a lawful basis since, as Dutch nationals (see paragraph 5 above), their right of residence in the Netherlands was not dependent on whether or not the applicant would be granted a residence permit – as was also recognised by the Administrative Jurisdiction Division of the Council of State (see point 2.5 in paragraph 23 above).

61. Accordingly, the Court considers that the applicant in the present case qualifies neither as a "settled migrant" nor as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests at stake (see paragraph 54 above), it can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the

Convention (see paragraph 52 above) nor that it would violate that provision only in very exceptional circumstances (see paragraph 58 above). Instead, the assessment has to be carried out from a neutral starting point, taking into account the specific circumstances of the applicant's case."

Herefter gennemgik EMD i præmis 62-63 klagerens tilknytning til opholdslandet og til hjemlandet:

"62. The Court observes that, from his arrival in the Netherlands, the applicant grew up in a family of Dutch nationals. He received all his schooling in the Netherlands and, by his own account, grew up as any other Dutch child (see paragraphs 5, 6 and 40 above). In 2004, the year in which he turned 17, the applicant found out that, contrary to what he had assumed until then, he might not have Dutch nationality, and that his residence in the Netherlands might in fact have been unlawful from the moment his tourist visa had expired some three and a half months after his first arrival back in 1991 (see paragraphs 8 and 10 above). He sought to regularise his stay in the Netherlands by applying for a residence permit in September 2006. As the applicant had by that time already spent fifteen years in the country, including most of his formative years as well as his adolescence, the Court has no doubt that he had established very strong ties there.

63. As for the applicant's ties to Indonesia, the Court observes that, other than that he was born and lived there until he was almost four years old, that he has Indonesian nationality, and that it is the home country of his deceased mother, those ties were not strong: he had apparently no actual family or social ties and did not speak Indonesian (see paragraph 16 and point 2.5 in paragraph 23 above)."

EMD udtalte herefter i præmis 64:

"Given that the applicant cannot be reproached for the unlawful character of his stay in the Netherlands (see paragraph 60 above) and bearing in mind that he had arrived there at a very young age and had established close ties with that country for a considerable period of time (see paragraph 57 above), the Court considers that, if no other factors entered into the equation, his interests in being allowed to reside in the Netherlands would have outweighed any interest of immigration control on the part of the State."

Efter at have gennemgået den af klageren begåede kriminalitet, som fandtes alvorlig og som for størstedelens vedkommende var begået på et tidspunkt, hvor klagerens opholdsstatus var usikker, udtalte EMD i præmis 67:

"The Court can accept that, given the length of his residence in, and the strength of his ties with the Netherlands, the applicant's relocation to Indonesia would have entailed a certain amount of hardship. Nevertheless, he was a healthy adult man, and it has neither been argued nor has it appeared that he was unable to manage by himself in that country. In that latter context the Court notes that the applicant possessed a number of practical skills such as metal work and cookery (see paragraph 6 above), and there is no reason to assume that he would not have been able to adjust to Indonesian culture and to learn the language. Contacts with his foster family and others in the Netherlands may have been maintained through modern means of communication. The Court further observes that no exclusion order was imposed on the applicant, which leaves open the possibility that he may apply for a visa in order to make visits to the Netherlands."

EMD henviste endvidere til den grundige artikel 8-afvejning foretaget af de nationale myndigheder og udtalte derefter i præmis 69-70:

"69. In the light of all of the above, and having regard in particular to the nature, seriousness and number of the offences committed by the applicant, including at a time when he knew that his residence status in the Netherlands was precarious, the Court is satisfied that the domestic authorities did not attribute excessive weight to the general interest in the prevention of disorder or crime and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

70. There has accordingly been no violation of Article 8 of the Convention."

I sagen *Darren Omoregie a.o. v. Norway (2008)* var klageren indrejst som 22-årig og havde fået afslag på asyl, men undlod at efterkomme udrejsebeslutningen og arbejdede endvidere ulovligt i opholdslandet. Nogle måneder senere giftede han sig med en statsborger fra opholdslandet og søgte om familiesammenføring, hvilket blev afslået, og klageren blev på ny pålagt at udrejse, hvilket han ikke efterkom. Der blev endvidere truffet afgørelse om at udvise klageren med indrejseforbud i fem år med mulighed for genindrejse efter ansøgning allerede efter to år. Under domstolsbehandlingen af udvisningsafgørelsen blev klagerens ægtefælle gravid med deres fælles barn, som blev født fem år efter klagerens indrejse. Klageren fik på ny afslag på familiesammenføring og efter fem et halvt års ophold blev han udsendt.

EMD udtalte i præmiserne 59-65, at:

"59. The first and second applicants met in October 2001 and started cohabiting in March 2002. Already from the beginning of their relationship it must have been clear to them both that their prospects of being able to settle as a couple in Norway were precarious. The first applicant's asylum request was rejected, first by the Directorate of Immigration on 22 May 2002, and then by the Immigration Appeals Board on 11 September 2002, giving him until 30 September 2002 to leave the country. No judicial appeal was lodged against these decisions, which became final. Nevertheless, the first applicant opted to evade his duty to leave and stayed in Norway unlawfully.

60. On 2 February 2003, while the first applicant was staying illegally in Norway, he got married to the second applicant. Because of his lack of residence status the marriage had not been contracted in accordance with domestic law, though this shortcoming did not deprive the marriage of its validity.

61. In the Court's view, at no stage prior to their marriage on 2 February 2003 could the first and the second applicants have reasonably held any expectation that he would be granted leave to remain in Norway.

62. This state of affairs was not changed, but was confirmed rather, by the developments in the case in the ensuing period. On 14 February 2003 the first applicant made a new request on the ground of family reunification with the second applicant, but again his request was rejected and he was ordered to leave the country, in a decision of 26 April 2003, notified to him on 7 May 2003. Therefore the applicant could not reasonably expect a right to reside in Norway based on these proceedings.

63. Moreover, on account of the first applicant's unlawful stay in Norway for four months and a half from September 2002 to February 2003 and for his having worked there unlawfully without a work permit for nine

months from September 2002 to July 2003, the Directorate of Immigration decided on 26 August 2003 firstly that he should be expelled pursuant to section 29(1)(a) of the Immigration Act and secondly be prohibited to re-enter Norway for five years (with a possibility of re-entry on application normally after two years). To the Court's understanding, the first part of the decision represented hardly anything new but was rather a renewed response to the first applicant's failure to comply with previous orders to leave the country. The decision of 26 August 2003 was upheld by the Immigration Appeals Board on 21 July 2004 and by the appellate courts respectively on 27 February and 14 June 2006. At each level (including the City Court which held in his favour on 15 February 2005) it was found established that the basic condition for expelling the first applicant – that he had seriously or repeatedly violated the Immigration Act or had defied implementation of the decision that he should leave the country – had been fulfilled. It is true that the City Court found the measure disproportionate but that finding was not final and was overturned by the High Court and leave to appeal was refused by the Appeals Leave Committee of the Supreme Court.

64. Against this background the Court does not consider that the first and second applicants, by confronting the Norwegian authorities with the first applicant's presence in the country as a fait accompli, were entitled to expect that any right of residence would be conferred upon him (see Roslina Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003; Yash Priya v. Denmark (dec.) 13594/03; 6 July 2006; cf. Rodrigues da Silva and Hoogkamer, cited above, § 43).

65. In the Court's view, the same considerations apply to the third applicant's birth on 20 September 2006, which fact could not of itself give rise to any such entitlement."

Om tilknytningen til henholdsvis klagerens hjemland og opholdsland samt om indrejseforbuddets varighed udtalte EMD i præmis 66-67, at:

"66. It should further be noted that the first applicant had lived in Nigeria since he was six months old until he left the country at the age of 22, had studied at university for four years and had three brothers with whom he was still in contact. Whereas his links to Nigeria were particularly strong, his links to Norway were comparatively weak, apart from the family bounds he had formed there with the second and third applicants pending the proceedings. […]

67. Finally, the Court notes that the decision prohibiting the first applicant re-entry for five years was imposed as an administrative sanction, the purpose of which was to ensure that resilient immigrants do not undermine the effective implementation of rules on immigration control. Moreover, it was open to the first applicant to apply for re-entry already after two years."

Endelig udtalte EMD i præmis 68:

"Against this background, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed their margin of appreciation when deciding to expel the first applicant and to prohibit his re-entry for five years. The Court is not only satisfied that the impugned interference was supported by relevant and sufficient reasons but also that in reaching the disputed decision the domestic authorities struck a fair balance between the personal interests of the applicants on the one hand and the public interest in ensuring an effective implementation of immigration control on the other hand. In view of

the first applicant's immigration status, the present case disclosed no exceptional circumstances requiring the respondent State to grant him a right of residence in Norway so as to enable the applicants to maintain and develop family life in that country. In sum, the Court finds that the national authorities could reasonably consider that the interference was 'necessary' within the meaning of Article 8 § 2 of the Convention.
Accordingly, there has been no violation of Article 8 of the Convention."

I sagen *Butt v. Norway (2012)* havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende klagernes opholdstilladelse, da de var blevet myndige.

EMD udtalte i præmis 76:

"The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."

Videre udtalte EMD i præmis 78:

"78. In the case under consideration, the Norwegian immigration authorities had granted the applicants' mother and, by extension, the applicants, a residence permit on the ground of strong humanitarian considerations on 28 February 1992 and then a settlement permit on 2 August 1995. They granted the latter permit whilst ignorant of the fact that the mother and the applicants had left for Pakistan in the summer of 1992 and on the basis of the false information provided by the mother that she and the applicants continued to reside in Norway. By virtue of their sojourn in Pakistan, their entitlement to residence in Norway ceased and, following their return to the country in early 1996, their stay there was in reality unlawful even though it was in August 1999 that their settlement permit was finally revoked (see paragraph 6 to 8 above). The Court therefore agrees with the Government that the applicants could not be viewed as "settled migrants" as this notion has been used in the case-law (see Üner, cited above, § 59; and Maslov, cited above, § 75). Accordingly, on the same approach as that adopted in the afore-mentioned Nunez judgment, the Court will have regard

to the following principles stated therein (see also Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012): [citat af præmis 68-70 i Nunez-dommen, red.]"

EMD udtalte i præmis 79-87, at:

"79. In this regard the Court has noted the general approach of the Borgarting High Court that strong immigration policy considerations would in principle militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that parents exploited the situation of their children in order to secure a residence permit for themselves and for the children (see paragraph 34 above). The Court, seeing no reason for disagreeing with this general approach, observes that during a police interview on 15 November 1996 the applicants' mother conceded that she had previously given incorrect information to the police and other institutions about her own and her children's stay in Pakistan during this period. Thus, it seems that her children's family life was created in Norway at a time when she was aware that their immigration status in the country was such that the persistence of that family life would, since their return in 1996, be precarious (see Nunez, cited above, §§ 71-76). That was also the case of their private life in the country. From the above considerations, it follows that the removal of the applicants would be incompatible with Article 8 only in exceptional circumstances.

80. In assessing whether there were such exceptional circumstances, the Court observes in the first place that, as also held by the High Court, the need to identify children with the conduct of their parents could not always be a decisive factor; in the concrete case there had been no such risk of exploitation as mentioned above since the applicants had reached the age of majority and their mother had died (see paragraph 34 above).

81. Furthermore, already in connection with the application for family reunion, submitted by applicant's father in 1996, the immigration authorities were informed of the mother and the applicants' stay in Pakistan for most of the period from the summer of 1992 to early 1996. During the said police interview of 15 November 1996 the mother conceded that she had previously given incorrect information to the police and to other institutions about this in 1996 (see paragraph 79 above). However, without enquiring into the justification for the Directorate of Immigration's decision of January 1999 (upheld by the Immigration Appeals Board in August 1999) to revoke the applicants' and their mother's settlement permit, the Court has noticed the lapse of time between the said discovery in 1996 and the revocation of the permit in 1999 (see Nunez, cited above, paragraph 82).

82. Moreover, as found by the High Court, it was not until their arrest in May 2001 that the applicants had become aware of the irregular character of their residence status and, presumably also, that they had exceed the timelimit for their voluntary repatriation (see paragraphs 29 to 31 above). It thus appears that their family- and other social ties in the host State had already been formed when it was brought to their attention that the persistence of those ties would be precarious. Therefore, at least until then, they cannot be reproached, as suggested by the Government, for having confronted the authorities with a fait accompli (compare Darren Omoregie and Others, cited above, § 64).

83. On the contrary, as noted by the High Court, since the applicants' mother had gone into hiding, the immigration police shortly after their arrest released the applicants, who were then minors, and refrained from implementing the deportation without their mother. The authorities omitted to take any steps to arrange for

the applicants' obtaining the passports required for their travelling. Because their mother had gone under ground, the applicants had been dependent on such assistance until they passed the age of majority. The Court sees no reason for disagreeing with the High Court's assessment that until they reached the age of majority – in 2003 and 2004, respectively – the applicants could reasonably perceive the situation as one where the authorities did not expect them to leave the country on their own and that it was difficult to ascribe any responsibility to them for not having taken any steps to do so while their mother had gone into hiding from the police (see paragraphs 31 and 33 above).

84. Nor is it apparent that the applicants could no longer reasonably entertain the same perception after they reached the age of majority. The authorities did not make any attempt to implement the deportation when, after having found their mother in September 2005, they forcibly sent her to Pakistan. The stated reason was to enable the applicants to attend a hearing due to open later in the same month before the Oslo City Court (see paragraph 32 above), the outcome of which went in their favour (see paragraph 12 above).

85. Also, the Court cannot but note the observation made by the High Court (in 2008) that, in view of the unusually long duration of the applicants' unlawful stay in Norway, it was questionable whether general immigration policy considerations would carry sufficient weight to regard the refusal of residence "necessary in a democratic society" (see paragraph 37 above).

86. In the Court's view, the above considerations do not imply that the authorities of the respondent State were responsible for the irregularities from 1996 onwards pertaining to the applicants' stay in Norway. They nonetheless militate strongly against identifying the applicants' conduct with that of their mother and bringing them to bear adverse consequences from this state of affairs (see, mutatis mutandis, Nunez, cited above, §§ 78-85).

87. In fact, for the reasons stated at paragraph 76 above, it was obvious that with time the applicants had developed strong family- and private life ties to Norway."

I præmis 88 og 89 gennemgik EMD klagernes tilknytning til hjemlandet og betydningen af den anden klagers pådømte kriminalitet. EMD udtalte i præmis 90-91:

"90. In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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.

91. In sum, the Court concludes that the applicants' deportation from Norway would entail a violation of Article 8 of the Convention."

5.5.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

I sagen *Berrehab. v. the Netherlands (1988)* opnåede klageren en opholdstilladelse på baggrund af ægteskab med en hollandsk statsborger. Parret fik en datter. Da klageren efterfølgende blev skilt fra sin ægtefælle,

nægtede de nationale myndigheder at forlænge hans opholdstilladelse, da denne var betinget af et bestående ægteskab. Klageren havde opholdt sig i hjemlandet de første 25 år af sit liv og havde derefter opholdt sig 11 år i opholdslandet. Klagerens datter var på tidspunktet for EMD's afgørelse ni år gammel.

EMD udtalte i præmis 20-21, at:

"20. The applicants asserted that the applicability of Article 8 (art. 8) in respect of the words 'right to respect for ... private and family life' did not presuppose permanent cohabitation. The exercise of a father's right of access to his child and his contributing to the cost of education were also factors sufficient to constitute family life. The Government challenged that analysis, whereas the Commission agreed with it.

21. The Court likewise does not see cohabitation as a sine qua non of family life between parents and minor children. It has held that the relationship created between the spouses by a lawful and genuine marriage - such as that contracted by Mr. and Mrs. Berrehab - has to be regarded as 'family life' (see the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 32, § 62). It follows from the concept of family on which Article 8 (art. 8) is based that a child born of such a union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to 'family life', even if the parents are not then living together.
Subsequent events, of course, may break that tie, but this was not so in the instant case. Certainly Mr. Berrehab and Mrs. Koster, who had divorced, were no longer living together at the time of Rebecca's birth and did not resume cohabitation afterwards. That does not alter the fact that, until his expulsion from the Netherlands, Mr. Berrehab saw his daughter four times a week for several hours at a time; the frequency and regularity of his meetings with her (see paragraph 9 in fine above) prove that he valued them very greatly. It cannot therefore be maintained that the ties of 'family life' between them had been broken."

EMD udtalte i præmis 28-29, at:

"28. In determining whether an interference was "necessary in a democratic society", the Court makes allowance for the margin of appreciation that is left to the Contracting States (see in particular the W v. the United Kingdom judgment of 8 July 1987, Series A no. 121-A, p. 27, §60 (b) and (d), and the Olsson judgment of 24 March 1988, Series A no. 130, pp. 31-32, § 67).

In this connection, it accepts that the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens. According to the Court's established case-law (see, inter alia, the judgments previously cited), however, "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.

29. Having to ascertain whether this latter condition was satisfied in the instant case, the Court observes, firstly, that its function is not to pass judgment on the Netherlands' immigration and residence policy as such. It has only to examine the interferences complained of, and it must do this not solely from the point of view of immigration and residence, but also with regard to the applicants' mutual interest in continuing their relations. As the Netherlands Court of Cassation also noted (see paragraph 16 above), the legitimate aim pursued has to be weighed against the seriousness of the interference with the applicants' right to respect for their family life. As to the aim pursued, it must be emphasised that the instant case did not concern an alien seeking

admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr. Berrehab already had real family ties there - he had married a Dutch woman, and a child had been born of the marriage. As to the extent of the interference, it is to be noted that there had been very close ties between Mr. Berrehab and his daughter for several years (see paragraphs 9 and 21 above) and that the refusal of an independent residence permit and the ensuing expulsion threatened to break those ties. That effect of the interferences in issue was the more serious as Rebecca needed to remain in contact with her father, seeing especially that she was very young. Having regard to these particular circumstances, the Court considers that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society. It thus concludes that there was a violation of Article 8 (art. 8)."

5.5.6. Familiesammenføring til udlændinge, der har børn med lovligt ophold i opholdslandet

I sagen *Sen v. the Netherlands (2001)* var den første klager som 12-årig blevet familiesammenført til sin far i Nederlandene og havde fået permanent opholdstilladelse. Han blev gift med den anden klager i Tyrkiet, hvor hun blev boende efter indgåelse af ægteskabet. Den tredje klager blev efterfølgende født i Tyrkiet. Den anden klager flyttede derefter til Nederlandene og overlod den tredje klager i sin søsters og svogers varetægt i Tyrkiet. Den første og anden klager fik efterfølgende to børn i Nederlandene, som på det tidspunkt, hvor sagen blev indbragt for EMD, var fem og et år gamle, og på tidspunktet for EMD's afgørelse i sagen var 11 og syv år gamle. Omkring seks år efter den andens klagers indrejse søgte forældrene om opholdstilladelse til den tredje klager, hvilket blev afvist af de nationale myndigheder, som blandt andet vurderede, at den tredje klager ikke længere var en del af deres familieenhed, men derimod tilhørte mosterens familieenhed.

Dommen foreligger ikke i en officiel engelsk oversættelse, hvorfor der henvises til det komplette legal summary i afsnit 5.2.2.1.5.

Den officielle franske version såvel som en uofficiel dansk oversættelse kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/Artikel 8-afgørelser fra EMD.

EMD udtalte i præmis 39-42 (uofficiel dansk oversættelse):

"39. Som i Ahmut-sagen er klagernes særskilte bopæl resultatet af den beslutning, som forældrene bevidst har truffet, da den anden klager sluttede sig til sin mand i Nederlandene, og klagerne er derfor ikke afskåret fra at opretholde den grad af familieliv, som forældrene selv valgte i 1986. Sinem blev, efter at moren var rejst til Nederlandene i 1986, passet af sin moster og onkel (præmis 14 og 17 ovenfor). Hun har boet hele sit liv i Tyrkiet og har derfor stærke bånd til det sproglige og kulturelle miljø i sit land, hvor hun stadig har familie, nemlig to onkler, to tanter og kusiner, hvortil kommer hendes bedstefar, der regelmæssigt opholder sig i landet (præmis 17 ovenfor).

40. Domstolen finder i modsætning til sin vurdering i Ahmut-sagen, at der i den foreliggende sag imidlertid er en væsentlig hindring for, at familien Şen kan vende tilbage til Tyrkiet. De to første klagere, hvoraf den ene har permanent opholdstilladelse og den anden opholdstilladelse på grund af sit ægteskab med en person, der har tilladelse til at bosætte sig i Nederlandene, etablerede deres liv som par i Nederlandene, hvor de har haft

lovligt ophold i mange år (jf. a contrario Gül-dommen, nævnt ovenfor, s. 175-176, præmis 41), og hvor et andet barn blev født i 1990, derefter et tredje i 1994. Disse to børn har altid boet i Nederlandene, i landets kulturelle miljø, og går i skole der (jf. dommen Berrehab, nævnt ovenfor, s. 8, § 7 og s. 16, præmis 29). De har derfor kun få eller ingen andre bånd end nationalitet til deres oprindelsesland (jf. navnlig dommen i Mehemi mod Frankrig af 26. september 1997, Samlingen 1997-VI, s. 1971, præmis 36), og der var derfor hindringer fra deres side for en flytning af familielivet til Tyrkiet (jr. a contrario dommene i Gül, s. 176, præmis 42, og Ahmut, s. 2033, præmis 69). Under disse forhold var Sinems ankomst til Nederlandene den mest hensigtsmæssige måde at udvikle et familieliv med hende på, især da der i betragtning af hendes unge alder var et særligt behov for at fremme hendes integration i forældrenes familieenhed (jf. navnlig, mutatis mutandis, Johansen mod Norge af 7. august 1996, Samlingen 1996-III, s. 1001-1002, præmis 52, og s. 1003-1004, præmis 64, og X. , Y. og Z. mod Det Forenede Kongerige af 22. april 1997, Samlingen 1997-II, s. 632, præmis 43), der var i stand til og villig til at tage sig af hende. Det er rigtigt, at forældrene, efter at Sinem havde tilbragt de første tre år af sit liv med sin mor, valgte at efterlade deres ældste barn i Tyrkiet, da anden klager sluttede sig til sin mand i Nederlandene i 1986. Denne omstændighed, som indtraf i Sinems tidlige barndom, kan imidlertid ikke anses som en uigenkaldelig beslutning om, at hun altid skulle have bopæl i dette land, og om, at der kun skulle være kortvarig og løs kontakt med hende, og om at der definitivt gives afkald på samvær med hende og enhver idé om genforening af deres familie opgives. Det gælder tilsvarende for det forhold, at klagerne ikke har kunnet dokumentere, at de har bidraget økonomisk til deres datters underhold.

41. Den indklagede stat undlod ved kun at overlade valget til de to første klagere mellem at opgive den situation, de havde opnået i Nederlandene, eller opgive samværet med deres ældste datter, at finde en rimelig balance mellem på den ene side klagernes interesser og på den anden side sin egen interesse i at kontrollere immigrationen, uden at det er nødvendigt for Domstolen at tage stilling til spørgsmålet om, hvorvidt Sinems slægtninge bosat i Tyrkiet er villige og i stand til at tage sig af hende, som den indklagede regering hævder.

42. Der er følgelig sket en krænkelse af Konventionens artikel 8."

6. Andre relevante konventioner

6.1. Børnekonventionen

FN's konvention om barnets rettigheder (*Convention on the Rights of the Child* (CRC) - herefter betegnet Børnekonventionen) blev ratificeret af Danmark den 5. juli 1991 ved kongelig resolution, efter at Folketinget havde meddelt samtykke den 31. maj 1991. Konventionen trådte i kraft den 18. august 1991.

FN's komité om barnets rettigheder (*the Committee on the Rights of the Child*, herefter betegnet Børnekomitéen) blev oprettet i 1991 i henhold til konventionens artikel 43 og består af 18 medlemmer, som sædvanligvis mødes tre gange årligt. Medlemmerne vælges af de stater, der har tiltrådt konventionen. Komitéen overvåger medlemsstaternes implementering af nationale tiltag, der realiserer konventionens forpligtelser. De deltagende stater skal afgive beretninger til komitéen om de foranstaltninger, de træffer for at gennemføre deres forpligtelser ifølge konventionen.

Den 27. august 2002 ratificerede Danmark den valgfri tillægsprotokol af 25. maj 2000 til FN-konventionen om barnets rettigheder vedrørende inddragelse af børn i væbnede konflikter, og den trådte i kraft den 27. september 2002.

Den 24. juli 2003 ratificerede Danmark den valgfri tillægsprotokol af 25. maj 2000 til FN-konventionen om barnets rettigheder vedrørende salg af børn, børneprostitution og børnepornografi, og den trådte i kraft den 24. august 2003.

Senest har Danmark den 7. oktober 2015 ratificeret den valgfri tillægsprotokol af 19. december 2011 om en procedure for henvendelser til konventionen af 20. november 1989 om barnets rettigheder, og den trådte i kraft den 7. januar 2016. Danmark har ved ratificeringen anerkendt, at Børnekomitéen har kompetence til at behandle klager fra enkeltpersoner eller grupper af enkeltpersoner over statens krænkelse af de i konventionen givne rettigheder – den såkaldte individuelle klageadgang, jf. tillægsprotokollens artikel 1 og 5. Komitéens udtalelser er ikke retligt bindende.

Af præamblen til Børnekonventionen fremgår det, at staterne er:

"Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,"

Ved afgørelser om inddragelse, nægtelse af forlængelse af eller bortfald af opholdstilladelser er de mest relevante bestemmelser i Børnekonventionen artikel 3, 9 og 12.

Artikel 3 omhandler *"barnets tarv",* artikel 9 *"adskillelse fra forældre"* og artikel 12 *"barnets ret til at blive hørt"*.

For mere information om Børnekonventionen henvises til OHCRC´s hjemmeside.

EMD har i nogle sager vedrørende medlemsstaternes udsendelse af udlændinge inddraget Børnekonventionens artikel 3, stk. 1, i sin vurdering efter EMRK artikel 8. Sagerne har vedrørt dels udsendelse af mindreårige udlændinge, dels udsendelse af udlændinge med mindreårige børn i medlemsstaten.

6.1.1. Relevante artikler i Børnekonventionen

6.1.1.1. Børnekonventionens artikel 3 – "barnets tarv"

Den engelske ordlyd i artikel 3 er som følger:

"Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

Den danske ordlyd, jf. *"Bekendtgørelse af FN-konvention af 20. november 1989 om barnets rettigheder"* af 16. januar 1992, er:

"Artikel 3

1. *I alle foranstaltninger vedrørende børn, hvad enten disse udøves af offentlige eller private institutioner for socialt velfærd, domstole, forvaltningsmyndigheder eller lovgivende organer, skal barnets tarv komme i første række.*
2. *Deltagerstaterne påtager sig at sikre barnet den beskyttelse og omsorg, der er nødvendig for dettes trivsel under hensyntagen til de rettigheder og pligter, der gælder for barnets forældre, værge eller andre personer med juridisk ansvar for barnet, og skal med henblik herpå træffe alle passende lovgivningsmæssige og administrative forholdsregler.*
3. *Deltagerstaterne skal sikre, at institutioner, tjenester og organer med ansvar for omsorg for eller beskyttelse af børn skal være i overensstemmelse med de standarder, der er fastsat af kompetente myndigheder, særligt med hensyn til sikkerhed, sundhed, personalets antal og egnethed samt sagkyndigt tilsyn."*

Om begrebet "barnets tarv", fremgår det af *The 1959 Declaration of the Rights of the Child*, principle 2, at:

"The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."

Det fremgår af Børnekomitéens *General comment No. 5* af 27. november 2003 om *"General measures of implementation of the Convention on the Rights of the Child"* i punkt 12, at:

"The development of a children's rights perspective throughout Government, parliament and the judiciary is required for effective implementation of the whole Convention and, in particular, in the light of the following articles in the Convention identified by the Committee as general principles:

[…]

Article 3 (1): the best interests of the child as a primary consideration in all actions concerning children.' The article refers to actions undertaken by 'public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'. The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children."

Af *General comment No. 7* af 20. september 2006 om *"Implementing child rights in early childhood"* fremgår det endvidere af punkt 13, at:

"[…] The principle of best interests applies to all actions concerning children and requires active measures to protect their rights and promote their survival, growth, and well-being, as well as measures to support and assist parents and others who have day-to-day responsibility for realizing children's rights."

Det fremgår af *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)* af 29. maj 2013, afsnit I A, at:

"The Committee underlines that the child's best interests is a threefold concept:

a) *A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.*
b) *A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.*
c) *A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases."*

Om selve begrebet anføres det endvidere under afsnit II i *General comment No. 14 (2013)*, at:

"The best interests of the child is a dynamic concept that encompasses various issues which are continuously evolving."

Det anføres under afsnit III i *General comment No. 14 (2013)*, at:

"Article 3, paragraph 1, establishes a framework with three different types of obligations for States parties:

(a) *The obligation to ensure that the child's best interests are appropriately integrated and consistently applied in every action taken by a public institution, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children;*
(b) *The obligation to ensure that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child's best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision.*

(c) *The obligation to ensure that the interests of the child have been assessed and taken as a primary consideration in decisions and actions taken by the private sector, including those providing services, or any other private entity or institution making decisions that concern or impact on a child."*

Det anføres endvidere, at:

"In giving full effect to the child's best interests, the following parameters should be borne in mind:

a) *The universal, indivisible, interdependent and interrelated nature of children's rights;*
b) *Recognition of children as right holders;*
c) *The global nature and reach of the Convention;*
d) *The obligation of States parties to respect, protect and fulfill all the rights in the Convention;*
e) *Short-, medium- and long-term effects of actions related to the development of the child over time."*

I *General comment No. 14 (2013)* oplistes videre de elementer, som skal indgå i vurderingen af hensynet til barnets tarv:

- *The child's views*
- *The child's identity*
- *Preservation of the family environment and maintaining relations*
- *Care, protection and safety of the child*
- *Situation of vulnerability*
- *The child's right to health*
- *The child's right to education*

Om hvorledes ovenstående elementer skal anvendes i afvejningen af hensynet til barnets tarv anføres:

"It should be emphasized that the basic best-interests assessment is a general assessment of all relevant elements of the child's best interests, the weight of each element depending on the others. Not all the elements will be relevant to every case, and different elements can be used in different ways in different cases. The content of each element will necessarily vary from child to child and from case to case, depending on the type of decision and the concrete circumstances, as will the importance of each element in the overall assessment."

Der kan endvidere henvises til Implementation handbook for the convention on rights of the child (herefter "Implementation Handbook") udgivet af UNICEF i 2007, side 35-36.

Der henvises til afsnit 6.1.2 for praksis.

6.1.1.2. Børnekonventionens artikel 9 – "adskillelse fra forældre"

Den engelske ordlyd i artikel 9 er som følger:

"Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law

and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned."

Den danske ordlyd, jf. *"Bekendtgørelse af FN-konvention af 20. november 1989 om barnets rettigheder"* af 16. januar 1992 er:

"Artikel 9

1. Deltagerstaterne skal sikre, at barnet ikke adskilles fra sine forældre mod deres vilje, undtagen når kompetente myndigheder, hvis afgørelser er undergivet retlig prøvelse, i overensstemmelse med gældende lov og praksis bestemmer, at en sådan adskillelse er nødvendig af hensyn til barnets tarv. En sådan beslutning kan være nødvendig i særlige tilfælde, f.eks. ved forældres misbrug eller vanrøgt af barnet, eller hvor forældrene lever adskilt og der skal træffes beslutning om barnets bopæl.

2. I behandlingen af enhver sag i medfør af stykke 1 skal alle interesserede parter gives mulighed for at deltage i sagsbehandlingen og fremføre deres synspunkter.

3. Deltagerstaterne skal respektere retten for et barn, der er adskilt fra den ene eller begge forældre, til at opretholde regelmæssig personlig forbindelse og direkte kontakt med begge forældre, undtagen hvis dette strider mod barnets tarv.

4. Hvor en sådan adskillelse er en følge af en handling iværksat af en deltagerstat, såsom tilbageholdelse, fængsling, udvisning, forvisning (langvarigt, tvungent ophold i et fremmed land eller på et bestemt sted, fx som straf, (red.)) eller død (herunder dødsfald af en hvilken som helst årsag, mens personen er i statens varetægt) af den ene eller begge forældre eller af barnet, skal deltagerstaten efter anmodning give forældrene, barnet eller om nødvendigt et andet medlem af familien de væsentlige oplysninger om, hvor den eller de fraværende medlemmer af familien befinder sig, medmindre afgivelsen af oplysningerne ville være skadelig for barnets velfærd. Deltagerstaterne skal desuden sikre, at fremsættelsen af en sådan anmodning ikke i sig selv medfører skadelige følger for vedkommende person eller personer."

Børnekomitéen har ikke udarbejdet en *General comment* omhandlende artikel 9.

Det fremgår af Implementation Handbook, side 121, at *"Article 9 of the Convention on the Rights of the Child enshrines two essential principles of children's rights: first, that children should not be separated from their parents unless it is necessary for their best interests and, second, that all procedures to separate children from parents on that ground must be fair. It also affirms children's rights to maintain relations and contact with both parents, and places a duty on the State to inform parent and child of the whereabouts of either if the State has caused their separation (for example by deportation or imprisonment)."*

Det fremgår dog ikke af Implementation Handbook, hvorledes de ovenstående principper konkret skal anvendes i sager, hvor der sker nægtelse af forlængelse, inddragelse eller bortfald af opholdstilladelser.

6.1.1.3. Børnekonventionens artikel 12 – "barnets ret til at blive hørt"

Den engelske ordlyd i artikel 12 er som følger:

"Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

Den danske ordlyd i artikel 12 er som følger:

"Artikel 12

1. Deltagerstaterne skal sikre et barn, der er i stand til at udforme sine egne synspunkter, retten til frit at udtrykke disse synspunkter i alle forhold, der vedrører barnet; barnets synspunkter skal tillægges passende vægt i overensstemmelse med dets alder og modenhed.

2. Med henblik herpå skal barnet især gives mulighed for at udtale sig i enhver behandling ved dømmende myndighed eller forvaltningsmyndighed af sager, der vedrører barnet, enten direkte eller gennem en repræsentant eller et passende organ i overensstemmelse med de i national ret foreskrevne fremgangsmåder."

Det fremgår af Børnekomiteens *General Comment No. 12 (2009)* om *The right of the child to be heard*, punkt 2, at:

"The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention. The Committee on the Rights of the Child (the Committee) has identified article 12 as one of the four general principles of the Convention, the others being the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests, which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights."

I punkt 15 fremgår det, at:

"Article 12 of the Convention establishes the right of every child to freely express her or his views, in all matters affecting her or him, and the subsequent right for those views to be given due weight, according to the child's age and maturity. This right imposes a clear legal obligation on States parties to recognize this right and ensure its implementation by listening to the views of the child and according them due weight. This obligation requires that States parties, with respect to their particular judicial system, either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child."

Endvidere fremgår det af punkt 18, at:

"Article 12 manifests that the child holds rights which have an influence on her or his life, and not only rights derived from her or his vulnerability (protection) or dependency on adults (provision). The Convention recognizes the child as a subject of rights, and the nearly universal ratification of this international instrument by States parties emphasizes this status of the child, which is clearly expressed in article 12."

Om indholdet i artikel 12, stk. 2, fremgår det af punkt 32, at:

"Article 12, paragraph 2, specifies that opportunities to be heard have to be provided in particular 'in any judicial and administrative proceedings affecting the child'. The Committee emphasizes that this provision applies to all relevant judicial proceedings affecting the child, without limitation, including, for example, separation of parents, custody, care and adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied children, asylum-seeking and refugee children, and victims of armed conflict and other emergencies. Typical administrative proceedings include, for example, decisions about children's education, health, environment, living conditions, or protection. Both kinds of proceedings may involve alternative dispute mechanisms such as mediation and arbitration."

Af punkt 33 fremgår det videre, at:

"The right to be heard applies both to proceedings which are initiated by the child, such as complaints against ill-treatment and appeals against school exclusion, as well as to those initiated by others which affect the child, such as parental separation or adoption. States parties are encouraged to introduce legislative measures requiring decision makers in judicial or administrative proceedings to explain the extent of the consideration given to the views of the child and the consequences for the child."

Om staternes implementering af Børnekonventionens artikel 12 fremgår det af punkterne 40-47:

"Implementation of the two paragraphs of article 12 requires five steps to be taken in order to effectively realize the right of the child to be heard whenever a matter affects a child or when the child is invited to give her or his views in a formal proceeding as well as in other settings. These requirements have to be applied in a way which is appropriate for the given context.

(a) Preparation

41.Those responsible for hearing the child have to ensure that the child is informed about her or his right to express her or his opinion in all matters affecting the child and, in particular, in any judicial and administrative decision-making processes, and about the impact that his or her expressed views will have on the outcome. The child must, furthermore, receive information about the option of either communicating directly or

through a representative. She or he must be aware of the possible consequences of this choice. The decision maker must adequately prepare the child before the hearing, providing explanations as to how, when and where the hearing will take place and who the participants will be, and has to take account of the views of the child in this regard.

(b) The hearing

42.The context in which a child exercises her or his right to be heard has to be enabling and encouraging, so that the child can be sure that the adult who is responsible for the hearing is willing to listen and seriously consider what the child has decided to communicate. The person who will hear the views of the child can be an adult involved in the matters affecting the child (e.g. a teacher, social worker or caregiver), a decision maker in an institution (e.g. a director, administrator or judge), or a specialist (e.g. a psychologist or physician).

43. Experience indicates that the situation should have the format of a talk rather than a one‑sided examination. Preferably, a child should not be heard in open court, but under conditions of confidentiality.

(c) Assessment of the capacity of the child

44. The child's views must be given due weight, when a case-by-case analysis indicates that the child is capable of forming her or his own views. If the child is capable of forming her or his own views in a reasonable and independent manner, the decision maker must consider the views of the child as a significant factor in the settlement of the issue. Good practice for assessing the capacity of the child has to be developed.

(d) Information about the weight given to the views of the child (feedback)

45. Since the child enjoys the right that her or his views are given due weight, the decision maker has to inform the child of the outcome of the process and explain how her or his views were considered. The feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously. The information may prompt the child to insist, agree or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or a complaint.

(e) Complaints, remedies and redress

46. Legislation is needed to provide children with complaint procedures and remedies when their right to be heard and for their views to be given due weight is disregarded and violated. Children should have the possibility of addressing an ombudsman or a person of a comparable role in all children's institutions, inter alia, in schools and day-care centres, in order to voice their complaints. Children should know who these persons are and how to access them. In the case of family conflicts about consideration of children's views, a child should be able to turn to a person in the youth services of the community.

47. If the right of the child to be heard is breached with regard to judicial and administrative proceedings (art. 12, para. 2), the child must have access to appeals and complaints procedures which provide remedies for rights violations. Complaints procedures must provide reliable mechanisms to ensure that children are confident that using them will not expose them to risk of violence or punishment."

6.1.1.4. Samspillet mellem artikel 12 og andre af Børnekonventionens bestemmelser

Under afsnit B i *General Comment No. 12 (2009)* udtalte Børnekomitéen i punkt 68, at:

"Article 12, as a general principle, is linked to the other general principles of the Convention, such as article 2 (the right to non-discrimination), article 6 (the right to life, survival and development) and, in particular, is interdependent with article 3 (primary consideration of the best interests of the child). The article is also closely linked with the articles related to civil rights and freedoms, particularly article 13 (the right to freedom of expression) and article 17 (the right to information). Furthermore, article 12 is connected to all other articles of the Convention, which cannot be fully implemented if the child is not respected as a subject with her or his own views on the rights enshrined in the respective articles and their implementation."

Endvidere fremgår det af punkt 74, at:

"74. There is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives."

General comment No. 12, afsnit C, omhandler implementeringen af barnets ret til at blive hørt i forskellige situationer. Under afsnit C 9, *"In immigration and asylum proceedings"*, fremgår det af punkterne 123 og 124, at:

"123.Children who come to a country following their parents in search of work or as refugees are in a particularly vulnerable situation. For this reason it is urgent to fully implement their right to express their views on all aspects of the immigration and asylum proceedings. In the case of migration, the child has to be heard on his or her educational expectations and health conditions in order to integrate him or her into school and health services. In the case of an asylum claim, the child must additionally have the opportunity to present her or his reasons leading to the asylum claim.

124.The Committee emphasizes that these children have to be provided with all relevant information, in their own language, on their entitlements, the services available, including means of communication, and the immigration and asylum process, in order to make their voice heard and to be given due weight in the proceedings. A guardian or adviser should be appointed, free of charge. Asylum-seeking children may also need effective family tracing and relevant information about the situation in their country of origin to determine their best interests. Particular assistance may be needed for children formerly involved in armed conflict to allow them to pronounce their needs. Furthermore, attention is needed to ensure that stateless children are included in decision-making processes within the territories where they reside."

General comment No. 12, afsnit D, omhandler de grundlæggende krav til implementeringen af barnets ret til at blive hørt. Af punkterne 132-134 fremgår det, at:

"132.The Committee urges States parties to avoid tokenistic approaches, which limit children's expression of views, or which allow children to be heard, but fail to give their views due weight. It emphasizes that adult manipulation of children, placing children in situations where they are told what they can say, or exposing children to risk of harm through participation are not ethical practices and cannot be understood as implementing article 12.

133. If participation is to be effective and meaningful, it needs to be understood as a process, not as an individual one-off event. Experience since the Convention on the Rights of the Child was adopted in 1989 has led to a broad consensus on the basic requirements which have to be reached for effective, ethical and meaningful implementation of article 12. The Committee recommends that States parties integrate these requirements into all legislative and other measures for the implementation of article 12.

134. All processes in which a child or children are heard and participate, must be:

(a)Transparent and informative - children must be provided with full, accessible, diversity-sensitive and age-appropriate information about their right to express their views freely and their views to be given due weight, and how this participation will take place, its scope, purpose and potential impact;

(b)Voluntary - children should never be coerced into expressing views against their wishes and they should be informed that they can cease involvement at any stage;

(c)Respectful - children's views have to be treated with respect and they should be provided with opportunities to initiate ideas and activities. Adults working with children should acknowledge, respect and build on good examples of children's participation, for instance, in their contributions to the family, school, culture and the work environment. They also need an understanding of the socio-economic, environmental and cultural context of children's lives. Persons and organizations working for and with children should also respect children's views with regard to participation in public events;

(d)Relevant - the issues on which children have the right to express their views must be of real relevance to their lives and enable them to draw on their knowledge, skills and abilities. In addition, space needs to be created to enable children to highlight and address the issues they themselves identify as relevant and important;

(e)Child-friendly - environments and working methods should be adapted to children's capacities. Adequate time and resources should be made available to ensure that children are adequately prepared and have the confidence and opportunity to contribute their views. Consideration needs to be given to the fact that children will need differing levels of support and forms of involvement according to their age and evolving capacities;

(f)Inclusive - participation must be inclusive, avoid existing patterns of discrimination, and encourage opportunities for marginalized children, including both girls and boys, to be involved (see also para. 88 above). Children are not a homogenous group and participation needs to provide for equality of opportunity for all, without discrimination on any grounds. Programmes also need to ensure that they are culturally sensitive to children from all communities;

(g)Supported by training - adults need preparation, skills and support to facilitate children's participation effectively, to provide them, for example, with skills in listening, working jointly with children and engaging children effectively in accordance with their evolving capacities. Children themselves can be involved as trainers and facilitators on how to promote effective participation; they require capacity-building to strengthen their skills in, for example, effective participation awareness of their rights, and training in organizing meetings, raising funds, dealing with the media, public speaking and advocacy;

(h)Safe and sensitive to risk - in certain situations, expression of views may involve risks. Adults have a responsibility towards the children with whom they work and must take every precaution to minimize the risk to children of violence, exploitation or any other negative consequence of their participation. Action necessary to provide appropriate protection will include the development of a clear child-protection strategy which recognizes the particular risks faced by some groups of children, and the extra barriers they face in obtaining help. Children must be aware of their right to be protected from harm and know where to go for help if needed. Investment in working with families and communities is important in order to build understanding of the value and implications of participation, and to minimize the risks to which children may otherwise be exposed;

(i)Accountable - a commitment to follow-up and evaluation is essential. For example, in any research or consultative process, children must be informed as to how their views have been interpreted and used and, where necessary, provided with the opportunity to challenge and influence the analysis of the findings. Children are also entitled to be provided with clear feedback on how their participation has influenced any outcomes. Wherever appropriate, children should be given the opportunity to participate in follow-up processes or activities. Monitoring and evaluation of children's participation needs to be undertaken, where possible, with children themselves."

6.1.2. Udtalelser fra Børnekomitéen

6.1.2.1. Børnekonventionens artikel 3

Det er ved gennemgangen af Børnekomitéens udtalelser konstateret, at der kun er behandlet en sag omhandlende en inddragelse af en opholdstilladelse.

I udtalelse af 26. september 2019, *A.S. mod Danmark, communication No. 36/2017*, havde klageren (barnet) og hans forældre fået inddraget deres opholdstilladelser, som var opnået på baggrund af svig. Klageren var indrejst i Danmark som toårig sammen med sine forældre, og efter to et halvt år blev deres opholdstilladelser inddraget, idet udlændingemyndighederne kom i besiddelse af oplysninger, der viste, at centrale dokumenter og erklæringer, som faren havde fremlagt til støtte for sit asylmotiv, måtte anses som urigtige og fremskaffet til brug for asylsagen.

Klageren anførte overfor komitéen, at Flygtningenævnet ikke havde forholdt sig til Børnekonventionen og til klagerens risiko ved udsendelse til Pakistan, herunder for bl.a. at blive adskilt fra sin mor og udsat for overgreb fra sin fars familie. Klageren gjorde gældende, at en udsendelse til Pakistan ville udgøre en krænkelse af flere bestemmelser i Børnekonventionen, heriblandt artikel 3 om "barnets tarv".

Børnekomitéen udtalte i punkt 9.4.:

"The Committee also notes the author's claim based on article 3 of the Convention, referring to the fact that returning the author to Pakistan would be against the best interests of the child, placing him at risk of separation from his mother, and that Danish authorities did not take the author's particular circumstances into account during relevant procedures. However, the Committee takes note of the State party's arguments that due consideration was given to the author's best interests throughout all relevant procedures, considering his particular circumstances (including his age, school attendance, language skills and family situation) as an

integral part of those procedures and that the author has failed to identify any concrete irregularity in the decision-making process or risk factors for which the Danish authorities have failed to properly consider."

Komitéen udtalte i pkt. 9.5.-9.6. generelt om inddragelse af hensynet til barnets tarv:

"9.5. The Committee recalls that the assessment of the existence of a risk of serious violations of the Convention in the receiving State should be conducted in an age- and gender-sensitive manner, that the best interests of the child should be a primary consideration in decisions concerning the return of a child, and that such decisions should ensure that the child, upon return, will be safe and provided with proper care and enjoyment of rights. The best interests of the child should be ensured explicitly through individual procedures as an integral part of any administrative or judicial decision concerning the return of a child.

9.6. The Committee also recalls that it is generally for the organs of the States parties to the Convention to review and evaluate facts and evidence in order to determine whether a risk of a serious violation of the Convention exists upon return, unless it is found that such evaluation was clearly arbitrary or amounted to a denial of justice."

I punkt 9.7.-9.8. udtalte komitéen om den konkrete sag:

"9.7. In the present case, the Committee notes that the Danish Refugee Appeals Board and the Immigration Appeals Board have assessed the authors' new ground for requesting asylum, namely, the alleged threats made by the author's paternal relatives in Pakistan, together with the author's particular circumstances, but rejected this ground, considering it unreliable and elaborative. These organs concluded that the author would not face a risk of being separated from his mother if returned to Pakistan and that it was in the author's best interest to remain with his mother.

9.8. The Committee observes that, while the author disagrees with the conclusion reached by the Danish Refugee Appeals Board and Immigration Appeals Board, he has not shown that their assessment of the facts and evidence presented by the author was arbitrary or otherwise amounted to a denial of justice. The Committee therefore considers that this part of the communication is also insufficiently substantiated and declares it inadmissible under article 7 (f) of the Optional Protocol."

Komitéen afviste sagen som inadmissible.

Det bemærkes, at Børnekomitéen i andre udtalelser – f.eks. i sagen *K.Y.M. mod Danmark, communication no. 3/2016 (2018),* og i sagen *A.Y. mod Danmark, communication no. 7/2016 (2018)*, har udtalt sig om inddragelsen af hensynet til barnets tarv i den asylretlige vurdering.

Se endvidere en sag om familiesammenføring *O.M. mod Danmark, communication No. 145/2021*, udtalelse af 19. september 2023, om opretholdelse af kontakt ved brug af sociale medier.

Der kan endvidere henvises til sagen M.F. og L.B. mod Schweiz (148/2021), udtalelse af 27. januar 2025, hvor klageren blev udvist for alvorlig kriminalitet og nægtet opholdstilladelse i opholdslandet, hvor hans partner og børn var statsborgere.

6.1.2.2. Børnekonventionens artikel 9

I sagen *O.M. mod Danmark, communication No. 145/2021*, udtalelse af 19. september 2023, fandt komitéen artikel 9 krænket, idet klageren som stedfar til et barn skulle betragtes som en 'forælder' med henblik på barnets ret til ikke at blive adskilt fra klageren.

Der kan endvidere henvises til sagen M.F. og L.B. mod Schweiz (148/2021), udtalelse af 27. januar 2025, hvor klageren blev udvist for alvorlig kriminalitet og nægtet opholdstilladelse i opholdslandet, hvor hans partner og børn var statsborgere.

6.1.2.3. Børnekonventionens artikel 12

Det ses ikke, at Børnekomitéen har behandlet sager omhandlende nægtelse af forlængelse, inddragelse eller bortfald af opholdstilladelser, hvor artikel 12 er blevet påberåbt.

Børnekomitéen har i et enkelt tilfælde behandlet en sag omhandlende familiesammenføring, hvor klageren havde anført, at der var sket en krænkelse af artikel 3 sammenholdt med artikel 12.

I Børnekomitéens udtalelse i *Y.B & N.S v. Belgium, communication no. 12/2017 (2018)* var klageren blevet anbragt i plejefamilie af hjemlandets myndigheder. I hjemlandet var dette sket ifølge en lovgivning, som pålagde plejeforældrene en pligt til at beskytte, uddanne og tage vare på barnet, men ikke etablerede et juridisk bånd mellem barnet og plejeforældrene (kaldet *kafalah* i marokkansk lovgivning). Plejeforældrene var statsborgere i opholdslandet, og de søgte på vegne af klageren om opholdstilladelse på baggrund af familiesammenføring. De nationale myndigheder i opholdslandet (plejeforældrenes hjemland) gav afslag på dette, ligesom de senere gav afslag på klagernes to ansøgninger om opholdstilladelse på baggrund af humanitære årsager. Klagerne indbragte derefter sagen for Børnekomitéen med henvisning til, at der var sket en krænkelse af bl.a. artikel 3 sammenholdt med artikel 12.

Om hensynet til barnets tarv, udtalte Børnekomitéen i punkt 8.3, at:

"The Committee recalls that in all actions concerning children, the best interests of the child must be a primary consideration and that the concept 'should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in the light of the specific circumstances of the particular child.'"

Børnekomitéen behandlede i punkterne 8.6-8.8, hvorledes den proceduremæssige beskyttelse skulle anvendes i den konkrete sag:

"8.6 With regard to the authors' claims based on article 12 of the Convention, the Committee notes the State party's arguments that C.E. was 1 year old at the time of the first decision and 5 at the time of the second, that she was not capable of forming her own views and that the need to allow a child to express his or her views would not be justified for the purposes of applying the rules for granting residence permits.

8.7 The Committee points out, however, that 'article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice that would restrict the child's right to be heard in all matters affecting her or him. […] It is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter […].'

It also notes that 'any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests. […] The fact that the child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child's views in determining his or her best interests. The adoption of specific measures to guarantee the exercise of equal rights for children in such situations must be subject to an individual assessment which assures a role to the children themselves in the decision-making process.'

8.8 The Committee observes in this case that C.E. was 5 years old when the second decision on the authors' application for a humanitarian visa was made and that she would have been perfectly capable of forming views of her own regarding the possibility of living permanently with the authors in Belgium. The Committee does not share the State party's view that it is not necessary to take the views of a child into account in proceedings conducted to determine whether he or she should be issued a residence permit, quite on the contrary. The implications of the proceedings in the authors' case are of paramount importance for C.E.'s life and future, insofar as they are directly tied to her chances of living with the authors as a member of their family."

Børnekomitéen fandt derefter i punkt 8.9, at:

"In the light of the above, the Committee concludes that the State party did not specifically consider the best interests of the child when it assessed the application for a visa for C.E. and did not allow her the right to be heard, in breach of articles 3 and 12 of the Convention."

Der kan endvidere henvises til sagen M.F. og L.B. mod Schweiz (148/2021), udtalelse af 27. januar 2025, hvor klageren blev udvist for alvorlig kriminalitet og nægtet opholdstilladelse i opholdslandet, hvor hans partner og børn var statsborgere.

6.1.3. Anvendelse af Børnekonventionen i praksis ved EMD

EMD har i nogle sager vedrørende medlemsstaternes udsendelse af udlændinge inddraget Børnekonventionens artikel 3, stk. 1, i sin vurdering efter EMRK artikel 8. Sagerne har vedrørt dels udsendelse af mindreårige udlændinge, dels udsendelse af udlændinge med mindreårige børn i medlemsstaten.

Nedenfor følger en gennemgang af sager, hvor EMD har inddraget Børnekonventionens artikel 3, stk. 1, som et blandt flere elementer i proportionalitetsafvejningen. Det fremgår af EMD's begrundelse i hver enkelt sag, hvordan princippet om barnets tarv har fundet anvendelse, og hvordan hensynet er indgået i den samlede afvejning.

6.1.3.1. Alvorlig kriminalitet

Det ses ikke, at EMD har henvist til Børnekonventionen i domme, hvor der er begået alvorlig kriminalitet. EMD har dog i følgende domme vurderet, om der var taget korrekt hensyn til barnets tarv ved proportionalitetsvurderingen:

I sagen A.H. Khan v. the United Kingdom (2011) var klageren indrejst i opholdslandet som syvårig og var tidligere blevet dømt for samleje med en mindreårig, to forsøg på røveri samt overfald. Som 30-årig blev han ydermere idømt fem års fængsel for røveri og udvist. Klageren blev udsendt ni år efter sin sidste dom. På tidspunktet for EMD´s afgørelse af sagen var han far til seks børn i alderen fra 12 til 17 år. Klageren var på daværende tidspunkt ikke i et forhold med mødrene til sine børn.

EMD henviste ved behandlingen af sagen ikke til Børnekonventionens artikel 3, men udtalte i præmis 40, at:

"As regards the applicant's relationship with his children and their mothers, the Court notes that, as predicted by the Tribunal, neither woman chose to accompany the applicant to Pakistan and both remain in the United Kingdom with their children. The Court also notes that the extent of the applicant's relationship with his children and their mothers was limited even at the time of his deportation, given that he had not lived with them since 1999 or seen the children since 2000. The applicant had not therefore seen his children in the ten years prior to his deportation and the eldest child would only have been aged four the last time he or she had seen his or her father. There was also, as noted by the Tribunal, some doubt as to whether the applicant fulfilled a positive role in his children's lives, given that four of the six had, at various times, been on the social services' 'at risk' register. Given the length of time since the applicant last had face-to-face contact with his children, as a result of his offending and consequent imprisonment, and the lack of evidence as to the existence of a positive relationship between the applicant and his children, the Court takes the view that the applicant has not established that his children's best interests were adversely affected by his deportation."

I præmis 41 udtalte EMD, at:

"Finally, the Court turns to the question of the respective solidity of the applicant's ties to the United Kingdom and to Pakistan. The Court notes that, unlike his younger brother, the applicant returned to Pakistan for visits following his arrival in the United Kingdom and also married there. In the absence of any evidence to the contrary, the Court assumes that this marriage is still, legally at least, subsisting. The applicant therefore maintained some level of connection to his country of origin and was not deported as a stranger to the country. As regards his ties to the United Kingdom, the Court has addressed the question of his family life, both with his parents and siblings and with his various partners and children, above, and found it to be limited in its extent. Furthermore, the applicant's private life in the United Kingdom, as observed by the Tribunal, has been constrained by his convictions and spells in prison. Whilst he was mainly educated in the United Kingdom and has worked, he does not appear to have established a lengthy or consistent employment history. In short, and despite the length of his stay, the applicant did not achieve a significant level of integration into British society. The Court is aware that, as a settled migrant who spent much of his childhood in the United Kingdom, serious reasons would be required to render the applicant's deportation proportionate (see Maslov, cited above, § 75). However, having regard to his substantial offending history, including offences of violence and recidivism following the commencement of deportation proceedings against him, the Court is of the view that such serious reasons are present in the applicant's case. His private and family life in the United Kingdom were not such as to outweigh the risk he presented of future offending and harm to the public and his deportation was therefore proportionate to the legitimate aim of preventing crime. As such, the applicant's deportation to Pakistan did not amount to a violation of Article 8."

EMD afviste derefter sagen som inadmissible.

Sagen *Salem v. Denmark (2016)* omhandlede en klager, som blev idømt seks års fængsel for narkokriminalitet samt andre forhold og blev udvist med indrejseforbud for bestandigt.

EMD udtalte i præmis 78, at:

"In the Court's view it is doubtful whether, on the basis of those statements, or on the material before it, the applicant has substantiated that he had a central role in the family (see paragraph 63 above) and that his children's best interests were adversely affected by his deportation (see, for example, A.W. Khan v. the United Kingdom, cited above, § 40)."

I præmis 79 udtalte EMD endvidere, at

"The Supreme Court did not expressly state whether it found that there were no insurmountable obstacles for the applicant's wife and children to follow him. It rather appears that the majority found that in any event the separation of the applicant from his wife and children could not outweigh the other counterbalancing factors, notably that the applicant had a leading and central role in the commission of persistent, organised and aggravated drug crimes (see paragraph 39 above)."

EMD udtalte i præmis 82, at:

"In the light of the above, the Court recognises that the Supreme Court carefully balanced the competing interests and explicitly took into account the criteria set out in the Court's case-law, including the applicant's family situation. Moreover, having regard to the gravity of the drug crimes committed by the applicant, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court finds that the interference was supported by relevant and sufficient reasons, and was proportionate in that a fair balance was struck between the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other hand."

EMD fandt i den konkrete sag, at der ikke var sket en krænkelse af EMRK artikel 8.

I sagen *Assem Hassan Ali v. Denmark (2018)* var klageren indrejst i en alder af 20 år. Klageren blev idømt fem års fængsel for narkokriminalitet og udvist. Han havde på tidspunktet for udvisningen opholdt sig 20 år i opholdslandet. Klageren havde under sit ophold fået seks børn i alderen fra syv til 14 år med to forskellige kvinder.

Ved proportionalitetsvurderingen udtalte EMD i præmis 54, at:

"The remaining criterion in the case to be examined is 'the best interests and well-being of the children, in particular the seriousness of the difficulties which any of the applicant's children are likely to encounter in the country to which the applicant is to be expelled'."

Endvidere udtalte EMD i præmis 55, at:

"In its judgment Jeunesse v. the Netherlands [GC], (no. 12738/10, § 109, 3 October 2014), which concerned family reunion, the Court reiterated "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 ... Whilst

alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it."

I præmis 56 til 60 udtalte EMD, at:

"56. Whilst this principle applies to all decisions concerning children, the Court notes that in the context of the removal of a non-national parent as a consequence of a criminal conviction, the decision first and foremost concerns the offender. Furthermore, as case-law has shown, in such cases the nature and seriousness of the offence committed or the offending history may outweigh the other criteria to take into account (see, for example, Cömert v. Denmark (dec.), 14474/03, 10 April 2006; Üner v. the Netherlands [GC], cited above, §§ 62-64; and Salem v Denmark, cited above, § 76).

57. In the present case, when the revocation proceedings were pending before the District Court in 2013, the applicant's children were approximately 14, 12, 11, 9, 8 and 7 years old. They would all remain in Denmark, so no question arose as to 'the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled'. The issue was rather which difficulties they would encounter in Denmark due to the separation from their father. The three eldest children would live with their mother, X, as they had done since their parents divorced in 2001. The eldest son was living part-time in an institution. The three youngest children would live with their mother, Y, as they had done since the applicant was detained in April 2008.

58. Both the District Court and the High Court found unsubstantiated the applicant's allegation that the children's health had deteriorated since the expulsion order was issued in 2009. The applicant's eldest son's medical condition was also known in 2009.

59. The domestic courts also stated that the fact that, while imprisoned, the applicant has maintained contact with his children since 2009, could not independently lead to the conclusion that there have been 'material changes in [the applicant's] circumstances' (see section 50 of the Aliens Act).

60. The domestic courts did not as such comment on X's allegation that 'It would be a disaster if her children were separated permanently from their father. They had lived in a strong hope that they would reunite with their father upon his release. She feared that her children would break down if [the applicant] were to be deported. It would become very difficult to integrate them into Danish society'. Nor did they take a stand on Y's allegation that "her eldest son had a support person. The reason was that he isolated himself. The reason why he isolated himself was that he missed being part of a whole family. It would help if he could be with [the applicant] ... It would also have a very negative impact on the children if their father were deported."

EMD udtalte i præmis 61, at:

"Apart from observing that such statements cannot be considered established facts, on the basis of the other material before it, the Court is not convinced that the applicant's children's best interests were adversely affected by the applicant's deportation to such an extent that those should outweigh the other criteria to take into account (see, for example, A.H. Khan v. the United Kingdom, no. 6222/10, § 40, 20 December 2011)."

EMD fandt på baggrund af ovenstående, at der ikke var sket en krænkelse af EMRK artikel 8.

6.1.3.2. Mindre alvorlig kriminalitet

Sagen *Maslov v. Austria (2008)* omhandlede udvisningen af en ung mand, som havde begået mindre alvorlig kriminalitet som mindreårig. Ved EMD´s behandling af klagen henviste EMD til relevant lovgivning og praksis, herunder Børnekonventionen.

I præmis 36 henviste EMD til følgende relevante artikler i Børnekonventionen:

"The United Nations Convention on the Rights of the Child of 20 November 1989, to which Austria is a State Party, provides:

Article 1

'For the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.'

Article 3 § 1

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

Article 40 § 1

'States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.'

Grundet klagerens unge alder, da han begik de kriminelle forhold og ved EMD´s efterfølgende behandling af sagen, udtalte EMD i præmis 83:

"The Court considers that, where expulsion measures against a juvenile offender are concerned, the obligation to take the best interests of the child into account includes an obligation to facilitate his or her reintegration. In this connection, the Court notes that Article 40 of the Convention on the Rights of the Child makes reintegration an aim to be pursued by the juvenile justice system (see paragraphs 36-38 above). In the Court's view this aim will not be achieved by severing family or social ties through expulsion, which must remain a means of last resort in the case of a juvenile offender. It finds that these considerations were not sufficiently taken into account by the Austrian authorities."

EMD fandt i den konkrete sag, at staten havde krænket EMRK artikel 8, idet indgrebet ikke var proportionalt.

6.1.3.3. Opholdstilladelse opnået på baggrund af svig

I sagen Butt v. Norway (2012) havde klagerne opnået opholdstilladelse på baggrund af svig udvist af deres mor, som ikke oplyste de norske myndigheder om, at hun og børnene havde opholdt sig i Pakistan i tre et halvt år fra 1992 til 1996. De nationale myndigheder blev klar over dette, men inddrog ikke klagernes opholdstilladelse, idet deres mor i mellemtiden var forsvundet, og fordi klagerne var mindreårige, hvorfor myndighederne ikke ville udsende dem uden deres mor. De nationale myndigheder inddrog efterfølgende klagernes opholdstilladelse, da de var blevet myndige.

EMD udtalte i præmis 79, at:

"In this regard the Court has noted the general approach of the Borgarting High Court that strong immigration policy considerations would in principle militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that parents exploited the situation of their children in order to secure a residence permit for themselves and for the children (see paragraph 34 above). The Court, seeing no reason for disagreeing with this general approach, observes that during a police interview on 15 November 1996 the applicants' mother conceded that she had previously given incorrect information to the police and other institutions about her own and her children's stay in Pakistan during this period. Thus, it seems that her children's family life was created in Norway at a time when she was aware that their immigration status in the country was such that the persistence of that family life would, since their return in 1996, be precarious (see Nunez, cited above, §§ 71-76). That was also the case of their private life in the country. From the above considerations, it follows that the removal of the applicants would be incompatible with Article 8 only in exceptional circumstances."

Ved proportionalitetsvurderingen lagde EMD i præmis 76 vægt på, at:

***"**The Court notes from the outset that the first and second applicants arrived in Norway in 1989 at the age of four and three years, respectively. Apart from an interval of three years and a half from the summer of 1992 to early 1996, they have lived there since then. Their mother went into hiding around the turn of the year 2000 – 2001, was expelled in 2005 and died in 2007. Their father remained in Pakistan. During most of their stay in Norway, the applicants lived at the home of their maternal uncle and aunt (their mother's brother and sister) with family in Oslo, who took care of them. As observed by the High Court in its judgment of 14 November 2008 (see paragraph 35 above) the applicants lived with them until 2005 and must therefore be presumed to have close emotional links to this part of the family. The Court further finds it established that the applicants lived with their uncle and aunt for most of the time thereafter. This was also where they had their friends and social network. They had received the essential part of their education and upbringing in Norway and mastered the Norwegian language to the full. It is obvious that with time the applicants had developed a strong personal and social attachment to Norway. The Court sees no reason to doubt that they both had such 'family life' and 'private life' in Norway as fall within the scope of protection of Article 8 of the Convention. The Government's suggestion that the private- and family life interests at stake were only at the fringes of the Article 8 rights must be rejected."*

EMD udtalte i præmis 90, at:

"In the light of the above, the Court finds that the circumstances of the present case were indeed exceptional. It is not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its 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."

EMD fandt samlet set, at der var sket en krænkelse af artikel 8.

EMD har også i andre sager inddraget Børnekonventionens artikel 3, såfremt der ifølge EMD forelå helt særlige omstændigheder i den konkrete sag.

I sagen Nunez v. Norway (2009) havde klageren opnået sin opholdstilladelse på baggrund af svig. Da opholdstilladelsen blev inddraget, havde hun opholdt sig i opholdslandet fra hun var 21 til hun var 26 år, i alt 5 år, og havde stiftet familie i opholdslandet ved at gifte sig og få børn.

Om de nationale myndigheders afvejning af hensynet til klagerens egne forhold modsat hensynet til statens behov for at kontrollere indrejse og ophold udtalte EMD i præmis 72 og 73:

"72. Nor does the Court see any reason to disagree with the assessment made by the national immigration authorities and courts (see paragraphs 47 to 51 of the Supreme Court's judgment) as to the aggravated character of the applicant's administrative offences under the Immigration Act. In July 1996 she had returned to Norway in breach of the two-year-prohibition on re-entry imposed in March 1996. She had given misleading information about her identity, her previous stay in Norway and her criminal conviction. By having intentionally done so she had obtained residence and work permits, which were renewed a number of times, then a settlement permit, none of which she had been entitled to. She had thus lived and worked in the country unlawfully throughout and the seriousness of her offences does not seem to have diminished with time.

73. In these circumstances, the Court considers that the public interest in favour of ordering the applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention."

Om hensynet til klagerens børn, udtalte EMD i præmis 78:

"However, the Court will examine whether particular regard to the children's best interest would nonetheless upset the fair balance under Article 8."

I præmis 79 til 81 lagde EMD vægt på, at:

"79. It is to be noted that from their birth in 2002 and 2003, respectively, until the City Court's judgment of 24 May 2007 in the custody case, the children had been living permanently with the applicant, who had also assumed their daily care since her separation from their father in October 2005. Thus, as noted by the Supreme Court's minority, the applicant was the children's primary care person from their birth and until their father was granted custody in 2007. The Court regards it as significant that by virtue of that judgment, which attached great weight to the decision to expel the applicant (see paragraph 18 above), the children were moved from her to live with their father, whilst she was granted extended rights of contact with them. As observed by the Supreme Court minority, together with the father, the applicant was the most important person in the children's lives.

80. Also, an equally important consequence of the said judgment of 24May 2007 was that the children, who had lived all their lives in Norway, would remain in the country in order to live with their father, a settled immigrant.

81. Moreover, in the assessment of the Supreme Court's minority, the children had experienced stress, presumably due to the risk of their mother's being expelled as well as disruption in their care situation, first by their parents' being separated, then by being moved from their mother's home to that of their father. They would have difficulty in understanding the reasons were they to be separated from their mother. Pending her expulsion and the two-year re-entry ban she would probably not return to Norway and it was uncertain whether they would be able to visit her outside Norway. The Court has taken note that, as observed by the Supreme Court's majority, Mr O. stated that, in the event that the applicant were to be expelled, he would facilitate contacts between the children and her, notably during summer and Christmas holidays. According to the Supreme Court's majority, there was no reason to assume that it would not be possible to maintain contact between the children and the applicant during the expulsion period. Nevertheless, the Court observes that, as a result of the decisions taken in the expulsion case and in the custody case, the children would in all likelihood be separated from their mother practically for two years, a very long period for children of the ages in question. There is no guarantee that at the end of this period the mother would be able to return. Whether their separation would be permanent or temporary is in the realm of speculation. In these circumstances, it could be assumed that the children were vulnerable, as held by the minority of the Supreme Court."

EMD udtalte i præmis 84:

"Having regard to all of the above considerations, notably the children's long lasting and close bonds to their mother, the decision in the custody proceedings, the disruption and stress that the children had already experienced and the long period that elapsed before the immigration authorities took their decision to order the applicant's expulsion with a re-entry ban, the Court is not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention. Reference is made in this context also to Article 3 of the UN Convention on the Rights of the Child, according to which the best interests of the child shall be a primary consideration in all actions taken by public authorities concerning children (see Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, § 135, ECHR 2010-...). The Court is therefore not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicant's need to be able to remain in Norway in order to maintain her contact with her children in their best interests, on the other hand."

EMD fandt, at der var sket en krænkelse af EMRK artikel 8.

Der kan endvidere henvises til sagen *Antwi v. Norway (2012)*, hvor den ene klager havde opnået opholdstilladelse på baggrund af urigtige oplysninger om sin nationalitet. Opholdstilladelsen var således opnået på baggrund af svig. Den anden og den tredje klager var henholdsvis den første klagers ægtefælle og barn, og de var begge norske statsborgere.

Om hensynet til den tredje klager udtalte EMD i præmis 94-104:

"94. As to the third applicant, the Court notes that she is a Norwegian national who since birth has spent her entire life in Norway, is fully integrated into Norwegian society and, according to the material submitted to

the Court, speaks Norwegian with her parents at home. In comparison, her direct links to Ghana are very limited, having visited the country three times (see paragraph 44 above) and having little knowledge of the languages practiced there.

95. Furthermore, as a result of the first applicant no longer holding a work permit and staying full-time at home and of the second applicant's being particularly occupied by her work, the first applicant assumes an important role in the third applicant's daily care and up-bringing. He is the parent who follows up her home-work and parental contacts with her school and who facilitates her participation in sport activities. She is also at an age, ten years, when this kind of support would be valuable and she is strongly attached to her father as she is to her mother.

96. It would most probably be difficult for her to adapt to life in Ghana, were she and her mother to accompany the father to Ghana, and to readapt to Norwegian life later.

97. Against this background, the Court shares the High Court's view that the implementation of the expulsion order would not be beneficial to her.

98. However, the Court sees no reason to call into doubt the High Court's findings to the effect that, both parents having been born and brought up in Ghana and having visited the country three times with their daughter, there were no insurmountable obstacles in the way of the applicants settling together in Ghana or, at the least, to maintaining regular contacts. As to the allegation that the third applicant's rashes had been aggravated by heat during her previous stays in Ghana, the High Court majority found that this had not been sufficiently documented and could not be relied upon. The minority agreed that the evidence submitted in support of this contention had been weak and observed that the information appeared to have originated from the first and the second applicants. In the proceedings before the Court, the applicants submitted no further evidence in support of this argument or placed emphasis on it.

99. As also observed by the High Court, it does not emerge that the third applicant had any special care needs or that her mother would be unable to provide satisfactory care on her own.

100. Moreover, the Court considers that there are certain fundamental differences between the present case and that of Nunez where it found that the impugned expulsion of an applicant mother would give rise to a violation of Article 8 of the Convention. In reaching this finding, the Court attached decisive weight to the exceptional circumstances pertaining to the applicant's children in that case, which were recapitulated in the following terms in its judgment (cited above, § 84): […] [gengivet ovenfor, udeladt her, red.]

101. Unlike what had been the situation of the children of Mrs Nunez, the third applicant had not been made vulnerable by previous disruptions and distress in her care situation (compare Nunez, cited above, §§ 79 to 81).

102. Also, the duration of the immigration authorities' processing of the matter was not so long as to give reason to question whether the impugned measure fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures (compare Nunez, cited above, § 82). On the contrary, in October 2005, only a few months after the discovery of the first applicant's fraud in July 2005, he was put on notice that he might be expelled from Norway. In May 2006 the Directorate ordered his expulsion and prohibition on re-entry and gave him until 24 July 2006 to leave the country.

103. There being no exceptional circumstances at issue in the present case, the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant's expulsion.

104. The above considerations are not altered by the duration of the prohibition on re-entry – five years. In this connection, the Court reiterates that in a comparable case, Darren Omoregie (cited above, §§ 63-68), it found no violation of Article 8 of the Convention with respect to an expulsion order with a re-entry ban of the same duration imposed on the applicant father in that case in reaction to offences against the immigration rules involving unlawful stay and work in the country. The offences committed by the first applicant in the present case, obtaining a residence permit on the basis of incorrect and misleading information about his identity and nationality supported by a forged passport, were of a more serious nature. In the Court's view, it is clear that the corresponding public interest in the administrative sanction imposed on him cannot have been less than that which was at issue in the afore-mentioned case."

Om de nationale myndigheders afvejning udtalte EMD i præmis 105:

"In light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need that the first applicant be able to remain in Norway, on the other hand."

EMD fandt på den baggrund, at udvisningen af den første klager med et femårigt indrejseforbud ikke udgjorde en krænkelse af EMRK artikel 8.

I sagen *Alleleh a.o. v. Norway (2022)* havde den første klager opnået sin opholdstilladelse på baggrund af svig. Klagerens ægtefælle (anden klager) og deres fire børn, som på tidspunktet for dommen var 12, syv, syv og fire år gamle, (tredje – sjette klagere) var alle statsborgere i opholdslandet, ligesom hun selv havde opnået statsborgerskab i opholdslandet. 13 år efter indrejsen i opholdslandet blev myndighederne bekendt med klagerens rette identitet, hvorefter hendes statsborgerskab blev inddraget, og hun blev udvist med indrejseforbud i to år.

EMD udtalte i præmis 94-107:

"*94. The Court first notes that the decision to expel the first applicant and issue a two-year ban on re-entry was first taken by the Directorate of Immigration, and thereafter examined on appeal by the Immigration Appeals Board. Subsequently, a judicial review was carried out by three levels of court. During those proceedings, a psychologist was appointed to protect the best interests of the children, several witnesses were heard, and other pieces of evidence examined (see, in particular, paragraphs 22, 24 and 34 above). There is nothing to suggest that the expulsion case of the first applicant was not dealt with thoroughly and swiftly, enabling the decision makers to take into account all relevant circumstances, including those directly related to the situation of the four children.*

95. As one additional initial observation the Court observes that the Supreme Court's conclusion that there were no insurmountable obstacles to the family moving as a whole to Djibouti – which relates to an aspect that under the Court's case-law is highly relevant to the proportionality assessment under Article 8 § 2 of the Convention (see paragraph 90 above) – did not touch on the applicants' argument before the Court concerning the risk of genital mutilation. Based on the materials provided to the Court, that appears to have been connected to how the applicants had structured their pleadings before the Supreme Court. Given the applicants' own limited focus on and their apparent lack of attempts to substantiate that argument before the

domestic authorities, and observing that the Supreme Court in any event, in its assessment of the proportionality of the expulsion, included the assumption that the family would decide that the father and the children would remain in Norway during the ban on re-entry imposed on the first applicant, the Court does not in the circumstances of the case find it appropriate to analyse the situation in Djibouti on the basis of new material or replace the assessment of the national courts by its own on that point. It is sufficient to observe that the applicants have not shown convincingly that the Supreme Court's finding that the second to sixth applicants could also in principle go to Djibouti – either to stay (see paragraph 63 above) or at least to visit the first applicant (see paragraph 70 above) – was arbitrary or otherwise manifestly deficient.

96. The Court moreover notes the Supreme Court's meticulous examination of the Court's case-law in order to infer relevant legal standards under Article 8 of the Convention and to apply them in a Convention–compliant manner when deciding the first applicant's expulsion case. Such an approach is crucial for the distribution of responsibility between the Court and the domestic courts, in order to ensure that the proper standards have been applied at domestic level (see, as a recent authority, Savran, cited above, §§ 188-89).

97. The Court also attaches importance to the Supreme Court's detailed reasoning with regard to its explanation of the weighty immigration policy arguments in favour of the expulsion of the first applicant. The Supreme Court made particular reference to the seriousness of her offences and that a sanction – as had also been emphasised by the legislature in the preparatory work to the Immigration Act (see, in particular, paragraphs 46-48 above) – in the form of expulsion was considered necessary in order to uphold respect for the immigration regulations and deter from future contraventions, that is to say for reasons of general deterrence (see, inter alia, paragraph 60 above). Indeed, as already found by the Court in a number of cases, a scheme of implementation of national immigration law which is based on administrative sanctions in the form of expulsion and a ban on re-entry does not as such raise an issue of failure to comply with Article 8 of the Convention (see, for example, Antwi and Others, cited above, § 90). Thus, the Court has in principle no objections to the Supreme Court's approach in this respect, bearing in mind, at the same time, that any such scheme must be construed and applied in a manner that is compatible with the Convention rights of all involved.

98. The Court furthermore observes that the Oslo City Court and the Borgarting High Court each examined the facts of the case with regard to what an expulsion would entail for each of the applicants, including the children (see paragraphs 26-33 and 36-42 above, respectively). The Borgarting High Court's findings as to the facts of the case, the children's situation included, formed the basis for the Supreme Court's assessment of the case within the scope of the appeal, the appeal having been limited to the High Court's application of the law. In this respect the Supreme Court considered that the proportionality analysis, unlike what had been done by the High Court (see paragraph 35 above), had to be conducted in the light of the Court's case-law according to which an expulsion of a person whose grounds for residence were precarious at the outset would only be disproportionate in "exceptional" circumstances (see, for example, paragraphs 52, 54 and 64 above). Moreover, the Supreme Court concluded that the facts of the case as established by the Borgarting High Court did not support the finding that such "exceptional circumstances" existed. In this connection the Supreme Court emphasised that there was nothing in the lower instances' findings of fact that stood out from what had generally to be assumed to follow from expulsion of one of the parents for a relatively short period (see paragraphs 66 and 71 above).

99. Regarding the Supreme Court's legal starting points under Article 8 of the Convention, the Court notes that the first applicant was not a "settled migrant" in Norway in so far as her stay there was based on repeatedly giving incorrect information over a long period and therefore had never had a valid legal basis. It was for that reason the Supreme Court proceeded on the basis that the expulsion was valid unless "exceptional circumstances" could be identified. Although the Court does not disagree with the Supreme Court regarding this being the starting point, the Court also notes the very particular aspect of the instant case that the sanction imposed on the first applicant impacted as much, if not more, on her family members, notably her children, all being Norwegian nationals who had been born and lived all their lives in Norway. Even if the other family

members would follow the first applicant to Djibouti during the period when the ban on re-entry would be in force in order to preserve "family life", they would have to experience a considerable unwanted change in their "private life" in moving to a country with which they had no connection, including as concerned language. This contrasted with the first applicant's own situation, coming from Djibouti, speaking the language, having family there and even having visited there after she had arrived in Norway (see, inter alia, paragraph 26 above). The expulsion imposed on the first applicant to sanction her behaviour could thus, somewhat paradoxically, put an equally heavy if not heavier strain on the other family members. The Court observes in this context – as did the Supreme Court – that the Norwegian Parliament has requested that the Government consider an amendment of the Immigration Act to "make it possible for the immigration administration to supplement the use of expulsion and prohibition of entry with a broader set of sanctions where warranted by special circumstances such as the child's best interests" (see paragraph 57 above).

100. Furthermore, the Court understands the Supreme Court's role in being limited to correcting what had been an erroneous understanding of the law by the Borgarting High Court. Nonetheless, even an examination of whether any "exceptional circumstances" existed also required a concrete and broad examination of the whole case and how the whole family would be affected by the expulsion of one of them. It might even be particularly important that the Supreme Court demonstrate that concrete assessment in a situation where the lower court had, regardless of its misunderstanding of the law, given a detailed explanation of why it, based on evidence that had been presented to it directly during its hearing, considered the expulsion to contradict the children's best interests, which in its assessment made the expulsion disproportionate vis-à-vis them (see paragraphs 36-42 above).

101. Turning, then, to the concrete proportionality assessment, the Court notes that the facts with regard to what impact an expulsion would have on the children had been established by way of a thorough process where an expert had been engaged and the children's views obtained in so far as possible based on their age and maturity (see, inter alia, paragraph 37 above). The factual findings on that point had also been set out in detail by the Borgarting High Court in its judgment, providing a basis for the Supreme Court in its application of the law (see paragraph 98 above).

102. Against that background, the Court does not consider that it has a basis for concluding that the Supreme Court erred in its assessment that there were no concrete facts in the case before it that gave grounds for characterising the children's situation as different from what would essentially always follow with the expulsion of a parent. The Court therefore understands the Supreme Court's reluctance to qualify the circumstances as "exceptional" within the meaning of the Court's case-law. The Court notes that the case differed from those of Nunez and Kaplan and Others (both cited above), where the Court found violations of Article 8 of the Convention. It refers to Antwi and Others (cited above, §§ 101-02), where a five-year re-entry ban was accepted by the Court with reference to the fact that the child in question, also a Norwegian national who since birth had spent her entire life in Norway, had not been made vulnerable by previous disruption and that the duration of the immigration authorities' processing of the matter had not been so long as to give reasons to question whether the impugned measure fulfilled the requirements of swiftness and efficiency, in contrast to what had been the situation in the case of Nunez. The applicant children in the instant case had not either been exposed to the same degree of disruption and stress as in the case of Nunez (cited above). Neither can the authorities be blamed for not having dealt with the expulsion case in a timely manner. The facts of the current case also clearly differ from those in the case of Butt (cited above).

103. Moreover, the Court observes that the Supreme Court stressed various aspects that mitigated the effects of the expulsion on the children. First of all, the Supreme Court emphasised that it was only out of consideration for the children that the ban on re-entry imposed on the first applicant had been limited to two years in the first place (see paragraph 70 above). The duration of the exclusion order is an important element in the proportionality assessment (see Savran, cited above, § 182), and the Court must take into account that it did

not find re-entry bans of five years imposed on parents disproportionate in cases such as Antwi and Others (cited above, § 104) and Darren Omoregie and Others (cited above, § 67).

104. Furthermore, the Supreme Court emphasised the first applicant's possibility to apply to have the ban from re-entry revised (see paragraphs 57 and 71 above). Such a revision of the re-entry ban according to the second paragraph of section 71 of the Immigration Act (see paragraph 75 above) would enable the domestic authorities to take into account any subsequent negative development, such as the second applicant not being able to take adequately care of the four children, or any unforeseen change related to the children's health or overall situation. The Supreme Court also emphasised the first applicant's possibility to apply for access to Norway for brief visits during the two-year ban from re-entry (see paragraph 57 above). Lastly, the Court finds reasons to stress not only the importance of the fact that the ban from re-entry had been limited to two years (see paragraph 103 above), but that it proceeds on the basis that she will be allowed to resume her family life in Norway when the two years have passed.

105. Considering all of the above, the Court accepts that the present case disclosed no exceptional circumstances as such requiring the respondent State to withdraw the expulsion order so as to enable the applicants to maintain and continue to develop family life in Norway. Moreover, the Court accepts that the domestic authorities were faced with a balancing of interests that had to be done in a situation where particularly weighty interests in immigration control supported the first applicant's expulsion while at the same time an expulsion would impose considerable difficulties on the other applicants. The Court also accepts that the domestic authorities, including the Supreme Court, sought to attend to the children's interests in so far they could be reconciled with the public interest reasons in sanctioning the first applicant's behaviour.

106. Therefore, as to the final conclusion that the expulsion was not disproportionate because it did not exceed the standards indicated by the Court in its case-law relevant to the case, the Court does not find that the authorities of the respondent State transgressed their margin of appreciation when, having carefully examined the facts and adequately balanced the interests in issue (see paragraphs 92-93 above), they decided to expel the first applicant and to prohibit her re-entry for two years. Neither are there any other reasons for the Court to substitute its own assessment for that of the competent national authorities, bearing in mind in particular the domestic courts' careful examination.

107. On the basis of the above, the Court concludes that there has been no violation of Article 8 of the Convention."

6.1.3.4. Ulovligt ophold

I sagen Jeunesse v. the Netherlands (2014) var klageren indrejst i opholdslandet på et visum fra en tidligere hollandsk koloni og havde giftet sig med en statsborger i opholdslandet. Hun blev i landet efter udløbet af sit visum og fik med sin ægtefælle tre børn, som alle var statsborgere i opholdslandet. Klageren søgte flere gange om opholdstilladelse, hvilket hver gang blev afslået, da klageren som udgangspunkt skulle søge fra hjemlandet. Efter 16 års ophold blev klageren forsøgt udsendt fra opholdslandet under henvisning til, at hun ikke havde et lovligt opholdsgrundlag. Børnene var på tidspunktet for Storkammerets afgørelse 14, knap ni og knap fire år.

I præmis 74 udtalte EMD:

"In its General Comment No. 7 (2005) on Implementing child rights in early childhood, the Committee on the Rights of the Child – the body of independent experts that monitors implementation of the CRC by its State

Parties – wished to encourage recognition by States Parties that young children are holders of all rights enshrined in the said Convention and that early childhood is a critical period for the realisation of these rights. The best interests of the child are examined, in particular, in section 13, which provides as follows:

13. Best interests of the child. Article 3 [of the CRC] sets out the principle that the best interests of the child are a primary consideration in all actions concerning children. By virtue of their relative immaturity, young children are reliant on responsible authorities to assess and represent their rights and best interests in relation to decisions and actions that affect their well-being, while taking account of their views and evolving capacities. The principle of best interests appears repeatedly within the Convention (including in articles 9, 18, 20 and 21, which are most relevant to early childhood). The principle of best interests applies to all actions concerning children and requires active measures to protect their rights and promote their survival, growth, and well-being, as well as measures to support and assist parents and others who have day-to-day responsibility for realizing children's rights:

(a) Best interests of individual children. All decision-making concerning a child's care, health, education, etc. must take account of the best interests principle, including decisions by parents, professionals and others responsible for children.

States parties are urged to make provisions for young children to be represented independently in all legal proceedings by someone who acts for the child's interests, and for children to be heard in all cases where they are capable of expressing their opinions or preferences; […]"

Om hensynet til *"barnets tarv"* udtalte EMD i præmis 109:

"Where children are involved, their best interests must be taken into account (see Tuquabo-Tekle and Others v. the Netherlands, no. 60665/00, § 44, 1 December 2005; mutatis mutandis, Popov v. France, nos. 39472/07 and 39474/07, §§ 139-140, 19 January 2012; Neulinger and Shuruk v. Switzerland, cited above, § 135; and X v. Latvia [GC], no. 27853/09, § 96, ECHR 2013). On this particular point, the Court reiterates 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 (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it."

I præmis 115 til 119 lagde EMD vægt på følgende forhold med hensyn til *"barnets tarv":*

"115. The Court first and foremost takes into consideration the fact that all members of the applicant's family with the exception of herself are Netherlands nationals and that the applicant's spouse and their three children have a right to enjoy their family life with each other in the Netherlands. The Court further notes that the applicant held Netherlands nationality at birth. She subsequently lost her nationality when Suriname became independent. She then became a Surinamese national, not by her own choice but pursuant to Article 3 of the Agreement between the Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality (see paragraph 62 above). Consequently, her position cannot be simply considered to be on a par with that of other potential immigrants who have never held Netherlands nationality.

116. The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for more than sixteen years and that she has no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Netherlands authorities, while she repeatedly submitted residence requests and awaited the outcome of appeals. The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. The applicant's address, where she has been living for the last fifteen years, has always been known to the Netherlands authorities.

117. Thirdly, the Court accepts, given the common background of the applicant and her husband and the relatively young age of their children, that there would appear to be no insurmountable obstacles for them to settle in Suriname. However, it is likely that the applicant and her family would experience a degree of hardship if they were forced to do so. When assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family.

118. The Court fourthly considers that the impact of the Netherlands authorities' decision on the applicant's three children is another important feature of this case. The Court observes that the best interests of the applicant's children must be taken into account in this balancing exercise (see above § 109). On this particular point, the Court reiterates 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 (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. For that purpose, in cases concerning family reunification, the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents (see Tuquabo-Tekle and Others v. the Netherlands, cited above, § 44).

119. Noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation. In this connection, the Court observes that the applicant's husband provides for the family by working full-time in a job that includes shift work. He is, consequently, absent from the home on some evenings. The applicant – being the mother and homemaker – is the primary and constant carer of the children who are deeply rooted in the Netherlands of which country – like their father – they are nationals. The materials in the case file do not disclose a direct link between the applicant's children and Suriname, a country where they have never been."

I præmis 120 udtalte EMD, at:

"In examining whether there were insurmountable obstacles for the applicant and her family to settle in Suriname, the domestic authorities had some regard for the situation of the applicant's children (see paragraphs 23 (under 2.19 and 2.21), 28 and 34 (under 2.4.5) above). However, the Court considers that they fell short of what is required in such cases and it reiterates that national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any such removal in order to give effective protection and sufficient weight to the best interests of the children directly affected

by it (see above § 109). The Court is not convinced that actual evidence on such matters was considered and assessed by the domestic authorities. Accordingly, it must conclude that insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit."

I præmis 122 udtalte EMD endvidere, at:

"The Court, whilst confirming the relevant principles set out above (see paragraphs 106-109), finds that, on the basis of the above considerations (see paragraphs 115-120) and viewing the relevant factors cumulatively, the circumstances of the applicant's case must be regarded as exceptional. Accordingly, the Court concludes that a fair balance has not been struck between the competing interests involved. There has thus been a failure by the Netherlands authorities to secure the applicant's right to respect for her family life as protected by Article 8 of the Convention."

EMD fandt derefter, at der var sket en krænkelse af EMRK artikel 8.

6.1.3.5. Inddragelse, nægtelse af forlængelse og bortfald, hvor ingen kriminalitet

Det ses ikke, at EMD i sin praksis eksplicit har anvendt Børnekonventionen i sager omhandlende inddragelse, nægtelse af forlængelse og bortfald, hvor klageren ikke har begået kriminalitet. EMD har dog i enkelte domme lagt vægt på, hvilken betydning det måtte have for klagerens børn, såfremt klageren måtte blive udvist.

I sagen *Berrehab v. the Netherlands (1988)* opnåede klageren en opholdstilladelse på baggrund af ægteskab med en hollandsk statsborger. Parret fik en datter. Da klageren efterfølgende blev skilt fra sin ægtefælle, nægtede de nationale myndigheder at forlænge hans opholdstilladelse, da denne var betinget af et bestående ægteskab. Klageren havde opholdt sig i hjemlandet de første 25 år af sit liv og havde derefter opholdt sig 11 år i opholdslandet. Klagerens datter var på tidspunktet for EMD's afgørelse ni år gammel.

EMD udtalte i præmis 29, at:

"Having to ascertain whether this latter condition was satisfied in the instant case, the Court observes, firstly, that its function is not to pass judgment on the Netherlands' immigration and residence policy as such. It has only to examine the interferences complained of, and it must do this not solely from the point of view of immigration and residence, but also with regard to the applicants' mutual interest in continuing their relations. As the Netherlands Court of Cassation also noted (see paragraph 16 above), the legitimate aim pursued has to be weighed against the seriousness of the interference with the applicants' right to respect for their family life. As to the aim pursued, it must be emphasised that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr. Berrehab already had real family ties there - he had married a Dutch woman, and a child had been born of the marriage. As to the extent of the interference, it is to be noted that there had been very close ties between Mr. Berrehab and his daughter for several years (see paragraphs 9 and 21 above) and that the refusal of an independent residence permit and the ensuing expulsion threatened to break those ties. That effect of the interferences in issue was the more serious as Rebecca needed to remain in contact with her father, seeing especially that she was very young. Having regard to these particular circumstances, the

Court considers that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society. It thus concludes that there was a violation of Article 8 (art. 8).”

6.1.3.6. Familiesammenføring til personer, som har lovligt ophold

Det ses ikke, at EMD eksplicit har inddraget Børnekonventionens bestemmelser i sager omhandlende familiesammenføring.

6.2. Handicapkonventionen

FN's konvention om rettigheder for personer med handicap (*Convention on the Rights of Persons with Disabilities* – herefter betegnet Handicapkonventionen) af 13. december 2006 trådte i kraft den 3. maj 2008. Danmark ratificerede konventionen den 24. juli 2009 i henhold til kgl. resolution af den 13. juli 2009 efter samtykke fra Folketinget den 28. maj 2009, hvorefter konventionen trådte i kraft for Danmark den 23. august 2009.

FN´s komité om rettigheder for personer med handicap *(the Committee on the Rights of Persons with Disabilitites* – herefter Handicapkomitéen) blev oprettet i henhold til konventionens artikel 34. Komitéen består af 18 uafhængige eksperter fra medlemslandene. Komitéen overvåger medlemsstaternes implementering af nationale tiltag, der realiserer konventionens forpligtelser. De deltagende stater skal afgive beretninger til komitéen om de foranstaltninger, de træffer for at gennemføre deres forpligtelser i henhold til konventionen.

Den 23. september 2014 tiltrådte Danmark ligeledes tillægsprotokollen til konventionen.

I sager omhandlende inddragelse, nægtelse af forlængelse og bortfald af opholdstilladelser anses artikel 5 for at være mest relevant.

6.2.1. Relevante artikler i Handicapkonventionen

6.2.1.1. Handicapkonventionens artikel 1 – ”Formål”

Konventionens artikel 1 omhandler formålet med konventionens bestemmelser.

Den engelske ordlyd er som følger:

”Article 1 - Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

Den danske ordlyd er jf. *Bekendtgørelse af FN-konvention af 13. december 2006 om rettigheder for personer med handicap* som følger:

"Artikel 1 – Formål

Formålet med denne konvention er at fremme, beskytte og sikre muligheden for, at alle personer med handicap fuldt ud kan nyde alle menneskerettigheder og grundlæggende frihedsrettigheder på lige fod med andre, samt at fremme respekten for deres naturlige værdighed.

Personer med handicap omfatter personer, der har en langvarig fysisk, psykisk, intellektuel eller sensorisk funktionsnedsættelse, som i samspil med forskellige barrierer kan hindre dem i fuldt og effektivt at deltage i samfundslivet på lige fod med andre."

Handicapkomitéen har ikke udgivet en *General comment* om artikel 1, som kan anvendes til fortolkning af indholdet.

6.2.1.2. Handicapkonventionens artikel 5 – "Lighed og ikke-diskrimination"

Konventionens artikel 5 omhandler retten til lighed og ikke-diskrimination for personer med handicap.

Den engelske ordlyd er som følger:

"Article 5 – Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention."

Den danske ordlyd er jf. *Bekendtgørelse af FN-konvention af 13. december 2006 om rettigheder for personer med handicap* som følger:

"Lighed og ikke-diskrimination

1. Deltagerstaterne anerkender, at alle er lige for loven, og at alle uden nogen form for diskrimination har ret til lige beskyttelse og til at drage samme nytte af loven.

2. Deltagerstaterne skal forbyde enhver diskrimination på grund af handicap og skal sikre personer med handicap lige og effektiv retlig beskyttelse imod diskrimination af enhver grund.

3. Med henblik på at fremme lighed og afskaffe diskrimination skal deltagerstaterne tage alle passende skridt til at sikre, at der tilvejebringes rimelig tilpasning.

4. Særlige foranstaltninger, der er nødvendige for at fremskynde eller opnå reel lighed for personer med handicap, anses ikke for diskrimination i henhold til denne konvention."

Handicapkomitéen har som hjælp til fortolkning af konventionens artikel 5 udgivet *General comment No. 6 (2018)* om principperne om lighed og ikke-diskrimination.

Af punkt 5 fremgår det, at:

"Equality and non-discrimination are at the core of all human rights treaties. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights prohibit discrimination on an open list of grounds, from which article 5 of the Convention originated. All of the thematic United Nations human rights conventions aim to establish equality and eliminate discrimination, and contain provisions on equality and non-discrimination. The Convention on the Rights of Persons with Disabilities has taken into account the experiences offered by the other conventions, and its equality and non-discrimination principles represent the evolution of the United Nations tradition and approach."

Om det legale grundlag for ikke-diskrimination og lighed fremgår det af punkt 12, at:

"Equality and non-discrimination are principles and rights. The Convention refers to them in article 3 as principles and in article 5 as rights. They are also an interpretative tool for all the other principles and rights enshrined in the Convention. The principles/rights of equality and non-discrimination are a cornerstone of the international protection guaranteed by the Convention. Promoting equality and tackling discrimination are cross-cutting obligations of immediate realization. They are not subject to progressive realization."

I *General comment No. 6 (2018)* oplistes fire typer af overordnede former for diskrimination. I punkt 18 er disse beskrevet som:

"The duty to prohibit 'all discrimination' includes all forms of discrimination. International human rights practice identifies four main forms of discrimination, which can occur individually or simultaneously:

(a) 'Direct discrimination' occurs when, in a similar situation, persons with disabilities are treated less favourably than other persons because of a different personal status in a similar situation for a reason related to a prohibited ground. Direct discrimination includes detrimental acts or omissions based on prohibited grounds where there is no comparable similar situation. The motive or intention of the discriminating party is not relevant to a determination of whether discrimination has occurred. For example, a State school that refuses to admit a child with disabilities in order not to change the scholastic programmes does so just because of his or her disability and is an example of direct discrimination;

(b) 'Indirect discrimination' means that laws, policies or practices appear neutral at face value but have a disproportionate negative impact on a person with a disability. It occurs when an opportunity that appears accessible in reality excludes certain persons owing to the fact that their status does not allow them to benefit from the opportunity itself. For example, if a school does not provide books in Easy-Read format, it would indirectly discriminate against persons with intellectual disabilities, who, although technically allowed to attend the school, would in fact need to attend another. Similarly, if a candidate with restricted mobility had a job interview on a second floor office in a building without an elevator, although allowed to sit the interview, the situation puts him/her in an unequal position;

(c) 'Denial of reasonable accommodation', according to article 2 of the Convention, constitutes discrimination if the necessary and appropriate modification and adjustments (that do not impose a 'disproportionate or undue burden') are denied and are needed to ensure the equal enjoyment or exercise of a human right or fundamental freedom. Not accepting an accompanying person or refusing to otherwise accommodate a person with a disability are examples of denial of reasonable accommodation;

(d) 'Harassment' is a form of discrimination when unwanted conduct related to disability or other prohibited grounds takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. It can happen through actions or words that have the effect of perpetuating the difference and oppression of persons with disabilities. Particular attention should be paid to persons with disabilities living in segregated places, such as residential institutions, special schools or psychiatric hospitals, where this type of discrimination is more likely to occur and is by nature invisible, and so not likely to be punished. 'Bullying' and its online form, cyberbullying and cyberhate, also constitute particularly violent and harmful forms of hate crimes. Other examples include (disability-based) violence in all its appearances, such as rape, abuse and exploitation, hate-crime and beatings."

Endvidere fremgår det af punkt 19, at:

"Discrimination can be based on a single characteristic, such as disability or gender, or on multiple and/or intersecting characteristics. 'Intersectional discrimination' occurs when a person with a disability or associated to disability suffers discrimination of any form on the basis of disability, combined with, colour, sex, language, religion, ethnic, gender or other status. Intersectional discrimination can appear as direct or indirect discrimination, denial of reasonable accommodation or harassment. For example, while the denial of access to general health-related information due to inaccessible format affects all persons on the basis of disability, the denial to a blind woman of access to family planning services restricts her rights based on the intersection of her gender and disability. In many cases, it is difficult to separate these grounds. States parties must address multiple and intersectional discrimination against persons with disabilities. 'Multiple discrimination' according to the Committee is a situation where a person can experience discrimination on two or several grounds, in the sense that discrimination is compounded or aggravated. Intersectional discrimination refers to a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and thereby expose relevant individuals to unique types of disadvantage and discrimination."

Om staternes forpligtelser i henhold til Handicapkonventionen fremgår det af punkt 30, at:

"States parties have an obligation to respect, protect and fulfil the right of all persons with disabilities to non-discrimination and equality. In that regard, States parties must refrain from any action that discriminates against persons with disabilities. […]"

6.2.2. Udtalelser fra Handicapkomitéen

6.2.2.1. Handicapkonventionens artikel 5

Det ses ikke, at Handicapkomitéen har behandlet klager omhandlende krænkelse af artikel 5 i forbindelse med inddragelse, nægtelse af forlængelse eller bortfald af opholdstilladelser.

Handicapkomitéen har i sagen *Iuliia Domina and Max Bendtsen v. Denmark, communication No. 39/2017 (2018)* behandlet en klage over afslag på familiesammenføring.

Klagerne anførte, at afslaget på familiesammenføringen var diskriminerende i henhold til Handicapkonventionens artikel 5 sammenholdt med artikel 23. Klagerne var et ægtepar, hvoraf manden var statsborger i Danmark. Den kvindelige klager søgte om familiesammenføring til sin ægtefælle, hvilket blev afslået af de nationale myndigheder. Den mandlige klager var fire år forinden blevet tilkendt invalidepension som følge af en permanent hjerneskade. De nationale myndigheder afslog ansøgningen om familiesammenføring på grund af, at den mandlige klager ikke opfyldte betingelsen i den nationale lovgivning om, at han ikke forud for ansøgningen måtte have modtaget sociale ydelser i en periode på tre år. Afgørelsen blev sidenhen stadfæstet af Udlændingenævnet, som var klageinstans, omgjort af Vestre Landsret og stadfæstet igen af Højesteret. Afgørelsen fra Højesteret blev derefter påklaget til Handicapkomitéen.

Komiteen udtalte om diskrimination på baggrund af et handicap i punkt 8.3, at:

"The Committee recalls that under article 2 of the Convention, 'discrimination on the basis of disability' is defined as any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field, and includes all forms of discrimination, including denial of reasonable accommodation. The Committee further recalls that a law that is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different. The Committee recalls that in cases of indirect discrimination, laws, policies or practices that appear neutral at face value have a disproportionately negative impact on persons with disabilities. Indirect discrimination occurs when an opportunity that appears accessible in reality excludes certain persons owing to the fact that their status does not allow them to benefit from the opportunity itself. The Committee notes that treatment is indirectly discriminatory if the detrimental effects of a rule or decision exclusively or disproportionately affect persons of a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Being a person with a disability falls within such categories. The Committee further observes that under article 5 (1) and (2) of the Convention, States parties have obligations to recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law; and to prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds."

I punkt 8.5 udtalte komiteen, at:

"In the present case, the Committee notes that at the time of the authors' application for family reunification Mr. Bendtsen was receiving social benefits on the basis of his disability and he was not in a position to take up employment. The Committee notes that the domestic authorities rejected the authors' application for family reunification as they concluded that Mr. Bendtsen had a reasonable prospect of satisfying the requirement of self-support under section 9 (5) of the Aliens Act because of his possibility of finding a job under the wage

subsidy programme. It also notes, however, that when the authors made their application for family reunification, Mr. Bendtsen had not yet qualified for the wage subsidy programme and could therefore not fulfil the requirement under section 9 (5) for family reunification under the Aliens Act. It further notes that at that point in time, family reunification was already a priority for the authors and their son. The Committee further notes that the assessment as to whether Mr. Bendtsen could qualify for employment under the wage subsidy programme was not finalized until March 2015 and that he was not employed under the programme until October 2015, six years after he had first started to receive social benefits under the Active Social Policy Act, and two and a half years after the authors had filed their application for family reunification. The Committee further notes the authors' undisputed claim that in order to fulfil the requirement under section 9 (5) of the Aliens Act once Mr. Bendtsen had qualified for the wage subsidy programme in October 2015, they would have faced an additional waiting period of three years before they would have been eligible for family reunification under the Act. The Committee therefore concludes that in the present case the requirement of self-support under section 9 (5) of the Aliens Act disproportionally affected Mr. Bendtsen as a person with a disability and resulted in him being subjected to indirectly discriminatory treatment."

Komitéen konkluderede i punkt 8.6, at:

"The Committee therefore finds that the fact that the relevant domestic authorities rejected the authors' application for family reunification on the basis of criteria that were indirectly discriminatory against persons with disabilities had the effect of impairing or nullifying the authors' enjoyment and exercise of the right to family life on an equal basis with others, in violation of their rights under article 5 (1) and (2) read alone and in conjunction with article 23 (1) of the Convention."

6.2.3. Anvendelse af Handicapkonventionen i praksis ved EMD

Det ses ikke at EMD har anvendt Handicapkonventionen i praksis i sager omhandlende udsendelse af udlændinge på baggrund af kriminalitet, svig, ulovligt ophold eller familiesammenføring eller nægtelse af forlængelse, inddragelse eller bortfald af en meddelt opholdstilladelse.

6.3. Konventionen om borgerlige og politiske rettigheder

FN's konvention om borgerlige og politiske rettigheder (*The International Covenant on Civil and Political Rights* - herefter betegnet ICCPR) af 16. december 1966 blev ratificeret af Danmark i 1972. Konventionen trådte i kraft for Danmark den 23. marts 1976.

Menneskerettighedskomitéen (*UN's Human Rights Committee*) blev oprettet i henhold til konventionens artikel 28 og består af 18 medlemmer, som vælges af de stater, som har tiltrådt konventionen.

Komitéen overvåger medlemsstaternes implementering af nationale tiltag, som har til formål at realisere konventionens forpligtelser. De deltagende stater skal afgive beretning til komitéen om de foranstaltninger, de træffer for at gennemføre deres forpligtelser ifølge konventionen.

Danmark ratificerede på samme tidspunkt som konventionen den frivillige tillægsprotokol, hvorved Danmark anerkendte, at Menneskerettighedskomitéen har kompetence til at behandle klager fra enkeltpersoner, som hævder at være ofre for en krænkelse fra den pågældendes deltagerstats side – den såkaldte individuelle

klageadgang, jf. tillægsprotokollens artikel 1. Tillægsprotokollen trådte i kraft den 23. marts 1976. Komitéens udtalelser er ikke retligt bindende for den indklagede stat.

Menneskerettighedskomitéen kan behandle tre typer af sager omhandlende ICCPR: *"individual communications", "state-to-state complaints*" og "*inquiries*".

I sager omhandlende inddragelse, nægtelse af forlængelse og bortfald af opholdstilladelser kan artikel 17 og artikel 12, stk. 4, være relevante.

6.3.1. Relevante artikler i ICCPR

6.3.1.1. ICCPR artikel 17 – "forbud mod vilkårlig eller ulovlig indblanding i privat- og familieliv"

Ordlyden i ICCPR artikel 17 er:

"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."

Den officielle danske oversættelse er jf. *"Bekendtgørelse af international konvention af 16. december 1966 om borgerlige og politiske rettigheder med tilhørende valgfri protokol"* af 29. marts 1976:

"Artikel 17

1. Ingen må udsættes for vilkårlig eller ulovlig indblanding i sit privatliv eller familieliv, sit hjem eller sin brevveksling, eller for ulovlige angreb på sin ære og sit omdømme.

2. Enhver har ret til lovens beskyttelse mod sådan indblanding eller sådanne angreb."

Menneskerettighedskomitéen har udgivet *General comment No. 16: Article 17 (Right to privacy)* om indholdet i artikel 17.

Af punkt 1 fremgår, at:

"Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right."

Under punkt 3 uddyber komitéen, at

"The term 'unlawful' means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant."

Under punkt 4 uddyber komitéen, at

"The expression 'arbitrary interference' is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression 'arbitrary interference' can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."

Under punkt 5 uddyber komitéen, at

"Regarding the term 'family', the objectives of the covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned. […]"

Menneskerettighedskomitéen har endvidere udgivet *General Comment No. 15: The position of aliens under the Covenant* af 11. april 1986.

Det fremgår af punkt 4, at:

"The Covenant gives aliens all the protection regarding rights guaranteed therein, and its requirements should be observed by States parties in their legislation and in practice as appropriate. […] States parties should ensure that the provisions of the Covenant and the rights under it are made known to aliens within their jurisdiction."

Af punkt 5 fremgår det, at:

"The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise."

Vedrørende de i ICCPR artikel 17 beskyttede rettigheder fremgår det af punkt 7, at:

"They [aliens, red.] may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence."

6.3.1.2. ICCPR artikel 12, stk. 4 – "retten til at indrejse i sit eget land"

Ordlyden i ICCPR artikel 12, stk. 4, er:

" 4. No one shall be arbitrarily deprived of the right to enter his own country."

Den officielle danske oversættelse er jf. *"Bekendtgørelse af international konvention af 16. december 1966 om borgerlige og politiske rettigheder med tilhørende valgfri protokol"* af 29. marts 1976:

"Artikel 12

[…]

4. Ingen må vilkårligt berøves retten til at indrejse i sit ege[t] land."

Menneskerettighedskomitéen har udgivet *General comment No. 27: Freedom of movement (article 12)* af 2. november 1999.

Af punkt 19 under overskriften "The right to enter one's own country (paragraph 4)" fremgår, at:

"The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one's own country. It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (e.g. if that country is the person's state of nationality). The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries."

Under punkt 20 uddyber komitéen, hvilke personer rettigheden vedrører:

"The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country". The scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence."

Under punkt 21 uddyber komitéen statens forpligtelser i henhold til bestemmelsen:

"In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative, and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country."

Menneskerettighedskomitéen har endvidere udgivet *General Comment No. 15: The position of aliens under the Covenant* af 11. april 1986.

Det fremgår af punkt 4, at:

"The Covenant gives aliens all the protection regarding rights guaranteed therein, and its requirements should be observed by States parties in their legislation and in practice as appropriate. […] States parties should ensure that the provisions of the Covenant and the rights under it are made known to aliens within their jurisdiction."

Af punkt 5 fremgår det, at:

"The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise."

6.3.2. Udtalelser fra Menneskerettighedskomitéen

6.3.2.1. ICCPR artikel 17

Praksis fra Menneskerettighedskomitéen vedrørende artikel 17 kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/ICCPR artikel 12, st 4, 17 m.m.

6.3.2.2. ICCPR artikel 12, stk. 4

Praksis fra Menneskerettighedskomitéen vedrørende artikel 12, stk. 4, kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/ICCPR artikel 12, stk. 4, 17 m.m.

6.3.3. Anvendelse af ICCPR i praksis ved EMD

Det ses ikke, at EMD har inddraget ICCPR artikel 17 om forbud mod vilkårlig og ulovlig indblanding i privat- og familieliv eller artikel 12, stk. 4, om retten til at indrejse i sit eget land i sager vedrørende medlemsstaternes udsendelse af udlændinge.

7. Litteraturliste

- Council of Europe: "Guide on Article 8 of the European Convention on Human Rights 'Right to respect for private and family life, home and correspondence'", 31. december 2018
- Kjølbro, Jon Fridrik: "Den Europæiske menneskerettighedskonvention for praktikere". 4 udgave. Jurist- og økonomforbundets forlag, 2017
- Council of Europe human rights handbooks "Protecting the right to respect for private and family life", Ivana Roagna