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 værei 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. Konventionens ikrafttræden, statens forpligtelser og klageadgang

EMRK blev underskrevet i Rom den 4. november 1950 af 12 europæiske lande, heriblandt Danmark. Konventionen trådte i kraft den 3. september 1953. I Danmark er konventionen 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 konventionen, har forpligtet sig til at respektere visse grundlæggende menneskerettigheder over for enhver person, og konventionen 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 konventionen (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

EMD kan modtage klager fra personer, ikke-statslige organisationer eller grupper af enkeltpersoner. Det er en betingelse for at klage, at man kan bevise eller sandsynliggøre, at man personligt er offer (victim) for en

krænkelse af en eller flere af de rettigheder eller friheder, der opregnes i konventionen eller tillægsprotokollerne. 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 konventionen. 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 konventionen

EMD kan kun behandle klager over staters overtrædelser af konventionen 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 konventionen.

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 konventionen 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 6 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 6 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.

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 (præmisserne 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 preventingthe 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 konventionen, har staten pligt til at rette op på krænkelsen. Det er op til staten at bestemme, hvordan den kan leve op til konventionens 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 konventionen, 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 træffesaf 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 benytteti sager om retten til respekt for privat- og familieliv (EMRK artiklerne 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 konventionens 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 konventionens beskyttelse af klageren er effektiv. (se *Mamatkulov og Askarov mod Tyrkiet (2005)*, præmisserne 108 og 125, og *Aoulmi mod Frankrig (2006)*, præmisserne 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 konventionen. 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 konventionen. 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 præmisserne 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. Konventionens eksterritoriale virkning

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

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 konventionen, 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 konventionens 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 konventionens 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 konventionen har til hensigt at beskytte.

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

[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)

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:

"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 indgrebeti 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 bopælsregistrere 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 overfor 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 præmisserne 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 judgmentcited 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 EMDi 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 opholdi opholdslandet.

EMD udtalte i præmisserne 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 præmisserne 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 freedomsof 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."

Sagen *Jeunesse v. the Netherlands (2014)* omhandler en kvinde, som indrejste på et visum for at besøge en slægtning i opholdslandet. Hun giftede sig efterfølgende med en statsborger fra opholdslandet, og de fik sammen tre børn. Klageren søgte flere gange om opholdstilladelse, men fik afvist sin ansøgning, idet hun ikke havde søgt fra sit hjemland. Klageren blev 16 år efter sin indrejse tilbageholdt med henblik på udsendelse til sit hjemland.

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 andlasting 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 whereasthe 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 hensyni 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 efterfølgende genindrejst i medlemsstaten. 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 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)* indrejste klageren under en falsk identitet, idet hun tidligere var blevet udvist fra landet med indrejseforbud. Klageren opnåede opholdstilladelse på baggrund af den falske identitet og stiftede familie i opholdslandet ved at gifte sig og få børn. Opholdsstaten inddrog opholdstilladelsen fem år efter, at klageren var indrejst, under henvisning til at den var opnået på baggrund af svig.

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)* opnåede den ene klager opholdstilladelse på baggrund af urigtige oplysninger om sin nationalitet. Opholdstilladelsen blev således opnået på baggrund af svig.

EMD udtalte i præmisserne 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 *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 præmisserne 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."

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 27, 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."

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 bl.a. sagen *Osman v. Denmark (2011)*, hvor klageren af sine forældre var blevet sendt til familiens tidligere opholdsland for at bo hos nogle familiemedlemmer. Klagerens opholdstilladelse bortfaldt på grund af længerevarende ophold i udlandet, hvorefter klageren søgte opholdslandet om dispensation for bortfald af sin opholdstilladelse. Den indklagede stat afslog dette, hvorefter sagen blev indbragt for EMD.

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 overfor 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 fx *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]

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 afsnit 3.3.3.3 gennemgås betydningen af indgrebets karakter og varighed og EMD's praksis vedrørende vægtningen heraf i proportionalitetsafvejningen.

Endelig gennemgås i afsnit 3.3.3.4 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 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.

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.

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

[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)

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)* blev klageren som 30-årig udvist på baggrund af en dom for at have indsmuglet heroin. Han blev idømt tre års fængsel og blev udvist med indrejseforbud for bestandigt. I den efterfølgende appelsag blev dommen ændret til seks års fængsel, mens udvisningen blev stadfæstet. Efter sin løsladelse forblev han ulovligt i opholdslandet og blev efterfølgende arresteret for forsøg på røveri. Klageren blev idømt et års fængsel for røveriforsøget og for sit ulovlige ophold.

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 blevet idømt en fængselsstraf på fem år og tre måneder for uagtsomt manddrab, begået i forbindelse med et gaderæs, hvor klageren havde mistet herredømmet over bilen, hvorved hans passager var blevet dræbt. De nationale domstole fandt, at klageren havde optrådt uforsvarligt i den forbindelse. Klagerens opholdstilladelse blev efterfølgende inddraget. Klageren havde tillige en ældre betinget dom for underslæb.

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 præmisserne 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 thecouple 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)."

3.3.3.1.2. Mindre alvorlig kriminalitet

I sagen *Maslov v. Austria (2008)* var klageren 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.

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 præmisserne 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 præmisserne 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 re-adjust 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 virtuallyimpossible for the oldest child to relocate to Nigeria as he has a young daughter who was born in the UnitedKingdom. 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, andthey 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."

3.3.3.1.3. Opholdstilladelse opnået på baggrund af svig

I sagen *Antwi and others v. Norway (2012)* opnåede klageren sin opholdstilladelse på baggrund af svig.

Klageren var indrejst på et falsk pas med en falsk identitet, idet han udgav sig for at være statsborger i Portugal. Klageren opnåede derved ret til ophold efter en aftale med EU-landene. Klageren søgte om statsborgerskab, men fik afslag, idet han ikke opfyldte kravet om længde af ophold i opholdslandet. Klageren fik sammen med sin kæreste et barn, og de blev efterfølgende gift i klagerens reelle hjemland, Ghana, hvor også hans ægtefælle var statsborger.

Syv år efter indrejsen blev klageren anholdt under en rejse, hvorved opholdsstaten fik kendskab til hans reelle identitet. Året efter blev klageren udvist af opholdslandet. Klagerens barn var på daværende tidspunkt fem år.

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."

3.3.3.1.4. Ulovligt ophold

Sagen *Jeunesse v. the Netherlands (2014)* vedrørte en klager, der på intet tidspunkt under sit ophold i Nederlandene siden 1997 – 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 præmisserne 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 bl.a. (præmisserne 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 præmisserne 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 ophold i Nederlandene siden 1997 – 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)* havde klageren tidligere haft opholdstilladelse i medlemsstaten. Opholdstilladelsen var imidlertid bortfaldet, efter at klageren som barn havde haft et længerevarende opholdi familiens tidligere opholdsland. Klageren var efterfølgende genindrejst i medlemsstaten. Klageren havde opholdt sig i Danmark fra hun var syv år, indtil hun som 15-årig af sine forældre blev sendt på genopdragelsesrejse i sit tidligere opholdsland, Kenya, hvor hun også havde boet, fra hun var ca. fire år, til hun var syv år.

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 præmisserne 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)."

3.3.3.1.6. Familiesammenføring til personer, som har lovligt ophold

Familieliv, der måtte være etableret eller opretholdt på baggrund af lovligt ophold i et opholdsland, kan have betydning for en afgørelse om inddragelse, nægtelse af forlængelse eller bortfald af en opholdstilladelse. EMD har så vidt ses ikke afsagt domme, som direkte belyser betydning af et etableret familieliv i sager om inddragelse mv., men EMD har i en række domme reflekteret betydningen af familieliv i opholdslandet i forbindelse med behandling af ansøgninger om opholdstilladelse.

Sagen *Gül v. Switzerland (1996)* omhandlede en klager, som i sit hjemland boede sammen med sin ægtefælle og deres to fælles børn. Klageren rejste efterfølgende til opholdslandet og søgte om politisk asyl. Fire år efter klagerens indrejse indrejste hans ægtefælle i opholdslandet, hvor hun året efter fødte parrets tredje fællesbarn. Parrets to andre fællesbørn opholdt sig stadig i hjemlandet. Det tredje fællesbarn blev grundet moderens helbredsproblemer (epilepsi) anbragt udenfor hjemmet, hvor hun forblev. Ægtefællen blev efterfølgende undersøgt af en specialist, som erklærede, at hun ikke ville kunne modtage den påkrævede behandling i sit hjemland, og at en tilbagevenden til hjemlandet kunne være fatal for hendes liv.

Klageren blev meddelt afslag på asyl efter seks års ophold i opholdslandet, men klageren, hans ægtefælle og deres yngste datter blev samme år meddelt humanitær opholdstilladelse. Året efter søgte klageren dernæst om familiesammenføring for de to fællesbørn, som stadig opholdt sig i hjemlandet.

Om proportionalitetsvurderingen udtalte EMD i præmis 38:

"The Court reiterates that the essential object of Article 8 (art. 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 (art. 8) 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 (see, most recently, the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 19, para. 49, and the Kroon and Others v. the Netherlands judgment of 27 October 1994, Series A no. 297-C, p. 56, para. 31). The present case concerns not only family life but also immigration, and 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 and the general interest. 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 (see, among other authorities, the Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985, Series A no. 94, pp. 33-34, para. 67). Moreover, where immigration is concerned, Article 8 (art. 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. In order to establish the scope of the State's obligations, the facts of the case must be considered (see, mutatis mutandis, the Abdulaziz, Cabales and Balkandali judgment previously cited, p. 34, para. 68, and the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 32, para. 88)."

EMD udtalte i præmis 39, at selve proportionalitetsvurderingen skulle foretages ud fra, om dette var klagerens eneste mulighed for at kunne udvikle et familieliv med klagerens børn:

"In this case, therefore, the Court's task is to determine to what extent it is true that Ersin's move to Switzerland would be the only way for Mr Gül to develop family life with his son."

Ved proportionalitetsvurderingen lagde EMD i præmis 41 vægt på klagerens mulighed for at udleve familielivet i hjemlandet:

"By leaving Turkey in 1983, Mr Gül caused the separation from his son, and he was unable to prove to the Swiss authorities - who refused to grant him political refugee status - that he personally had been a victim of persecution in his home country. In any event, whatever the applicant's initial reasons for applying for political asylum, the visits he has made to his son in recent years tend to show that they are no longer valid. His counsel, moreover, expressly confirmed this at the hearing. In addition, according to the Government, by virtue of a social security convention concluded on 1 May 1969 between Switzerland and Turkey, the applicant could continue to receive his ordinary invalidity pension and half of the supplementary benefit he receives at present in respect of his wife, his son Ersin and his daughter Nursal if he returned to his home country (see paragraph 23 above). Mrs Gül's return to Turkey is more problematic, since it was essentially her state of health that led the Swiss authorities to issue a residence permit on humanitarian grounds. However, although her state of health seemed particularly alarming in 1987, when her accident occurred, it has not been proved that she could not later have received appropriate medical treatment in specialist hospitals in Turkey. She was, moreover, able to visit Turkey with her husband in July and August 1995 (see paragraph 19 above)."

EMD udtalte endvidere i præmis 42, om hvorvidt det ville være praktisk muligt for klageren på ny at tage ophold i hjemlandet, henset til længden af klagerens ophold i opholdslandet:

"In view of the length of time Mr and Mrs Gül have lived in Switzerland, it would admittedly not be easy for them to return to Turkey, but there are, strictly speaking, no obstacles preventing them from developing family life in Turkey. That possibility is all the more real because Ersin has always lived there and has thereforegrown up in the cultural and linguistic environment of his country. On that point the situation is not the sameas in the Berrehab case, where the daughter of a Moroccan applicant had been born in the Netherlands and spent all her life there (see the Berrehab judgment previously cited, p. 8, para. 7)."

EMD fandt således i præmis 43, at et afslag på familiesammenføring til de to børn, der fortsat opholdt sig i hjemlandet, ikke var en krænkelse af artikel 8.

I sagen *Ahmut v. the Netherlands (1996)* foretog EMD en proportionalitetsvurdering i forbindelse med en ansøgning om familiesammenføring fra klagerens søn.

Klageren havde fået fem børn med sin tidligere ægtefælle, inden han forlod hjemlandet og opnåede statsborgerskab i opholdslandet. Da klageren udrejste, efterlod han sine fem børn hos sin tidligere ægtefælle.

Hans tre ældste børn indrejste efterfølgende i opholdslandet, hvor en blev udvist, da han ikke havde et visum til midlertidigt besøgsophold og efterfølgende havde fået afslag på opholdstilladelse, og de to andre blev meddelt opholdstilladelse. Til sidst rejste også hans to resterende børn til opholdslandet, hvorefter klageren på vegne af disse søgte om opholdstilladelse under henvisning til ham.

Medlemsstaten afslog disse ansøgninger under henvisning til, at familielivet var afbrudt, og fandt på den baggrund at et afslag på opholdstilladelse ikke var en krænkelse af artikel 8. Det blev ligeledes anført, at såfremt der havde foreligget et familieliv mellem klageren og hans to børn, var hensynet til det statens ønske om at begrænse immigration, et forhold der var omfattet af undtagelsesbestemmelserne på grund af økonomiske hensyn.

Om proportionalitetsvurderingen udtalte EMD i præmis 63, at det generelle princip var:

"The Court reiterates that the essential object of Article 8 (art. 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 (art. 8) 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 (see, most recently, the above-mentioned Gül judgment, pp. 174-75, para. 38)."

I den konkrete sag lagde EMD i præmis 69 endvidere vægt på klagerens barns tilknytning til hjemlandet:

"After Salah Ahmut went to the Netherlands in 1986 Souffiane was cared for by others, first Souffiane's mother, and after the latter's death in 1987, his grandmother (see paragraphs 9 and 12 above). Apart from the period between 26 March 1990 and 30 September 1991, which he spent in the Netherlands, and a number of visits to his father (see paragraph 18 above), Souffiane has lived in Morocco all his life. It follows that Souffiane has strong links with the linguistic and cultural environment of his country. In addition, he still has family there, namely his elder brother Hamid, his sister Souad, two uncles and possibly his grandmother (see paragraph 33 above)."

EMD udtalte endvidere i præmis 70, at klageren stadig havde en tilknytning til sit hjemland:

"The fact of the applicants' living apart is the result of Salah Ahmut's conscious decision to settle in the Netherlands rather than remain in Morocco. In addition to having had Netherlands nationality since February 1990, Salah Ahmut has retained his original Moroccan nationality (see paragraph 7 above). Souffiane has Moroccan nationality only (see paragraph 8 above). It therefore appears that Salah Ahmut is not prevented from maintaining the degree of family life which he himself had opted for when moving to the Netherlands in the first place, nor is there any obstacle to his returning to Morocco. Indeed, Salah Ahmut and Souffiane have visited each other on numerous occasions since the latter's return to that country."

Om familiens ønske om at genoptage familielivet udtalte EMD endvidere i præmis 71:

"It may well be that Salah Ahmut would prefer to maintain and intensify his family links with Souffiane in the Netherlands. However, as noted in paragraph 67 above, Article 8 (art. 8) does not guarantee a right to choose the most suitable place to develop family life."

EMD fandt på den baggrund, at der ikke forelå en krænkelse af artikel 8.

3.3.3.2. Personlige forhold der skal inddrages i vurderingen

EMD har gennem sin praksis oplistet en række momenter, 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 afsnit 3.3.3.1.1 til 3.3.3.1.6 har baggrunden for medlemsstatens indgreb stor betydning for proportionalitetsafvejningen.

Dette afsnit oplister en række af de momenter, som EMD gennem sin praksis (primært om kriminelle udlændinge) har fremhævet som værende nødvendige at inddrage i proportionalitetsafvejningen.

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 momenter, 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
- Tidspunktet for den begåede kriminalitet og den pågældendes efterfølgende opførsel
- 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* 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."

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*

De i *Boultif*- og *Üner*-dommene fastsatte momenter 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 momenter i proportionalitetsafvejningen, som er oplistet i sagerne *Boultif* og *Üner*, også i sager, hvor der ikke er begået kriminalitet.

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]

EMD har i sin praksis udtalt, at vægtningen af de enkelte elementer i proportionalitetsafvejningen afhænger 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."

3.3.3.3. 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 ulovligt ophold og mindre alvorlig kriminalitet, *Konstatinov v. the Netherlands (2007)*, lagde EMDi vurderingen bl.a. 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. […]"

3.3.3.4. 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 overfor 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 overfor 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 konventionens 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 Københavner Erklæringen (*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 rightsat 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."

4. Privatliv i praksis (Kapitlet er under udarbejdelse)
5. Familieliv (Kapitlet er under udarbejdelse)
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 artiklerne 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 the 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 deltagei 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 ofthe 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.

6.1.2.2. Børnekonventionens artikel 9

Det ses ikke, at komitéen har behandlet sager, hvori der er taget stilling til, om der forelå en krænkelse af Børnekonventionens artikel 9. I Børnekomitéens udtalelser i sagerne *X. mod Finland, communication no. 6/2016 (2019),* og *J.S.H.R. mod Spanien, communication no. 13/2017 (2019)*, havde klagerne henvist til, at medlemsstaterne havde krænket artikel 9, men i begge sager afviste komitéen klagerne som inadmissible.

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."

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 tidligere blevet dømt for et seksuelt overgreb begået mod en mindreårig samt to forsøg på røveri og overfald. Disse forhold blev begået, da klageren var mindreårig. Som 30-årig blev klageren ydermere idømt fem års fængsel for røveri. I forbindelse med dommen for røveri blev han ligeledes dømt til udvisning. Klageren blev udsendt ni år efter han var blevet dømt for dette røveri. På tidspunktet for EMD´s afgørelse af sagen var klageren far til seks børn i alderen fra12 til 17 år. Klageren var på daværende tidspunkt ikke i et forhold med mødrene til hans 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 præmisserne 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 klageren opnået sin opholdstilladelse på baggrund af, at hans mor havde udvist svig. De nationale myndigheder blev klar over dette, men inddrog ikke klagerens opholdstilladelse, idet hans mor i mellemtiden var forsvundet, og fordi klageren var mindreårig, hvorfor myndighederne ikke ville udsende ham uden hans mor. De nationale myndigheder inddrog efterfølgende hans opholdstilladelse,da klageren var blevet myndig, på grund af mindre alvorlig kriminalitet.

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 andsister) 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 theConvention. The Government's suggestion that the private- and family life interests at stake were only at thefringes 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.

Sagen *Nunez v. Norway (2011)* omhandlede en kvinde, som havde opnået sin opholdstilladelse på baggrund af svig. Hun havde under sit ophold i medlemsstaten giftet sig og fået børn med en statsborger fra medlemslandet. De nationale myndigheder traf efterfølgende afgørelse om inddragelse af klagerens opholdstilladelse og udviste hende med et indrejseforbud gældende i to år.

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 præmisserne 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 theirfather was granted custody in 2007. The Court regards it as significant that by virtue of that judgment, whichattached 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 præmisserne 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.

6.1.3.4. Ulovligt ophold

Sagen *Jeunesse v. the Netherlands (2014)* omhandlede en kvinde, som indrejste i medfør af et visum for at besøge en slægtning i opholdslandet. Hun giftede sig efterfølgende med en statsborger fra opholdslandet, og de fik sammen tre børn. Klageren søgte flere gange om opholdstilladelse, men fik afslag på dette, idet hun ikke havde indgivet ansøgningerne om opholdstilladelse fra sit hjemland. Klageren blev 16 år efter sin indrejse tilbageholdt med henblik på udsendelse til sit hjemland. EMD henviste i sagen bl.a. til Børnekonventionens artikel 3, stk. 1.

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 præmisserne 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 breakthose 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 residentialinstitutions, 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 CCPR) 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 CCPR: *"individual communications", "state-to-state complaints*" og "*inquiries*".

I sager omhandlende inddragelse, nægtelse af forlængelse og bortfald af opholdstilladelser er artikel 17 mest relevant.

6.3.1. Relevante artikler i CCPR

6.3.1.1. CCPR artikel 17 – "forbud mod vilkårlig eller ulovlig indblanding i privat- og familieliv"

Ordlyden i CCPR 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 CCPR 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."

6.3.2. Udtalelser fra Menneskerettighedskomitéen

6.3.2.1. CCPR artikel 17

Praksis fra Menneskerettighedskomitéen vedrørende artikel 17 kan findes på Flygtningenævnets hjemmeside, www.fln.dk, under Publikationer og notater/Notater/CCPR artikel 17 mm.

6.3.3. Anvendelse af CCPR i praksis ved EMD

Det ses ikke, at EMD har inddraget CCPR artikel 17 om forbud mod vilkårlig og ulovlig indblanding i privat- og familieliv 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