Summary

ADJUDICATING THE PUBLIC INTEREST IN IMMIGRATION LAW

A Systematic Content Analysis of Strasbourg and Luxembourg Case Law on Legal Restrictions to Immigration and Free Movement

This book investigates the public interest role in denying residence to foreign nationals in the case law of the ECtHR and the ECJ. The starting point for the investigation are the contrasting paradigms employed by these Courts in relation to immigration: the Strasbourg acknowledgment of the right of States to control immigration versus the promotion of free movement and family reunification in EU law. For various reasons, it was foreseeable that Luxembourg scrutiny of national restrictions would prove stricter than the Strasbourg approach. However it was not yet clear how in concrete cases the scope of scrutiny depends on whether national immigration criteria are examined in the light of Article 8 ECHR or against standards of EU law. The main cause for this has been a widespread lack of insight into the boundaries of Strasbourg scrutiny in Article 8 ECHR immigration cases.

This research has confirmed the common perception of the Strasbourg case law as lacking transparency and consistency. At the same time, however, this research has also uncovered a clear pattern of adjudication in the body of Article 8 ECHR immigration cases. The identification of the Strasbourg boundaries of scrutiny and the core premises on which these boundaries rest, have allowed for establishing on a detailed level to which extent the scrutiny of national restrictions differs according to whether the measure is evaluated in the light of Article 8 ECHR or against standards of EU law. The basis for the findings of this research has been a systematic content analysis of Strasbourg Article 8 ECHR immigration cases, Luxembourg cases on free movement of Union citizens and their family members and Luxembourg cases on family reunification by third country nationals on the basis of Directive 2003/86.

Strasbourg: A decision-model that leaves the legitimacy of controlling and restricting immigration per se unquestioned

The first part of this book examines the Strasbourg approach to the public interest in denying residence to foreign nationals. In the analysis, six categories of reasons for denying residence were distinguished. In chapter 2, each category was examined regarding whether the ECtHR evaluates the circumstances of the case to establish the weight of the public interest in denying residence. If it appeared that the Court
did not evaluate the weight of the public interest on a case-by-case basis, it was noted which other aspects were addressed in order to conclude on the matter. The analysis of Strasbourg case law revealed a line of distinction between on the one hand cases featuring decisions on grounds relating to criminal convictions, national security, and national health; and on the other hand, cases featuring non-compliance with income-related criteria, procedural rules of immigration law and individual interest-related criteria.

In relation to the first three categories of reasons the Court was observed to critically evaluate the circumstances invoked by the State relating to the public interest in denying residence to the individual concerned. Furthermore, the Court did not automatically follow national authorities in their appreciation of the facts and circumstances in these cases. Consequently, the Court may disagree on the seriousness of crimes, risk of re-offending, or the extent to which a foreign national poses a threat to national security or health. In relation to the latter three categories of reasons, a different picture emerges. While the ECtHR makes explicit evaluative comments on the facts invoked to justify denying residence, in none of the cases was this evaluation at variance with that of the national authorities. In addition, there is no proportionate link between the appreciation of the facts underlying the decision to deny residence and the outcome of a case. Instead, factors other than the relative weight of the competing interests at stake emerged as being indicative for the outcome of individual cases. These factors concern the issue of whether the national criterion has been applied correctly and consistently, and whether there was a good excuse for non-compliance with that criterion. Furthermore, it appears that the Court accepts as a stand-alone legitimate interest, a generic interest in controlling immigration. This means that the interest per se in upholding national rules of immigration law may justify a decision to deny residence, irrespective of whether there are substantive objections against this person’s presence in the host State.

In chapter 3, a further exploration of the link between the occurrence of the aforementioned indicative factors and the outcome of a case resulted in a flowchart that shows how Article 8 ECHR immigration cases can be distinguished between cases in which the outcome arguably results from a balancing structure, and cases in which the outcome follows a decision-model based on indicative factors. In the latter category of cases, there is a strict correlation between the outcome of the case and the correct and consistent application of national immigration criteria and the occurrence of a good excuse for non-compliance with these criteria. The correlation entails that if in relation to these criteria the applicable national rules have been applied correctly and consistently, denying residence is not considered to violate Article 8 ECHR, unless a good excuse has been accepted for non-compliance with the criterion at issue. In these cases, the weight of the individual interests at stake, in itself, was not capable of tipping the scales.
Chapter 4 explains how the systematic content analysis of Article 8 ECHR immigration cases disclosed a clear distinction between cases in which the ECtHR can be said to conduct a balancing assessment, and cases in which the outcome corresponds to a decision-model that implies a full margin of appreciation being accorded to States. The ‘logic’ behind this distinction has been revealed by focusing on the emphasis placed by the ECtHR on the right of States to control immigration.

The distinctive feature of cases to which a full margin of appreciation applies is the occurrence of so-called immigration-specific aspects: aspects that only in the context of immigration may determine whether a person is to be physically excluded from society as a whole. In cases without immigration-specific aspects, the Court has shown to evaluate the weight of the competing interests on a case-by-case basis, without necessarily deferring to national authorities in this regard. By contrast, in cases that do feature immigration-specific aspects, the Court will not conclude that denying residence violates Article 8 ECHR if this would compromise the validity of the national restrictive criterion at issue or the manner in which the competing interests were balanced on the national level. Evidence for this full margin of appreciation is the aforementioned strict correlation in these cases between the outcome of the case and the aforementioned decision-model based on indicative factors. By accepting a violation of Article 8 ECHR only in case of an incorrect or inconsistent application of national criteria, or in case of a good excuse for non-compliance; the ECtHR, without this being its explicit purpose, secures that a violation never results in a State having to adjust its policy in relation to immigration-specific criteria. The dividing-line found in Strasbourg cases reflects the limits of Strasbourg scrutiny; the crossing of which would compel the Court to interfere with national exclusion policies specific to immigration, and in which, accordingly, States have no alternative instrument to physically exclude the person concerned from society as a whole.

The link between immigration-specific aspects and the outcome of Strasbourg cases has provided clarity on the outcome of controversial Strasbourg judgements in which it was difficult to understand why the Court had not considered the individual interests at stake such as to outweigh the public interest. The fact that this explanation exists in a full margin of appreciation being accorded to States in matters specific to immigration, however, gave rise to criticism of this judicial tool in Article 8 ECHR immigration cases. The ECtHR’s consistent presentation of cases as being the result of balancing, while in fact in a substantive number of these cases a full margin

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673 E.g. a failure to satisfy income requirements, or the end of a marriage. By contrast, aspects such as commission of crimes or posing a threat to national health are not immigration-specific: these aspects may also in other context determine a person’s physical exclusion from society, through imprisonment or quarantine.
applies, has resulted in a widespread distorted perception of the scope of Strasbourg scrutiny. Further, with this practice, the Court has created a potential bias in the political and legal discourse on the national level.

By not being explicit on the scope of the margin of appreciation left to States in immigration cases and presenting the outcome of every case as guided by the principle of balancing competing interests, the Strasbourg Court – albeit unwittingly – has obscured the significance of accepting the generic interest in controlling immigration as an autonomous justification for denying residence. This public interest, as it deals with the interest in controlling and restricting immigration per se, technically does not allow for making a substantive distinction between justified and unjustified decisions to deny residence. In cases where the generic interest in controlling immigration is accepted as an autonomous justification for denying residence, it is not even possible for the Court to follow a different approach than to examine whether the criterion has been applied correctly and consistently, and – to a limited extent – whether there was a good excuse for non-compliance with the criterion at stake. There is, in other words, a technical reason for the fact that the ECtHR’s approach in a substantial part Article 8 ECHR immigration cases does not provide substantive protection against arbitrary State decision-making.

No easy remedy for the Strasbourg contradiction

The criticism about the Court's approach to Article 8 ECHR immigration cases cannot easily be remedied within the boundaries of the current premises employed by the Court. To maintain the assertion that immigration cases affecting family or private life are not categorically excluded from the protection of Article 8 ECHR, the Court must either conduct substantive scrutiny of the public interest in denying residence, or acknowledge a concrete minimum threshold of substantive protection of an individual interest in being granted entry or residence. Article 8 ECHR, since it allows for general exceptions to rights in view of pursuing the public interest, cannot provide protection if there is no substantive minimum-level of protection of the individual interest in being granted residence, nor any substantive scrutiny of the public interest in denying residence.

If the Court included substantive scrutiny of reasons for denying residence, this would mean that procedural immigration rules and individual interest-related criteria could no longer be invoked as an autonomous reason for denying residence. And if the Court acknowledged a substantive minimum-threshold of protection below which denying residence would violate Article 8 ECHR, this would boil down to accepting a right that involves immigration. Clearly, this would not entail a right to immigrate as such: given the scope of Article 8 ECHR this right would be connected with the right to respect for private or family life. Obviously, both options would
seriously impair the ‘well-established right of States to control the entry of aliens into its territory and their residence there’.

To be sure, the decision-model in cases where the generic interest in controlling immigration is at stake cannot be considered as a minimum-level of judicial protection that would derive from Article 8 ECHR. First of all, the situations in which a good excuse may lead to being exempted from having to satisfy immigration-specific criteria is limited. The most striking case in point of an immigration-restricting aspect that cannot be ‘remedied’ by a good excuse concerns the nationality attributed at birth. This aspect lies at the basis of every immigration-decision and yet, no one can be held accountable for nationality of birth. To the extent that the Court lacks judicial power to include in its assessment aspects of accountability in relation to failure to satisfy criteria for entry and residence; all that remains for the Court to do is to verify whether these criteria, whatever their scope of restriction, were enforced correctly and consistently. Under vigour of such a limited examination, the scope of the interest in family and private life protected ‘under Article 8 ECHR’ is in fact determined by the restrictive criteria set out by the State, and therefore not follow from Article 8 ECHR.

Admittedly, the Court may dismiss a State’s assertion on whether a foreign national’s individual ties qualify as family or private life, as it did in for example Berrehab. However, the Court has no means to dismiss a State’s assertion on what in substance qualifies as ‘respect’ for family or private life. With only an examination of the correct and consistent application of national procedural rules and individual interest-related criteria, the Court cannot restrict States imposing immigration criteria that have the effect of limiting the enjoyment of such family or private life. The limits of Strasbourg scrutiny in this regard have been exemplified by its deference with regard to the obligation for individuals residing in the host State to apply for a residence permit abroad, and the Danish criterion that accepted only foreign nationals who had lived in Denmark for at least 28 years to be sufficiently ‘attached’ to Denmark so as to be eligible for family reunification.

The aim of this book is not to propose what should be done to include immigrants’ family and private life within the scope of protection of Article 8 ECHR. Rather, the purpose is to show the implications for the scope of judicial protection under Article 8 ECHR of accepting the interest per se in controlling or restricting immigration as an autonomous justification for denying residence, and to demonstrate how difficult it is to recognise when immigrants’ family and private life are categorically being excluded from the scope of judicial protection under Article 8 ECHR.
Luxembourg: prioritisation of immigration as a starting point

The analysis of Luxembourg case law, as expected, showed a different picture of judicial scrutiny concerning national restrictions on entry and residence of foreign nationals. The second part of the book describes how in light of EU aims to abolish the obstacles to free movement of Union citizens and, in relation to Directive 2004/38, to promote family reunification, the ECJ demands that the rights at issue are interpreted broadly and any relevant restrictions, stringently. National constraints that are not explicitly provided for by EU law or directly follow from definitions deployed by the ECJ are prohibited. Accordingly, the Court rejected a required minimum income-level to satisfy the worker-definition; the restriction entailing that economically non-active Union citizens themselves must provide sufficient income; and the restriction that only family members of Union citizens who had lawfully resided in another Member State could join the Union citizen: no rule had explicitly provided for such requirements to be imposed by the Member States. Further, the Court dismissed the failure to comply with registration requirements as posing a basis for denying entry and residence rights altogether. Such restrictions were only allowed as means to regulate the exercise of existing rights, not as conditions that had to be fulfilled in order to obtain such rights. Sanctioning infringement could therefore only entail measures that did not detract from the right of entry or residence as such.

In examining the scope of restrictions that are incorporated in EU law, such as the sufficient resources condition or restrictions regarding the personal scope of individual rights, the ECJ has been shown to evaluate whether the restriction deployed by the Member State is in accordance with the particular purpose of the inclusion of such restriction in EU law. Again the starting point here is that the right at issue is interpreted broadly and any restrictions are interpreted strictly. Hence, the requirement that the sponsor should have an income of 120% of the minimum wage was considered disproportionate because it went further than the stipulation that Member States may require evidence that the sponsor has sufficient means to prevent him from becoming a burden on the social assistance scheme. Also, a strict interpretation of integration requirements in light of the aim to facilitate the integration of family members in the host State, precluded Member States imposing examination fees or other limitations that are capable of making family reunification impossible or extremely difficult. Furthermore, a strict interpretation of the ‘dependency’ requirement in view of the aim to abolish obstacles to free movement of Union citizens and their family members, prohibited Member States requiring evidence of the reasons for dependency of a family member of a Union citizen. Here the significance becomes apparent of the fact that the principal aims of EU law in view of which the legitimacy of national measures is assessed, coincide with the
individual interest in being granted a right of residence, rather than being opposed to that interest. The interpretation of personal scope criteria in EU law are therefore consistently framed as *national measures restricting EU rights*.

A final characteristic of the ECJ’s approach to national restrictions concerns the obligation it imposes on Member States to apply only customised assessment standards. The Court consistently demands that in enforcing restrictive criteria, Member States are to take into account the circumstances of the case. Firstly, this means that Member States may not fix the means by which a person must prove that he satisfies certain criteria: there are various ways to prove one’s identity or one’s dependence on another person. Further, it means that generally, Member States may not apply fixed standards that should be met. With regard to the sufficient resources condition, the ECJ established that since the needs of people vary, what is considered sufficient to prevent a person from becoming a burden on the social assistance scheme should not be measured on the basis of fixed levels of income. Furthermore, since the economic nature of a person’s activities depend on a multitude of aspects, Member States may not deny the worker status to a person on the basis of a single aspect, such as the number of working hours per week. Of particular interest is the ECJ’s case law on procedural restrictions to entry and residence rights. The Court has consistently emphasised that infringement of procedural requirements in relation to Union citizens cannot serve as providing sufficient grounds for denying residence. Such reasons must always take into account personal conduct of the individual concerned in relation to the public interest. General prevention, *i.e.* the interest in preventing *other* persons from violating procedural rules, is categorically dismissed as a legitimate interest.

*The significance of marginalising the role of the generic interest in controlling or restricting immigration in judicial reasoning*

Contrasting the Strasbourg approach with the manner in which national restrictions are scrutinised under EU law immediately shows the paramount importance of either accepting or rejecting a generic interest in controlling or restricting immigration. The effect of taking the abolition of obstacles to free movement of Union citizens and the promotion of family reunification by third country nationals as starting points for judicial scrutiny is visible in various features of the Luxembourg case law.

First of all, the aims against which the legitimacy of restrictions is interpreted entail the *promotion* of rights that involve immigration. The principle that individual rights are to be interpreted extensively while limitations to these rights are to be interpreted strictly precludes the prioritisation of interest in restricting immigration. The inclusion in EU law of public interest-related criteria potentially restricting entry or residence rights, such as income or integration requirements, therefore, may not be interpreted in a manner that takes as a starting point that Member States have
discretionary powers to impose such public interest-related restrictions unless the
text of EU law explicitly indicates otherwise. The necessity of the restriction at issue
must always be argued for.

Moreover, the aim to promote rights involving immigration is reflected in the
stipulation that restrictive criteria may not be applied automatically and always
requires a case-by-case evaluation of whether it is necessary to enforce the
restriction. A generic interest in ensuring effective immigration control or in
quantitatively restricting immigration is not considered a legitimate justification for
denying entry or residence. Judicial considerations such as those found in Nunez,
endorsing general deterrence as a means to ensure effective immigration control,
consequently, play no role in relation to entry and residence rights accorded by EU
law. Likewise, the issue of whether the applicants were entitled to expect that any
right of residence would be conferred upon them cannot be invoked by States to
justify denying residence: in EU law, previous non-compliance with restrictive
criteria cannot be held against a person presently satisfying the relevant criteria.

Another feature of Luxembourg scrutiny that has the effect of limiting the
significance of the generic interest in controlling or restricting immigration, entails
the strict separation in the Court’s assessment of the various types of restrictions to
individual entry and residence rights. In the analysis, the following types of
restrictions were distinguished: conditions that must be fulfilled in order to fall
within the personal scope of a right; conditions, required by Member States to protect
certain substantive public interests; restrictions governing the exercise of an
established right of residence; and finally, general grounds to restrict the right to free
movement.

In establishing whether a person falls within the scope of EU law, the issue of
whether there are substantive objections against a person’s presence in the host State
may not be taken into account. The separate assessment of personal scope conditions
from other types of restrictions effectively precludes that the interests of Member
States in denying residence play a role in determining the personal scope of EU entry
and residence rights.

Moreover, once it is established that a person satisfies the conditions relating to
the personal scope of the right at issue, this means that subsequent decisions relating
to that person’s right fall within the scope of EU law. Hence, even if it appears that
this person does not satisfy conditions required by Member States to protect certain,
substantive public interests, or if it appears that there are general grounds of public
policy, public security or public health to restrict that person’s right to free
movement, any decision affecting that person’s right of residence must comply with
the strict, means-end, case-by-case assessment-standard of EU law. The separated
assessment of personal scope conditions from other types of restrictions thus
precludes that individuals who are considered a threat to the interests of a Member State cannot rely on the rights-based scrutiny that is required on the basis of EU law.

The same mechanism can be discerned in cases where the ECJ stresses the distinction between conditions determining whether a person has a right to free movement or family reunification and restrictions that merely govern the exercise of an already established right of residence. The Court has repeatedly held that Member States may not apply the latter type of restriction with the effect that individuals whose right of free movement or family reunification has been established will not be able to exercise that right. The sanction for non-compliance with such restriction may not result in denying residence to the person concerned altogether. Again, the strict separation between the distinct types of restrictions limits the extent to which Member States may pursue the interest in restricting immigration.

This book demonstrates that to take into account ‘the circumstances of the case’ in adjudicating national restrictions in immigration law means something completely different according to whether the assessment takes place under Article 8 ECHR or under EU law. A systematic comparison of the Strasbourg and the Luxembourg approach has revealed how the scope of scrutiny of national immigration criteria depends on the extent to which the public interest in controlling immigration is being prioritised or marginalised.