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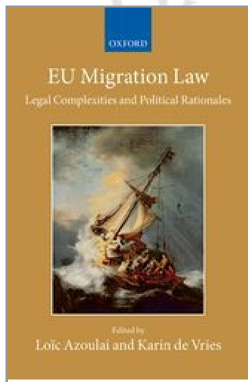

EU Migration Law: Legal Complexities and Political Rationales

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Analysing European Case-Law on Migration

Options for Critical Lawyers

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[–] Abstract and Keywords

This chapter addresses three ways in which lawyers can try to criticize the case law of European courts. The first is to re-analyse case law so as to expose its internal inconsistencies, which opens the possibility of arguing for a more consistent position. The European Court of Human Rights' (ECtHR) case-law on judicial review in asylum cases is used as an example. The second strategy is to contrast the case-law as it stands to an alternative line of case-law which is just as valid, and thus open up the possibility of change. The European Court of Justice's case-law on the family unity of EU citizens is used as an example. The third strategy is to bring into view an issue that has remained in the shadows as this may affect the outcome of a legal argument. The ECtHR's case law on HIV positive aliens and Article 3 ECHRis used as an example.

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Keywords: judicial review, asylum, ECHR Article 3, ECHR Article 13, EU citizens, family reunion, Directive 2004/38, HIV, inhuman treatment, critical legal theory

This chapter is about three strategies which lawyers may use when they want to criticize a court decision, or a set of court decisions ('case-law'). I will presume that they will criticize court decisions within legal discourse. Of course, they might do otherwise and criticize court decisions in other discourses. They might, for example, argue that the court decisions do not reflect the will of the democratic majority which drafted the legal rule which was applied (political critique), or that the court decisions are immoral (moral critique), or inefficient (law and economics critique). However, the influence a lawyer has stems from the notion that legal discourse is—to some extent—technical in nature, which gives it certain legitimacy. If a critical lawyer wants to rely on this source of legitimacy, the critique must be legal. I will presume that that is what critical lawyers want to do.

In order to point out other options than the one the court has taken, critical lawyers will either have to argue that the court was simply wrong, or that the court had another option which was preferable on some ground. In this text, I will largely ignore the first possibility. Although, obviously, it does happen that courts produce arguments which would be plain wrong in a law school exam, this does not happen very often, and it certainly does not happen much in the courts on which I focus here, the European Court of Human Rights (ECtHR) and the Court of Justice of (now) the EU (ECJ).

I am aware that terms like critique and critical lawyers have a progressive, leftist ring. However, the case-law of the European courts may be criticized both from a progressive position (in the present-day migration context: they give too much space to state sovereignty and give insufficient protection to individual rights) as well as from a more state-oriented position (the courts have gone way beyond what states have agreed to and infringe on the possibilities of national communities to rule themselves[2]). Although no doubt the following will expose me as belonging to **(p.189)** the first variety of critics, my aim in this text is more limited, and for that reason coincidentally more neutral. I want to inquire into three common strategies which critical lawyers of any political colour may use when they criticize case-law in the terms of legal discourse. The theoretical interest of this inquiry is that critical lawyers have to deal with the inconsistency at the heart of legal reasoning, being that legal reasoning, through its technical nature, claims to lead to determinate outcomes (at least in the great majority of cases) while at the same time the critique will point out that legal reasoning allows for more than one legitimate outcome.[3]

In order to distinguish the political positions one may take on immigration, I rely on a grid representing four ideal typical positions.[4] In the context of migration, familiar ways of linking general political views to particular positions on migration do not seem to work. If we loosely define leftists as people primarily concerned with equal distribution of wealth and rightists as people primarily concerned with freedom from government constraints, we cannot predict the positions of these persons on migration issues. There are leftists who defend migrants' rights, advocate freedom of cross-border movement, and embrace multiculturalism. But there are also leftists who plead for restricted migration as this seems necessary for defending the achievements of the labour movement over the

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past century or so. There are rightists who argue for free migration because they consider restrictions on migration as labour market distortions. But there are also rightists who champion migration restrictions on the basis of cultural-nationalist assumptions. In other words the political spectrum is warped on migration issues.

Table 7.1 Political positions on migration

	Left	Right
Libertarian	Multicultural rights advocates	Laissez-faire liberals
Statist	Welfare nationalists	Cultural nationalists

In this contribution, I will argue that this warped character of the political spectrum constitutes an opportunity for engaged lawyers who care about the outcome of their legal arguments, and about the decisions of courts. In the first part of my contribution, I will show how case-law that at first sight seems to be consistent, can be approached in such a way that when analysed more rigorously, it turns out to be inconsistent. This can be done by including in the analysis cases which were considered to be about something else in the more conventional approach. This opens up the possibility of suggesting to the judiciary more consistent ways of addressing the issues at stake. This section will use the ECtHR's case-law on the intensity of judicial scrutiny in asylum cases as an example. In section 2, I will show how case-law may be contrasted with a potential alternative which is just as valid from a legal-technical position as the one adopted in standing case-law. **(p.190)** When the standing case-law has been downgraded to merely one of the possible alternatives, this creates space for the court to adopt the alternative. In this second section, the ECJ's case-law on family reunion of EU citizens will be used as an example. Section 3 will address the possibilities of focusing on something that participants in the legal debate consider as an uncontested, evident issue (which I will call a background issue). Reframing the background issue may affect the likely outcomes of legal debates. The example in this chapter will be the Strasbourg case-law about HIV positive aliens and Article 3 of the European Convention on Human Rights (ECHR).

1. Constructing Consistency: the Intensity of Judicial Review in Asylum Law

The first argumentative move I want to discuss is one that identifies inconsistency in the law as it stands, and develops a more coherent approach which is presented as better from a technical-legal point of view. And—lo and behold!—the improved, more coherent approach invariably tends to be closer to the political position of the person making the move. This is obvious, because identifying the inconsistency and reconstructing a more coherent approach is a lot of work, which one will only undertake if one has a reason to do so. People who are more or less pleased with the law as it stands will not devote their time and energy to trying to change it.

The example I will use is the position of the ECtHR on the intensity of judicial review in asylum law.[5] When faced with a case concerning a government act (such as deportation), courts can ask themselves roughly two questions. They can ask the question whether the government was *correct* in finding the act legal. The object of enquiry is the government

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decision to undertake that act. In this case, the domestic court will replace the government's opinion with its own. However, courts may ask themselves another question, which leads to a significantly less intense form of review. In this case, the domestic court asks whether the government could *reasonably* decide to undertake the act. The domestic court will only intervene if the decision is unreasonable, either in substance (for example, the balance of interests should clearly have been decided otherwise), or procedurally (for example, the individual did not have a fair hearing). Whereas in response to the first question only one outcome will be acceptable to the domestic court (namely, the correct one), in response to the second question several outcomes may be acceptable (namely, all reasonable ones).

Faced with case-law of the ECtHR which seemed to accept a less intense scrutiny by domestic courts, I will argue that this is inconsistent with its case-law about its own assessment in asylum cases. Having identified the inconsistency, I will suggest a way to remedy it. **(p.191)**

Interestingly, the ECtHR uses the same term for the scrutiny which it applies itself in asylum cases as for the scrutiny it requires domestic courts to apply in asylum cases on the basis of Article 13 of the ECHR. Since its *Vilvarajah* judgment, the ECtHR has consistently held that its own examination of the existence of ill-treatment in breach of Article 3 of the ECHR must necessarily be a rigorous one in view of the absolute character of this provision, and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe.[6] This was reconfirmed in the Grand Chamber judgment in the *Saadi* case.[7] Since *Jabari*, the ECtHR has held that, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment materialized, and the importance of Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim under Article 3.[8] The fact that the ECtHR uses the term 'rigorous scrutiny' both for its own scrutiny and for the scrutiny it requires from domestic courts, suggests that these should be identical. However, that idea becomes problematic when one pays close attention to the ECtHR's case-law.

A. Rigorous scrutiny by the Court

In its case-law, the ECtHR acknowledges the difference between more and less intense forms of scrutiny. For example, in cases concerning Article 6 of the ECHR, the ECtHR has developed the position that its duty is to ensure the observance of the ECHR by states, not to deal with errors of fact or law allegedly committed by a national court, 'unless and in so far as they may have infringed rights and freedoms protected by the Convention'.[9] It has ruled, in contrast, that notwithstanding its subsidiary role, in cases concerning Articles 2 and 3 of the ECHR, 'the Court must apply a particularly thorough scrutiny, even if certain domestic proceedings and investigations have already taken place'.[10] **(p.192)**

In two 1991 asylum judgments, the ECtHR seemed not to apply a rigorous scrutiny, but instead to supervise national fact finding in a more distant way. In the *Cruz Varas*

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judgment it attached importance to the experience of the Swedish authorities in evaluating asylum claims, and to the fact that the national authorities had conducted a thorough examination.[11] The *Vilvarajah* judgment contains a similar passage.[12] Notwithstanding its deference to national authorities in its *Cruz Varas* and *Vilvarajah* judgments, in these and many other cases the ECtHR at the same time explicitly held that its examination of a risk of ill-treatment in breach of Article 3 of the ECHR must necessarily be a rigorous one in view of the absolute character of Article 3.[13] From a more recent judgment, it appears that the ECtHR sees no tension between, on the one hand, attaching special importance to the findings of national authorities, and making its own assessment on the other:

[The Court] accepts that, as a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned. However, in the circumstances of this case, the Court does not share the conclusion of the Government that the information provided by the applicant was such as to undermine his general credibility and it notes that one of the Migration Court's lay judges considered that the applicant had given a credible account of events and that he ought to have been granted asylum.[14]

The ECtHR's assessment of the facts is indeed often rigorous, as can be further illustrated by a number of cases. Specifically, when the credibility of the statements of an asylum seeker is at stake, the ECtHR itself will assess the credibility:

[I]n the opinion of the Government, the applicant's account of his arrest, of the reasons for it, and of his escape, is so implausible as to invalidate his claim of having deserted from the army. This being so, the Court must proceed, as far as possible, to an assessment of the general credibility of the statements made by the applicant before the Netherlands authorities and during the present proceedings.[15]

(p.193)

In its *Hilal* judgment[16] the ECtHR dealt extensively with the credibility of the applicant's statements, as well as with the authenticity of the documents submitted, and on both points ruled in favour of the applicant. The same proactive attitude is clear from the *N v. Finland* judgment,[17] where the ECtHR, 'in order to carry out its own assessment of the facts', appointed two delegates[18] who went to Finland and took testimony from the applicant, his common-law wife, another asylum seeker, and a Finnish civil servant. The ECtHR, after considering that the applicant's own testimony before the delegates was evasive on many points, reached detailed conclusions. It was not prepared to accept every statement of the claimant as fact, and found the core of N's motivation to flee credible, but not his account of his journey to Finland.[19] In the *Nasimi* decision, the Court assessed the statements of the applicant in a similarly detailed manner, did not find them credible, and hence dismissed the application as inadmissible.[20]

In the *Salah Sheekh* judgment, the Court considered:

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In its supervisory task under Article 19 of the Convention, it would be too narrow an approach under Article 3 in cases concerning aliens facing expulsion or extradition if the Court, as an international human rights court, were only to take into account materials made available by the domestic authorities of the Contracting State concerned, without comparing these with materials from other reliable and objective sources. This further implies that, in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, a full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time.[21]

This consideration is in line with what the ECtHR actually does in its decisions, and judgments. It is true that the ECtHR finds it relevant when the national authorities have engaged in extensive and thorough assessment of facts as well as collection and evaluation of evidence (*Cruz Varas* and *Vilvarajah*). However, its main point is that it has to be 'satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported' by relevant sources.[22] In this, the thoroughness of the national asylum procedure is one factor, but the crucial issue is not a procedural one, but the substance: was the assessment right? **(p.194)**

In sum, we can see that the requirement of rigorous scrutiny, which the ECtHR applies in its own assessment of asylum cases, means that the ECtHR replaces the view of the national authorities with its own view when it sees reason to disagree with the national authorities. The ECtHR does attach special importance to the position of the national authorities, but accords their view no formal deference of any kind.

B. Rigorous scrutiny under Article 13

Although the ECtHR uses the term rigorous scrutiny both for its own activity in Article 3 of the ECHR cases and for what it demands from domestic courts in Article 3 cases, under Article 13 it has accepted the UK judicial review system in asylum cases, which may well apply a form of scrutiny which is less intense than the ECtHR's own.[23] As was explained in the *Vilvarajah* judgment, UK judicial review occurs on the basis of the Wednesbury principles, and consists of an examination of the exercise of discretion by the authorities to determine whether they left out of consideration a factor that should have been taken into account or took into account a factor that should have been ignored, or whether they came to a conclusion so unreasonable that no reasonable authority could have reached it.[24] This gives the impression that UK judicial review in asylum cases is relatively distanced, and quite marginal. However, the ECtHR then went on to cite a then leading asylum decision of the House of Lords as to the extent and effect of judicial review. The Lords considered that the Wednesbury principles must be applied in such a way as to subject the refusal of asylum 'to the more rigorous examination to ensure that it is in no way flawed' and had to be subjected to 'the most anxious scrutiny' and to 'rigorous examination' (para. 91). In later case-law, the ECtHR cited the UK Court of Appeal, which held that in asylum cases the domestic court must subject the refusal of asylum to rigorous examination 'and this it does by considering the underlying factual material for itself to see whether it compels a different conclusion'. The Court of Appeal held that, notwithstanding that domestic law places asylum decisions in a discretionary

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area of judgment, no special deference had to be paid by the domestic courts to the authorities' conclusion on the facts. According to UK case-law, '[i]n circumstances such as these, what has been called the "discretionary area of judgment"—the area of judgment within which the Court should defer to the Secretary of State as the person primarily entrusted with the decision on the applicant's removal ... —is decidedly a narrow one'.[25] Thus, the ECtHR has consistently emphasized that the fact that judicial scrutiny in UK asylum cases takes place against the background of the criteria applied in judicial review of administrative decisions, namely, rationality and perverseness, **(p.195)** does not deprive the procedure of its effectiveness. The ECtHR found it sufficient that UK courts can 'effectively control the legality of executive discretion on substantive and procedural grounds', and that they can quash a decision 'where it was established that there was a serious risk of inhuman or degrading treatment'.[26]

One may argue that, in these cases, the ECtHR has accepted the UK judicial review system in asylum cases because, against the background of legal standards formulated in terms of domestic law, in fact a 'most anxious scrutiny', a 'rigorous examination' is applied, which 'ensures' that the denial of asylum is 'in no way flawed'. In this understanding of the ECtHR's case-law, the marginal form is accepted because of the rigorous substance.[27] Another view, however, holds that a judicial review which applies a marginal test on important points (concretely, on the assessment of credibility) still constitutes a rigorous scrutiny in the sense of Strasbourg case-law.[28] The body of case-law on Article 13 of the ECHR in itself leaves some room for this view. In its *Hilal* decision, the ECtHR found that a UK court 'would not form its own independent view of the facts which would then necessarily prevail over whatever view has been formed' by the authorities.[29] Also, the ECtHR has never explicitly stated that it accepted application of the Wednesbury principles *because*, in actual practice, they are applied in a way which leaves the administration barely any discretionary freedom. Furthermore, the ECtHR has not ruled that a judicial scrutiny which is less intense than the one in UK judicial review cases would be in violation of Article 13. The ECtHR has, in other words, never stated that the UK review system constitutes the bottom line of what is still acceptable.

To summarize this point, although it is not entirely clear to what extent the ECtHR accepts that domestic courts allow a meaningful discretionary area of judgment, it is clear that it has not required domestic courts to replace the view of the administration by their own view if they see reason to do so.

C. The meaning of rigorous scrutiny

At this point in the argumentation, the inconsistency has been established. In the context of Article 3 of the ECHR, the ECtHR holds that 'rigorous scrutiny = replace domestic position by Court's own view' but in the context of Article 13 of the ECHR, the Court holds that 'rigorous scrutiny ≠ replace administrative position by court's own view'.

If one accepts that one term used by one single court in the context of the same set of cases should have the same meaning, there is a problem to be resolved. **(p.196)**

It is, however, not easy to reconcile the ECtHR's clear position on its own rigorous

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scrutiny, and its ambiguous position on the rigorous scrutiny required from domestic courts in asylum cases. Clearly, the ECtHR cannot require that domestic courts examine by themselves whether or not deportation is contrary to Article 3. This is what the ECtHR does. Domestic courts in many, if not most, European countries work in a system in which the object of their scrutiny is not the deportation, but the decision to deport. This object of scrutiny in itself allows for either a full, or a marginal, judicial scrutiny, as explained above. It would be contrary to the ECtHR's subsidiary role if it were completely to rewrite national law of administrative procedure. It must limit itself to the way in which the procedure is applied.

As a consequence of the ECtHR's subsidiary role, it will not object in the abstract to the form of judicial review. This means that it will not question the criteria which are to be applied before national courts even when, as in the UK case, these criteria prescribe a marginal rationality test. The ECtHR can only intervene if the way in which the national test is applied in practice leads to judicial scrutiny which gives fewer guarantees for conformity of deportations with Article 3 of the ECHR than the ECtHR's own examination. If one interprets the ECtHR's case-law on Article 13 in such a way that domestic courts can apply a less intense scrutiny than the ECtHR itself, this implies that the Court would apply a kind of scrutiny to asylum cases which has not been applied by domestic courts. This is incompatible with the subsidiary role of the ECtHR, which requires that domestic courts apply a scrutiny which is at least as comprehensive and intense as the one applied by the Court.[30]

Only such a systematic analysis of the term rigorous scrutiny can take away the ambiguity in the ECtHR's case-law on the meaning of Article 13 of the ECHR in asylum cases. The scrutiny by domestic courts must dispel any doubts as to the unsoundness of the claim (compare with *Saadi*), regardless of the formal criterion applied, be it full scrutiny or a marginal rationality test. The ECtHR itself has not drawn this conclusion, and has even sidestepped the issue.[31] But if the Court wants to repair this open inconsistency, and if it wants to end the situation in which many asylum seekers approach the ECtHR in order to get a level of judicial scrutiny which they were unable to get at the domestic level, then the Court must impose on states the obligation to put in place judicial scrutiny in asylum cases which has the same substance (ie the same intensity, although it may have a different form) as the scrutiny which it exercises itself. Alternatively, the ECtHR could relax its own scrutiny—but such a restriction of the Court's supervision of the application of Articles 2 and 3 ECHR would be without precedent, and for that reason seems unlikely to occur.

(p.197) D. Constructing consistency: concluding observations

We can safely presume that welfare nationalists and cultural nationalists (ie the statists, be they on the left or the right), who both favour migration control, will favour marginal judicial scrutiny in asylum cases, because this gives optimal space for democratically legitimized governments to execute those asylum policies which they see as being in the interest of the national population. As a consequence, they do not have many problems with the permissive attitude of the ECtHR towards judicial scrutiny by domestic courts in

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asylum cases. They may even pressure the ECtHR to relax its own scrutiny. We can also safely assume that the multicultural rights advocates will insist on full judicial scrutiny at the domestic as well as at the European level. This simply increases the chances that asylum seekers will be accepted. Laissez-faire liberals do not have political stakes in asylum as such, although they may view asylum seekers with some sympathy. However, they have two reasons for sympathizing with the multicultural rights advocates: (1) more admitted asylum seekers means more competition on the labour market, which they favour; (2) laissez-faire liberals need courts to curb government intervention in markets; especially during a phase of government intervention in the market, they will favour judicial control as such, regardless of the subject, and consequently will be sympathetic to full judicial scrutiny in asylum cases—without, as a rule, joining the multicultural rights advocates on the barricades.

Table 7.2 Political positions on judicial scrutiny in asylum cases

	Left	Right
Libertarian	Strict scrutiny	Strict scrutiny
Statist	Marginal scrutiny	Marginal scrutiny

So whereas the statists will not make too much of the inconsistency (they will relate it to the different contexts of domestic courts and the ECtHR, and argue it is more a difference than an inconsistency) the multicultural rights advocates will expose it and champion a more coherent position, as shown above. They will be supported by laissez-faire liberals, whose main function will be that they will not speak out against the multicultural rights advocates (and may speak in favour of them in passing).

It should be noted that not only critics, but courts as well use the potential of inconsistency—or at least vagueness as to consistency. In the judgment in *A and others*,[32] for example, the ECtHR set rules for the admissibility of secret evidence in the context of Article 5 of the ECHR (detention, in this case on national security grounds). It referred to its case-law under Articles 6 and 13, thus signalling the broader relevance of its judgment. However, it gave no clues as to whether, and if so how, the rules specified in the rather specific context of national security detention would apply in the context of asylum or family migration cases. The combination **(p.198)** of, on the one hand, signalling the broader importance of the judgment, while, on the other hand, leaving unclear how different sets of case-law concerning secret evidence might relate to each other has as an effect, that litigation will follow at the domestic level as to the application of the ECtHR's rules in different contexts. After a while, the ECtHR will get a picture of how its rules have been received at the domestic level, and it can elaborate more detailed rules without running the risk of being unacceptable to domestic courts.

2. Exposing Choice: Family Members of European Workers

The second argumentative move I want to discuss consists of showing how a given position of a court is not a necessary application of law as it exists. Standing case-law is contrasted with an alternative application of the law, which is just as good from a legal-

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technical point of view, but yields a different outcome. If the existence of the alternative has been made plausible, it turns out that for one and the same legal issue there are two correct, but different outcomes. Preferring one outcome over the other then must be the result of a conscious or unconscious choice, which is not legitimate on account of being the right legal answer. Usually, the person making this argument will then argue that the alternative option (ie the one not presently adopted by the courts) is superior, because it is more efficient, more in line with human rights, or some such. If a person is satisfied with the choices that have been made in case-law, that person will not spend time on making it subject to critical debate.

The example I will use for this is case-law of the ECJ concerning the family members of European citizens. Even when these family members are not themselves EU citizens (so-called third country nationals (TCNs)), they can rely on EU law if they are family members of an EU citizen who has exercised his right of freedom of movement of workers. The problem that has come up in case-law is that in this way, in particular circumstances, TCNs may acquire a residence right on the basis of EU law which they would not have on the basis of the legislation of any EU member state. They may be considered as using EU law in order to evade national migration law. Interestingly, the ECJ itself has taken two fundamentally different positions on this issue, so we can analyse the choice it has made without having to construct the alternative.

A. *Levin*: motives for using freedom

Levin was a UK national who had married a South African man. After his asylum application in the UK had failed, they moved to the Netherlands.[33] When the couple was threatened with removal, she started working part-time as a room maid in Amsterdam, earning less than the social minimum.[34] A Dutch court sent **(p.199)** preliminary questions to the ECJ, focusing on, first, the question whether someone earning an income below the social minimum could be considered as a worker in the sense of European law (then Article 48 of the Treaty Establishing the European Economic Community) and, secondly, if so, whether such a worker would have a right to reside in another member state if it was apparent that the chief motive was not the pursuit of an economic activity. On the first point (which is not directly relevant in our context), the court famously held that part-time employment may make someone a worker in the sense of European law, but that these rules:

cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. It follows both from the statement of the principle of freedom of movement of workers and from the place occupied by the rules relating to that principle in the system of the treaty as a whole that those rules guarantee only the free movement of persons who pursue or are desirous of pursuing an economic activity.[35]

The ECJ then went on to discuss the relevance of the motives of a European national for becoming a worker in the sense of European law. It referred to four provisions in European legislation stipulating that free movement is granted ‘for the purpose of’ or ‘in

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order to' take up employment. It goes on to say that these formulations 'merely' express that free movement may be relied upon 'only by persons who actually pursue or seriously wish to pursue' employment (the reference to persons wishing to pursue employment concerns the right of free movement of job seekers[36]). But they do not mean that this freedom 'may be made dependent upon the aims pursued' by the person concerned. Therefore, 'the motives which may have prompted the worker to seek employment in the Member State concerned are of no account and must not be taken into consideration'. This meant that it did not matter that, so to speak, Levin worked in Amsterdam in order to get her husband asylum which had been denied in her own country. Together with the later *Surinder Singh* judgment,[37] which had the effect of giving persons in the situation of Levin and her husband a right to return to the UK, this meant that restrictive national immigration and asylum law could be evaded by taking up work in another European country, getting the TCN spouse a European law residence right there, and taking that European residence right back to the home country which had denied that right in the first place.

The ECJ reached this result by relying on a classical notion of a freedom: the essence of a freedom is that why the freedom is exercised is not to be questioned. Otherwise, the freedom in question may be made void. For example, if one holds that freedom of expression can only be used to express views which reflect the real interests of the person concerned (and not deluded views which have been implanted by, say, capitalist alienation or fundamentalist indoctrination), then **(p.200)** in fact the freedom of expression is denied. Comparably, the underlying idea of the ECJ in *Levin* seems to be that the freedom of movement of workers would be undermined if it could only be used for reasons of industriousness, as would be the result of a reasoning based on the 'for the purpose of/in order to' wording. The freedom of movement of workers, the Court decided, could be used in order to earn money, but also out of love (as in *Levin*), curiosity or for other motives—as long as the European national worked.[38]

B. *Akrich*: freedom versus access[39]

This line of thought was reversed in the *Akrich* judgment, where the ECJ—in the footsteps of the national court which had submitted the prejudicial questions—recast the issue at stake.[40] The central issue in these cases was not seen as whether particular motives for using the freedom of movement could be disqualified, but whether the freedom of movement of European nationals could be used in order to get non-European nationals entry into a European country through the back door.

Akrich, a Moroccan national, entered the UK as a tourist in 1989. A residence right as a student was refused. In 1990 he was convicted for attempted theft and use of a stolen identity card, and he was deported to Algeria in 1991. In 1992 he returned to the UK using a false French identity card. He was arrested and again deported five months later. He clandestinely returned to the UK shortly after. In 1996 he married a citizen of the UK. He was taken into immigration detention in 1997 and deported to Dublin, at his request, where his wife had moved two months earlier. In 1998 Akrich asked for permission to enter the UK. The couple argued that the UK spouse had worked for half a

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year in Ireland and that as a consequence Akrich had a European law-based residence right in Ireland (*Levin*) and could accompany his wife back into the UK (*Surinder Singh*). The national court wanted to know whether, in a situation where a European national moves to another member state in order to claim a residence right for her spouse upon return to her own country, the intention of the couple could be regarded as reliance on European law in order to evade the application of national legislation. The follow-up question was whether, if that was the case, this would be a ground for refusing a residence right.

The ECJ started out by stating that the preliminary questions were mainly about the scope of the *Surinder Singh* judgment, ie about the right to return with a TCN **(p.201)** spouse from another European state to the country of origin (Rec. 46). The Court then explained that this right follows from the right to freedom of movement (Recs 47–8). But it then redefined the issue at stake in the case before it. It made a distinction between 'freedom of movement within the Community', which is covered by European law, and on the other hand 'access [of third country nationals] to the territory of the Community' (Rec. 49). It then formulated the crucial consideration:

In order to benefit in a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation No. 1612/68 [now Directive 2004/38], the national of a non-Member State, who is the spouse of a citizen of the Union, must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated. [Rec. 50]

The ECJ argued for this position on a free movement rationale. First, it stated that freedom of movement implies that if a European national moves to another member state, 'that move must not result in the loss of the opportunity lawfully to live together' [Rec. 52]. However, the ECJ found that when the third country spouse had no right to reside in a European country to begin with, the fact that the spouse will not have that right in another European country either does not constitute a barrier to the free movement of the European national. Using freedom of movement should not result in the loss of an opportunity, but the fact that it does not lead to the creation of a new right does not deter European nationals from exercising their rights (Recs 52–4).

The ECJ then turned to the issue of abuse. It first repeated the passages from *Levin* holding that the motives for seeking employment in another member state were of no account (Recs 55–6). But it then overturned *Levin* (where the ECJ found the motive of the couple, to acquire a residence right for the South African husband, of no account) by holding:

Conversely, there would be an abuse if the facilities afforded by Community law in favour of migrant workers and their spouses were invoked in the context of marriages of convenience entered into in order to circumvent the provisions relating to entry and residence of nationals of non-Member States. [Rec. 57]

It then pointed to Article 8 of the ECHR which protects 'genuine' marriages [Recs 58–60].

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The concept of marriage of convenience which the ECJ employs here is not entirely clear. In the normal usage of the term, it refers to marriages which are not contracted out of love, but in order to get one of the spouses a residence right. What does the ECJ mean to say here? Does it equate a marriage of convenience to marriages entered into in order to circumvent migration law? These may include marriages concluded out of love (but the lovers would not have married if the foreign partner could have acquired a residence right without marrying). Does it suggest that couples which move to another member state in order to get the foreign spouse a residence right are involved in marriages of convenience? This may also involve true love couples (as, apparently, in the *Levin* case).

In any case, the crux of the ECJ's argument in *Akrich* consists of holding that the case is about access to the EU, and invoking the freedom of movement is not **(p.202)** hindered if a European national does not have a right in the member state of destination which he or she also did not have in the member state of origin.

C. *Metock*: the text of the law

In 2008, the ECJ revisited the question whether a TCN who is the spouse of a European worker can rely on European law to create a residence right (as opposed to transporting an already existing residence right from one member state to another). The case concerned failed asylum seekers who were spouses of European nationals who had moved to Ireland and worked there. The central question was whether European law stands in the way of national legislation which requires previous lawful residence in another member state in the context of the case.[41]

The ECJ set out by stating that no provision of the relevant Directive 2004/38 'makes the application of the directive conditional on [family members] having previously resided in a Member State' (Rec. 49). It then pointed out that Article 3, which stipulates the beneficiaries of the Directive, does not distinguish according to whether or not family members have lawfully resided in another member state. It then referred to three other provisions in the Directive, which confer the right of entry and residence to TCN family members who accompany *or join* European citizens, 'without any reference to the place or conditions of residence they had before arriving in that member State' (Rec. 51). It also pointed to a provision providing that TCN family members have a visa, thus providing for entry into a member state of family members who do not possess a residence card in another member state (Rec. 52). And yet another provision, which lists exhaustively the documents which TCN family members may be required to present, does not mention documents demonstrating prior lawful residence in another member state (Rec. 53). Therefore, it concluded that the right to reside with a European national who works in another member state than his or her own applies to all TCNs, 'without distinguishing according to whether or not the national of a non-member country has already resided lawfully in another member State' (Rec. 54). This finding is in accordance with the ECJ's earlier case-law (Recs 55–7), except the *Akrich* judgment, the conclusion of which, however, 'must be reconsidered' (Rec. 58).

The ECJ then began a second line of argument, focusing on the division of competences

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between the member states and the Community. The contested issue here is whether there is European competence regarding the first admission of TCNs; member states have argued that this has remained a national competence, which they have not abandoned by adopting Directive 2004/38. The ECJ stated that it is common ground that the Community is competent to legislate on the free movement of European nationals. It then stated that it would interfere with the freedom of movement of Europeans if they would not be able to be accompanied or joined by family members (Recs 62–4, and, worded slightly differently, **(p.203)** Recs 67–8). The ECJ did not deal with the issue that it said the opposite in Recs 52–4 of *Akrich*. The ECJ rejected the interpretation that the member states have retained exclusive competence to regulate the first access of TCN family members of European nationals (Rec. 66). Then it mentioned that it would be paradoxical if member states were free to refuse entry and residence to the spouse of a European national while it would be obliged to admit that person on the basis of Directive 2003/86 (Family Reunification) (Rec. 69). Then followed some paragraphs reassuring member states that they can apply public policy, public security, or public health grounds in these cases, as well as combating abuse (Recs 74–5).

We can see that the Court uses two lines of argument. The first is literalism: the use of the word join, the reference to visa, the lack of reference to documents showing prior legal residence—this is a very black letter-law positivist way of applying legal provisions. But one can easily understand the ECJ's arguments on this point. The second line of argumentation relies on the argument that requiring a previous residence right would interfere with freedom of movement. Despite the ECJ's repetitions and its emphasis on this point, it is hard to follow its arguments. Because, indeed, as the ECJ itself argued in *Akrich*, if someone does not have a right in one member state, how can free movement possibly be affected by the fact that that same right will not be granted in another member state either? Why does the ECJ find it paradoxical to hold that a TCN should first be admitted to a European country on the basis of national laws (which are harmonized by, inter alia, Directive 2003/86), and can only after that invoke the right to accompany a spouse to another member state?

D. Emphasizing choice

In the two judgments, the ECJ plays with the object of scrutiny. In *Akrich*, the ECJ argued that what in fact is at stake is the right of access of a TCN to European territory, not free movement of European citizens. In *Metock*, the Court stated that free movement of Europeans can only materialize if Europeans have the right to be joined by TCN family members—and therefore the case is, essentially, about free movement.[42]

Also, the ECJ situates the issue in a different field of law. The *Akrich* Court found the issue one of immigration law (which is a field of harmonized, but nevertheless national law), while the *Metock* Court found the issue one of European law on free movement of citizens (of which the ECJ is the supreme supervisor and guardian).

In this case, it is easy to see the choice the Court made, because the Court itself followed one line of argument up until *Akrich*; then implicitly reversed its view in *Akrich*;

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subsequently wavered a bit (see *Eind*[43] and *Jia*[44]); and finally explicitly **(p.204)** rejected its *Akrich* position in *Metock*, thereby returning to the earlier *Levin*/*Surinder Singh* position. It is undeniable that there are two conceivable positions, both apparently good enough for an institution no less reverend than the ECJ to take. Relying on the same legal rules (but see the excursion below) the ECJ took two different views. Therefore, the difference between the two positions cannot be legal in nature, and must be related to the people taking the two positions.

i. Excursion

I make a small excursion here. When you work in the mode I am writing in at the moment (exposing choices by judges which cannot be based on legal necessity), you will resist the idea that, as a matter of fact, there were compelling legal reasons for the ECJ to change course. What would an argument holding that, in fact, there were compelling reasons for the ECJ's changes of opinion look like? It would go as follows. Before *Akrich*, the ECJ had never been asked directly whether European law could *create* a residence right for a TCN family member. Admittedly, the ECJ had suggested that this could be the case, in particular because *Levin* was precisely about such a case. But the idea that a TCN could acquire a residence right in a European country on the basis of European law had been implicit, and it was not clear that the ECJ was willing to accept such a rule were it confronted with a direct question. In Akrich, Advocate General Geelhoed submitted a brilliant and compelling opinion.[45] He argued that the case was at the juxtaposition of two areas of competence, namely immigration law (national sovereignty) and free movement (almost complete harmonization). Although from a free movement perspective it is evident that a spouse must be able to accompany a European citizen who moves to another member state, it is—Geelhoed argued—'less self-evident also to grant a right of residence under Community law to spouses from non-Member States who have not yet been so admitted or who, as in the case of Mr Akrich, are within the territory of the European Union without leave to remain' (Rec. 7). Notice that Geelhoed does not start out by denying the possibility of a residence right for *Akrich*, but by questioning it. But also notice that Geelhoed uses his crucial argument here: he refers to 'the territory of the European Union', thus framing the issue as whether European law creates a residence right in Europe without a prior residence right based on national law. Although Geelhoed will take several pages to get to it, the answer is already clear: such a right is nowhere to be found in European law. Geelhoed rephrases the question several times, culminating in:

Thus I come to the dilemma to which the Court must find a solution. Must the Court's extensive case-law, as expressed, *inter alia*, in the *Singh* judgment, entail the consequence that national immigration legislation must always remain inapplicable where spouses from outside the European Union who are married to Community nationals, were not, at the time when they were entitled to derive rights from Community law, legally within the territory of the European Union? That dilemma is all the more pressing since in regard to **(p.205)** freedom of movement for persons EC law does not verify the nature and duration of the marriage whilst that test is of considerable significance under national immigration law in order to prevent marriages of convenience. [para. 10]

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After this introduction, it is clear where Geelhoed is headed. Relying both on competence (immigration is a national, not a European competence) and on the purpose of free movement (no obstacles, but no need for rewards in the form of creating a new immigration right) he argues for the conclusion which was adopted by the ECJ. So, the argument supporting *Akrich* as a non-political judgment would go, Geelhoed's analysis convinced the Court of not going where its case-law until then possibly was headed, but where it had not yet arrived. One can defend *Akrich* by admitting that it was a change of tone, of attitude, possibly a rejection of implications of earlier case-law—but not a change in something the ECJ had already decided explicitly. And, both from the point of view of competence as well as from the point of view of free movement, Geelhoed's reasoning was superior to the alternative—so the argument goes.

Now that we have gotten rid of the idea that *Akrich* constituted a choice of the ECJ to change direction (motivated by politics, ethics, or whatever one wants to call it—but not by compelling legal arguments), we also have to get rid of the explicit change of direction in *Metock*. *Metock* is a Grand Chamber judgment, unlikely to be an incident. It may be noticed that only one judge sitting in *Metock* was also a member of the *Akrich* chamber (the Dutch judge, Timmermans). But that does not imply that *Metock* did not constitute a change. An argument that *Metock* did not constitute a change would go something like this. Earlier case-law of the Court concerned Regulation 1612/68.[46] *Akrich*, to the contrary, concerned a new piece of European legislation, entailing a recodification of the free movement of persons—Directive 2004/38. This recodification did involve changes. First, the legal instrument was not a Regulation any more (ie not European legislation that by its very nature has direct effect in member states), but a Directive (ie European legislation creating an obligation for member states to adopt national legislation in accordance with the Directive). Secondly, the applicable rules were not, strictly speaking, identical. None of the provisions of Directive 2004/38 the ECJ referred to were identical to provisions in Regulation 1612/68, even where there were roughly equivalent provisions (like Article 3(2) of Directive 2004/38 and Article 1 of Directive 1612/68; Article 2(2) of Directive 2004/38 and Article 10(1) of Directive 1612/68). As a consequence, the ECJ was not bound by case-law concerning Regulation 1612/68.

Are these arguments convincing? The first one (*Akrich* was not a change of direction) was made by Geelhoed in such a delightful way that I find it hard to resist. Given the outcome he prefers, he faces a difficult position because the Court's case-law seems against him. However, the facts of the case are good for Geelhoed's position—Akrich is a criminal. He succeeds in accepting all the Court's case-law, but shows that the ECJ has never given a ruling on this particular issue. This **(p.206)** creates an opening where he can deploy his heavy statist artillery: Europe should not take away competence from member states without their consent and free movement should not be allowed to become a ploy for illegal immigration. All these arguments are fine, but Geelhoed had to ignore a crucial thing. In *Levin*, three decades earlier, the ECJ had been faced with the same issue. Sure, the questions were worded differently, but it was clear that the national court in that case wanted to know whether free movement could be used in order to get a TCN a residence right which he did not have before. The ECJ gave a clear answer, which was

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reversed in *Akrich*. So regarding *Akrich*, I admire the argument that the ECJ did not change course, but I am unconvinced.[47]

The argument holding that *Metock* does not represent a change of direction, but merely reflects new legislation is unconvincing for more than one reason. Most importantly the Court does not say that *Akrich* is not in line with the new Directive, but it says that *Akrich* 'must be reconsidered'. Apparently, the ECJ itself thought it was changing course. Secondly, the ECJ abundantly referred to case-law about the old Regulation in order to justify its conclusion. This underscores the third point, namely that the new wording of the Directive does not reflect substantively new positions, but merely reflects the desire to combine different pieces of secondary legislation into one comprehensive legal instrument, and to incorporate the ECJ's case-law about the Regulation in explicit legislation. So it seems clear that the *Metock* Court was of the opinion that the law had not changed in substance, and that it wanted to change its position about the law.

One might use another argument for defending *Metock* as legally necessary. It requires outsmarting the ECJ, which did not use this argument itself. The Directive was intended, among others, to codify case-law. *Akrich* was given on 23 September 2003. The Directive was adopted on 29 April 2004. Because *Akrich* was not incorporated in any way in the text of the Directive, the ECJ had to do something with the fact that the European legislator did not do so. This argument would be convincing if the Court indeed had given its judgments about the Directive as if its case-law about the Regulation were irrelevant. As I noted above, it did not do this. If it had presented this argument as decisive for the outcome of *Metock*, it would have lost its standing case-law as a source of legitimacy in any situation where new legislation has been adopted. Clearly, that is not where the ECJ is going.

To summarize, *Metock* clearly represents a change of direction of the ECJ; in that judgment, the ECJ in so many words abandoned the *Akrich* position. Was *Akrich* a change? Geelhoed did an admirable job in creating space for a judgment reflecting his views by arguing that the ECJ had not yet ruled on the creation of a residence right for a TCN family member by European law. But the fact that it **(p.207)** needed such an admirable job in the end merely underscores that the outcome actually was at odds with earlier case-law.

ii. End of excursion

The point I want to make is that, even if a court has not changed position, it is possible to construct an alternative legal argument which is just as good as standing case-law. This may require a bit of work (as Geelhoed did in his opinion, or as the Court in *Metock* had to undertake), but it is always possible. If one has constructed a rivalling position, a court can be challenged for not taking that option. The argumentative move I try to illustrate here consists of four steps: (1) the court has position A; (2) but position B is just as convincing from a legal point of view; (3) the difference between A and B therefore is not legal in nature, but political, moral, ethical, etc; (4) so let us discuss politics, morality, ethics, etc.

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This argumentative move can make sense if it seems impossible to win a case by more mainstream, less confrontational tactics. In this instance, the different constructions affected the support both positions could get. The left libertarians are against requiring prior legal residence in both constructions, and the right statists are for it in both constructions. If the issue is constructed as being about immigration, the leftist statists will be for requiring prior legal residence, because admission of a TCN will mean an extra person potentially burdening the redistributive system. The right libertarians will hesitate. Their global labour market perspective will make them inclined not to require prior legal residence, but they will be hesitant because from an immigration perspective the behaviour of the TCN looks too much like abuse. The right libertarians attach too much importance to respectability to openly side with possible abusers. Once the issue is reconstructed as being about free movement, the hesitations of the right libertarians vanish. Free movement is exactly what they are for, and proudly so; they will not want prior legal residence to be required. The hesitation is passed on to the left statists. Instead of arguing for a requirement of prior legal residence, they will hesitate. The free movement of workers (and of others who are economically active or self-supporting) is not problematic for them because sufficient guarantees against undermining redistributive policies were built into the free movement system. Because they are entitled to equal labour standards, they are not a source of unfair competition and do not undermine the system of redistribution, but merely expand it. But instead of openly not requiring prior legal residence, they will hesitate because they are beginning to be insecure about those guarantees. Their hesitation is not caused by third country national family members, but by workers from the member states admitted since 2004. Is there not replacement of the local workforce by Eastern Europeans?[48] Is their influx not enlarging the pool of potential workers, with downward pressure on labour standards as a result?

Table 7.3 Immigration perspective

	Left	Right
Libertarian	Prior legal residence not required	Hesitation
Statist	Prior legal residence required	Prior legal residence required

Table 7.4 Free movement perspective

	Left	Right
Libertarian	Prior legal residence not required	Prior legal residence not required
Statist	Hesitation	Prior legal residence required

(p.208)

In this context, European law has two competing perspectives at the disposal of anyone who wants to make an argument. The cases discussed here can be brought under both, because they are related both to immigration and free movement. The different perspectives bring along different applicable rules, and they have a different appeal for

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two of the four ideal typical positions on migration.

3. Exposing Background Rules: Expulsion of HIV-Positive People

The last argumentative move I want to discuss is exposing the background rules of legal argumentation. These background rules are usually taken for granted, but they are very important to the outcome of legal argument. Background rules are the legal version of 'normality'—the things that go without saying, and mostly are not noticed. People will only expose the background rules if they think they cannot make a successful argument in the existing context, and therefore have to question that existing context. The example I will use is, in fact, a bad one, because the background that I will expose and question is not a rule, but a situation. The situation is that of the possibilities for HIV/AIDS treatment in Africa which, in the case I will discuss, is considered as given, while it can be argued that it is related to the outcome of that case.

A. *St Kitts*: the compassionate court

In its famous *St Kitts* judgment,[49] the European Court of Human Rights ruled that the removal of a man (D) dying of AIDS to the Caribbean island of St Kitts, where AIDS treatment was not available and where most likely nobody would take care **(p.209)** of him, would constitute a violation of the right not to be subjected to inhuman treatment (Article 3 of the ECHR). What was so remarkable about the judgment was that if the man had lived on St Kitts, no human rights violation would have taken place. Therefore, the *St Kitts* judgment was not yet another application of the line of case-law developed by the ECtHR since *Soering*,[50] according to which a person cannot be expelled or removed to a country where that person faces a real risk of being subjected to inhuman treatment. If D was removed to St Kitts, his treatment on St Kitts would not constitute inhuman treatment. The behaviour of poor countries towards ill people whose medical care they cannot afford does not constitute inhuman treatment. Then how could the ECtHR conclude that D's removal was contrary to Article 3?

The ECtHR notes that, until then, it has found the removal of aliens contrary to Article 3 where the risk of inhuman treatment 'emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-state bodies in that country where the authorities there are unable to afford him appropriate protection' (para. 49). The ECtHR implies that in these situations, the public authorities in the country of origin are directly (by meting out the inhuman treatment) or indirectly (by failure of protection) responsible for the situation of the individual concerned. It contrasts this to 'other contexts' in which the public authorities of the country of origin do not infringe the standards of Article 3 (para. 49), and where 'it cannot be said that the conditions confronting him in the receiving country are themselves a breach of the standards of Article 3' (para. 53). But, 'given the fundamental importance of Article 3 in the Convention system, the ECtHR must reserve for itself sufficient flexibility to address the application of that Article in other contexts which might arise' (para. 49). To limit the application of Article 3 to contexts in which there is direct or indirect responsibility of the receiving state 'would be to undermine the absolute character of its [i.e. Article 3] protection'.

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What the Court then focused on, was whether D's removal would be contrary to Article 3 in view of his present medical situation (para. 50). D's (limited) quality of life results from the sophisticated treatment, medication, care, and counselling he was at that moment receiving in the UK (para. 51). The abrupt withdrawal of the facilities would 'entail the most dramatic consequences for him', being a reduction of his already limited life expectancy (which was discussed in terms of months), and acute mental and physical suffering (para. 52). The Court emphasized that the UK had assumed responsibility for treating D's condition since 1994, and that he had become reliant on the care given to him. The Court's conclusion was that 'his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment'. [para. 53]

The ECtHR hastened to add that aliens who have served their prison sentence cannot in principle claim continuation of medical, social, or other forms of assistance, and that this case concerned 'very exceptional circumstances' and 'compelling humanitarian considerations' (para. 54). **(p.210)**

The ECtHR's reasoning becomes more obvious if we ignore the immigration context. If D were a legal resident of the UK, it would be a violation of Article 3 of the ECHR if he were denied medical treatment, or if medical treatment were terminated, if he clearly needed medical treatment and if the decision to exclude him from medical treatment was not taken on medical grounds.[51] This would violate Article 3, because it amounts to the infliction of suffering. In the *St Kitts* judgment, the ECtHR held that, because of the special circumstances of the case, the right to continuation of medical treatment 'trumps' the right of the UK to expel an alien who has no right of residence.

B. *Bensaid*: the torn court

In *Bensaid v. UK*,[52] the ECtHR had to decide about the removal of an Algerian national who had been in the UK since 1989, and who had been treated with medication for schizophrenia since 1994–5. Deterioration in his illness could involve relapses into hallucinations and psychotic delusions involving self-harm and harm to others, as well as restrictions in social functioning. The Court considered that the suffering associated with such a relapse could, in principle, fall within the scope of Article 3 of the ECHR (para. 37). The circumstances of the case made it less likely that he would receive adequate treatment in Algeria (the ECtHR spoke of circumstances which are 'less favourable', (para. 38)). The circumstances mentioned by the Court are the following:

- – The village where Bensaid's family lived was 75–80 km from the nearest hospital where treatment could be provided (para. 36);
- – In that part of Algeria, at that time there was violence and active terrorism (para. 37);
- – If he was an outpatient, the drug he was receiving was not free, but was 'potentially available on payment', as was other medication 'used in the management of mental illness' (para. 36);

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- – Bensaid's family did not have a car, and as devout Muslims they 'would urge him to rely on faith rather than medicine' (paras 30 and 39).

Bensaid, in short, argued that it was likely that he would not be treated. The ECtHR did not deny this, but essentially found the causal link between deportation and a relapse insufficient. To this end, it considered that there was a risk of relapse even if Bensaid remained in the UK and was given treatment (para. 38), **(p.211)** while Bensaid not receiving sufficient care and treatment in Algeria was 'to a large extent speculative'. Apparently, the fact that removal from the UK to Algeria made it rather more likely that a relapse would occur was not a sufficiently direct effect of the removal.

However, no less than three out of the seven judges, including President Costa, in a separate opinion appealed to the UK authorities:

Nevertheless, on the evidence before the Court, there exist powerful and compelling humanitarian reasons in the present case which would justify and merit reconsideration by the national authorities of the decision to remove the applicant to Algeria.

We see the Court distinguishing this case from *St Kitts*. The relationship between removal and suffering is less direct than in the *St Kitts* context, therefore—according to a unanimous ECtHR—removal to Algeria was not a violation of Article 3 of the ECHR. But we can see the hesitation of the ECtHR in the concurring opinion. Until the passage quoted above, the concurring opinion merely explains why the judgment is correct. The quoted passage is superfluous from a legal point, and even dubious. The ECtHR has competence to decide whether an expulsion would violate Article 3; that is what the complaint is about. The Court has no competence to adjudicate on 'compelling humanitarian reasons'. What the opinion states here is superfluous, does not fall within the ECtHR's competence, and therefore does not bind the UK or anybody else. Then why do three of the seven judges involved take the effort of writing a concurring opinion, the only use of which is this passage? It seems likely that these judges fear that the ECtHR will seem harsh, and they want to signal to the reader that, although the law is harsh, they are not harsh persons. They feel torn between morality and law.

C. *N v. UK*: the split court

In 2008, the Court referred a case to the Grand Chamber in order to restate its position on the removal of HIV-positive aliens.[53] The facts of the case resemble those of *St Kitts*, as it also concerns an HIV-positive person who claims that ending her medical treatment by removal will lead to intense suffering. N had entered the UK in 1998 under an assumed name, and was admitted to a UK hospital shortly after, being seriously ill with AIDS-related illnesses (para. 9). She had been treated in the UK. It was accepted that without medical treatment her condition would 'deteriorate rapidly and she would suffer illness, discomfort, pain and death within a year or two' (paras 23 and 47). If treatment were continued, she would be in good health for decades (para. 17). In Uganda, the country of origin of N, antiretroviral medication is available, 'although through lack of resources it is received by only half of those in need' (para. 48). N claimed that she would

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not be able to afford the treatment; that it would not be available to her in the rural area from which she came; and that her relatives would not be willing to care for her (para. 48). Five of her six siblings had died of AIDS (para. 27). **(p.212)**

The majority of the ECtHR followed the same logic as in *Bensaid*, and found that the removal of N to Uganda would not be contrary to Article 3, because 'the rapidity of the deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment, support, and care, including help from relatives must involve a certain degree of speculation, particularly in view of the constantly evolving situation as regards the treatment of HIV and AIDS worldwide' (para. 50). Because of the fierce dissenting opinion of three judges, the judgment is more explicit on some points than *Bensaid*.

Put bluntly, the problem which the ECtHR faced was this. If it accepted that there was a 50 per cent chance that N would not get treatment in Uganda, and applied the normal criteria, N would win her case in Strasbourg. Without a doubt, a 50 per cent chance that someone will be subjected to inhuman treatment after removal will lead to a successful application. The ECtHR could only stop short of that conclusion by holding, as it did in both *St Kitts* and *Bensaid*, that this is not a normal case concerning Article 3 and removal. It repeats the passages from the earlier judgments where, after referring to case-law concerning removal and Article 3, there may be 'other contexts' where Article 3 may stand in the way of removal. In the normal cases, the harm emanates from intentionally inflicted acts or omissions of public authorities or non-state bodies; but here, it emanates from 'naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country'. That is why the high threshold set in *St Kitts* must be maintained (para. 43). A second characteristic of this kind of case which distinguishes it from other cases, according to the ECtHR, is that this case concerned social and economic issues, while the Convention 'is essentially directed at the protection of civil and political rights' (para. 44). Thirdly, the Court stated, a fair balance must be found between the demands of the general interest of the community and the fundamental rights of individuals. Advances in medical science, together with social and economic differences between countries, entail that the level of medical care varies considerably. 'Article 3 does not place an obligation on the Contracting State to alleviate such differences through the provision of free and unlimited health care to aliens without a right to stay in its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States' (para. 44).

The dissenting opinion is unusual in tone. On a technical point which is not relevant in this context, it states that the majority could 'neither legally nor morally' take a certain position (para. 26). On all three points in the majority opinion identified above, the dissenters disagree. First, they disagree that a high threshold should be set. They point to case-law of the ECtHR indicating that inhuman treatment may include the suffering which is the result of illness. It is unclear to them why the usual criterion (is there a real risk that the applicant will be exposed to inhuman treatment?) should not apply (para. 5). Secondly, on the issue of socioeconomic rights, the dissenters accuse the majority of

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giving an ‘incomplete and thus misleading quotation’ from the judgment dealing with the implications of the ECHR for social and economic rights. In addition, the minority points out that, on this point, the majority’s position is circular or, as they put it, the *N* case *is* about a civil right, namely the one guaranteed by Article 3 (para. 6). Thirdly, **(p.213)** the dissenters point out that just a few months earlier, in the Grand Chamber judgment in the *Saadi v. Italy* case, the Court had ruled that the protection of Article 3 is absolute and does not allow for balancing. It is inconsistent with this principled judgment, which confirmed earlier case-law, to explicitly apply a balancing test in this context (paras 7–8). Just to be sure, the dissent adds that the balancing test is applied wrongly as well, because the idea that Europe would be flooded if the Court would decide in N’s favour is misconceived (para. 8).

We can see that the minority of the ECtHR, which argues for the radical position, does so by being legalistic. It insists that the criterion for the application of Article 3 is the usual real risk threshold (as opposed to the high threshold preferred by the majority). It argues that the possibility of socio-economic consequences of decisions about fundamental rights according to standard case-law are not a decisive factor against such decisions. It insists that in the context of Article 3, according to recently reconfirmed case-law, no balancing is to take place. The dissenting opinion rejects a context-specific approach and insists on application of the law. The majority, to the contrary, is context sensitive. It notes that the source of the harm which N faced was different from the source in usual Article 3 cases. It takes into account the socio-economic consequences of its ruling and rejects blind application of a formal rule, preferring one which takes into account the consequences.

D. Exposing the background

What if the Court had accepted N’s claim, and had decided with the dissenters? Would it be reasonable to expect (as the dissenters say the majority suggests) Europe would become the sick-bay of the world, that the floodgates would be opened? The dissenters argue (a) that this is irrelevant, because balancing is not possible in the application of Article 3 of the ECHR. But it also argues that (b) this argument is ‘totally misconceived’. However, to support this, they only refer to the number of applications to the ECtHR in HIV cases like that of N. That argument does not seem convincing, because the number of applications may be so low precisely because the ECtHR had not (and did not) ‘open the floodgates’.

There may be reasons to go along with the minority on this point. After its *Salah Sheekh* judgment,[54] in which the ECtHR prohibited the removal of Somalians belonging to minority clans in Southern Somalia, there may have been an increase in applications, but even accepting that there was a causal relation between the Court’s judgment and the increase (which has not been established), there was no flood. That does not confirm the idea that a judgment favourable to a group of migrants leads to a steep increase in migration.

But for a moment, let us accept the presumption that a decision in N’s favour would lead

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to a steep increase in the migration of HIV-positive persons from, in particular, Africa to Europe. That may not be an unreasonable idea, because the life expectancy of the 50 per cent of HIV-positive Africans who do not have access to treatment would increase dramatically in this scenario. How would **(p.214)** European countries respond? Of course, they would try to stop the flood by more restrictive migration policies. But we know by now that, even when we accept that such policies might have some effect, their influence would not be decisive. So there would be something like a flood. My guess, however, is that Europe would also respond by massive funding of HIV/AIDS programmes in African countries. Such an effort would not be entirely unrealistic. Universal access to HIV/AIDS prevention, treatment, and care would require 15 billion euros annually.[55] It could increase the life expectancy of HIV-positive people in Africa dramatically, and would do away with the central issue in *N.* And it would not be unaffordable, the more because substantial amounts of the investments would return to Europe, mainly through European pharmaceutical companies.

The issue at the core of the debate in *N* was: should Europe be prepared to provide 'free and unlimited health care to all aliens without a right to stay within its jurisdiction', regardless of how many might try to reach Europe if such a right is granted? It is very hard to answer that question affirmatively. In an immigration context, the ECtHR always begins by setting out that 'Contracting State[s] have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens'.[56] So, contrary to what is usual in human rights doctrine, it is not the individual right that is put first (which states may legitimately infringe under particular circumstances), but the sovereign right of states (which individuals may infringe under particular circumstances). The ECtHR's majority is aware that, despite this tilt to the state's benefit, application of the normal criteria from the Court's own case-law will lead to granting N a right to remain in the UK. The Court allows for balancing by introducing, for the second time, the immigration context into its reasoning.

Table 7.5 Admit people who are HIV+? Yes/No

	Left	Right
Libertarian	Yes	No, it's not the business of European states
Statist	No, too large a burden on the public health system	No, too large a burden on the public health system by people who are none of our business

However, if the issue is reframed as suggested above (ie the issue is not about whether or not to admit HIV-positive aliens, but about whether or not to fund universal access to HIV/AIDS prevention), the positions could change. The dissenters could have pointed out that they addressed the immigration context by accepting the primacy of the right of states to regulate immigration. Applying the **(p.215)** ECtHR's own criteria to this case would have led to acceptance of N's claim, but not to unlimited immigration because European states can eliminate the crucial circumstance which was the ground for allowing

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N's claim: the poor state of HIV/AIDS medical care in Africa. The dissenters could have gained more support in this way.

Table 7.6 Invest in HIV/AIDS medical care in Africa? Yes/No

	Left	Right
Libertarian	Yes	No, it's not the business of European states
Statist	Yes, redistribution is OK if the financial burden can be managed	Possibly yes, provided that it can be established that good HIV care in Africa is in the interest of European countries

In the reframed setting, the minority position is not bound to be successful, but it has a better chance than in the setting as defined by the ECtHR in *N* and it does not require attacking another background rule—the primacy of states' rights (which is surprising in a human rights setting). It merely requires pointing out that the poor state of HIV/AIDS medical care in Africa is not, as the majority suggests, necessarily a given (naturally occurring illness and lack of sufficient resources, para. 43). Changing this part of the perspective would have allowed an escape route from the majority's complicated tinkering with the recently reconfirmed absolute nature of the protection provided by Article 3 of the ECHR. The change of perspective is brought about by not taking the inequality between Africa and Europe as a given. Where the Court in *N* (both the majority and the dissenters) took the lack of HIV/AIDS treatment in Africa as a given, the alternative perspective suggested here considers that as something which may be changed.

E. From law and ideology to law as ideology

How can it be that the dissenters got stuck with the immigration perspective on the case? Why did they argue that the floodgate argument was (a) normatively irrelevant and (b) empirically flawed—especially when combined, this kind of argument is unconvincing (I didn't steal a cookie, *and* I was so hungry). One might think that either the dissenters did not try hard enough, or that they were not smart enough. Both ideas can be dismissed immediately. The dissenting opinion displays unusual engagement, and is very thoroughly argued.

Until now, I have tried to show how the application of law to individual situations cannot be done without at the same time applying substantive, non-legal ideas about fairness, justice, and morality. Lawyers who believe that law and such substantive ideas should be separate might say—and every now and then do say—such an application of non-legal ideas is ideology, not law. In this way, they dismiss a reasoning as not being legal, because purely legal argument has been **(p.216)** contaminated by substantive ('ideological') notions. My argument until now has been that law is always ideological in this sense, it is always linked to ideology; legal reasoning always has to rely on ideology.

But the ideas without which law cannot be applied are, in turn, influenced by law. So ideas influence the application of law, and the application of law influences ideas. The dissenting

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opinion in *N* is a good example of this. The right of states to control the entry, residence, and removals of aliens is simply posited by the ECtHR. There is no reference to a provision in the ECHR, or to any explicit rule of international law. It refers to its own case-law (which has indeed said this for decades), but for a non self-referential source it can only rely on 'well-established international law'. It is undoubtedly true that this is a well-established rule of international law. It is something like a political and legal axiom. This is well-established international law, because it evidently is so. The axiom holds, even in the face of contrary state practice. Asylum is an obvious example of a situation where states do not have this right. Theoretically, they still do have their full rights except for one option (removal to the country of origin), but in practice this implies the admission of considerable numbers of persons each year. Still, one might say, this is a tiny exception. But it is not the only one. In the European Union, states have, practically speaking, given up their right to control the entry, residence, and removal of citizens of other member states. European citizens have the right to enter and remain in the territory of every member state, and can be removed only in particular circumstances (Article 21 of the Treaty on the Functioning of the European Union; Directive 2004/38). But, one might say, this is a specific context, where states have mutually given up their migration control rights. A third case in which states act as if they do not have a sovereign right to control migration relies on Linda Bosniak's observation that states tend to give citizenship rights to both legal and illegal residents.[57] One may add that states also tend to regularize the residence status of undocumented aliens on account of their de facto citizenship.[58] In both contexts (grant of citizenship rights and regularization), states simultaneously emphasize the sovereign nature of their behaviour (ie it is grace, not entitlement), but the pressure to which they give in always partly relies on a notion of moral entitlement.

This is not meant to say that there can be no well-established rule of international law holding that states have the sovereign right to control the entry, residence, and removal of aliens. It is meant to say that it is not self-evident that this rule exists; its existence, and particularly its content, does not go without saying. Nevertheless, this rule is repeated like a mantra, its sources and its scope not subject to any serious debate. In *N*, we can see that it shapes our idea of how the world is. Even the dissenters in *N*, who were earnestly looking for arguments to prohibit the removal of N, found this sovereign right so obvious that they did not dispute its dominance even when it was introduced by the majority into its reasoning for the second **(p.217)** time. It would have been enough for the dissenters to say that state sovereignty in controlling migration is the rule, but that the rule is not relevant when we look at the potential consequences of prohibiting N's removal. Apparently, the minority presumed that disputing the relevance of state sovereignty in a particular part of the argument would make it look unrealistic: would look as if they were disputing state sovereignty itself.

In short, I suggest that the moral and political ideas of the dissenters were dominated by the legal notion of state sovereignty. In their arguments, they go along with the majority in seeing the case as being about migration—one of the crucial markers of state sovereignty—and because they allow the argument to be so narrow they were unable to get broader support for their position.

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4. Afterword: Scepticism and Activism

Critical lawyers—irrespective of whether they are conservative or progressive, leftists or rightists, libertarians or welfare state-minded—tend to 'use' law, ie to develop positivist arguments showing that the outcome which they prefer is right. This positivist style of argument requires a denial of the flexibility of legal argument. The core of positivist legal reasoning is that there can be only one correct answer. But this is hard to maintain. As lawyers, we know that legal issues can be dealt with in different ways, even if we strongly feel that one of these ways is the right one. Critical lawyers are doomed to be disappointed time and again by the fact that 'they' once again succeeded in winning cases, while 'we' were so right.

In this chapter, I have investigated some of the possibilities critical lawyers have in the field of immigration law: constructing consistency, exposing choice, and exposing background rules. This is not an exhaustive list of available tactics. It should be obvious that, in some situations, critical lawyers can get their way by insisting on 'applying the law'. In other words sometimes legal positivism, and insisting on the consistency and rightness of the law as it is, will be an obvious option and, certainly, there are other options. The effort in this chapter was to widen the scope of critical lawyers and to add to their arsenal. Instrumentalism is not the only available option.

To many, it seems scary to abandon instrumentalism and positivism. The fantasy which constitutes their main attraction is that, by acting as impersonators of the law, by pretending to be the people who come up with the right application of the law, we will share in the power of law. But this requires that we give up the other options, at least momentarily. When we formulate what follows from the law, we must act as if it is not us speaking, but the law. In that sense, we have to give up our subjectivity and act as functionaries of the law.[59] What I suggest in this article is that this is just one of the options we have, and if we use it now and then, **(p.218)** it does not require us to believe in its truth all the time. Sometimes, we can argue that law is consistent (if it comes out our way) but in other contexts, we can argue that law is inconsistent and should be made consistent; or that there are several right options, and argue for one; or that what seems the only possible outcome rests on a presumption which is debatable.

Notes:

(2) See, in this vein, eg M. Bossuyt, *Strasbourg et les demandeurs d'asile: des juges sur un terrain glissant* (2010).

(3) This is inspired to a great extent by D. Kennedy, *A Critique of Adjudication (Fin de Siècle)* (1997).

(4) This is loosely inspired by Marie-Bénedicte Dembour's four human rights schools, see M.-B. Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (2006).

(5) This is based on T. Spijkerboer, 'Subsidiarity and "Arguability": the European Court of Human Rights' Case Law on Judicial Review in Asylum Cases' 21 *International Journal of*

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Refugee Law (2009) 48, at 63–9.

(6) *Vilvarajah and ors v. UK*, ECHR (1991) Series A, No. 215, para. 108.

(7) *Saadi v. Italy*, ECHR (2008) Appl. No. 37201/06, para. 128.

(8) *Jabari v. Turkey*, ECHR RJ&D 2000-VIII, para. 50.

(9) *García Ruiz v. Spain*, ECHR (1999) RJ&D 1999-I, 28; compare with *Herbst v. Germany*, ECHR (2007) Appl. No. 20027/02, para. 83; *Tamminen v. Finland*, ECHR (2004) Appl. No. 40847/98, para. 38; *K-H. W. v. Germany*, ECHR (2001) Appl. No. 37201/97, para. 44; P. van Dijk and G. J. F. van Hoof, *Theory and Practice of the European Convention on Human Rights* (2006) 585, fn 512. In a number of Art. 6 cases the ECtHR attached importance to the fact that judges in the UK have particular knowledge of, and experience with, the jury system, see *G.C. v. UK*, ECHR (2001) Appl. No. 43373/98, para. 36, cited in *Snooks and Dowse v. UK*, ECHR (2002) Decision on Appl. No. 44305/98, equally an Art. 6 case; cited in *Betson and Cockram v. UK*, ECHR (2002) Decision on Appl. No. 12710/04.

(10) *Aktas v. Turkey*, ECHR (2003) RJ&D 2003-V; compare with *Ribitsch v. Austria*, ECHR (1995) Series A, No. 336; *Avsar v. Turkey*, ECHR (2001), Appl. No. 25657/94. Unusual, however, is the admissibility decision in the *Damla* case (*Damla and ors v. Germany*, ECHR (2000) Decision Appl. No. 61479/00). Here, the Court considered both that its examination in cases concerning Art. 3 must necessarily be a rigorous one, and that factual matters are primarily a matter for national courts (its general, distantial position developed in cases concerning Art. 6). Because the facts had already been evaluated carefully by national courts in three asylum procedures, and in the absence of indications of arbitrariness in this respect, the Court concluded that no substantial grounds had been shown for believing the applicants would face a real risk of treatment contrary to Art. 3 upon return to the country of origin. One explanation for this departure from its Art. 3 case-law may be that the Court erroneously used a standard text block from Art. 6 cases for an Art. 3 case. However, for this explanation it is puzzling that in *Damla*, the Court formulated a standard that seems even more restrictive (fact finding by national courts cannot be reviewed by the Court ‘unless there is an indication that the judges have drawn grossly unfair or arbitrary conclusions from the facts before them’) than the standard position in Art. 6 cases (the Court will not deal with errors of fact and law by national courts ‘unless and in so far as they may have infringed rights and freedoms protected by the Convention’, see n 9). Because of the eccentricity of the Court’s considerations when compared to the rest of its case-law, I hold the considerations from the *Damla* decision to be an error.

(11) *Cruz Varas and ors v. Sweden*, ECHR (1991) Series A, No. 201, para. 81.

(12) *Vilvarajah v. UK, supra* n 6, para. 114.

(13) *Vilvarajah v. UK, supra* n 6, para. 108; *Chahal v. UK*, ECHR (1996) RJ&D 1996-V,

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96; *D v. UK*, ECHR (1997) RJ&D 1997-III, 49; *T. I. v. UK*, ECHR (2000) RJ&D 2000-III, 'The Court's Assessment'; *Bensaid v. UK*, ECHR (2001) RJ&D 2001-I, 34. Compare the Court's case-law in French, 'Pour déterminer s'il y a des motifs sérieux et avérés de croire que l'intéressé court un risque réel de traitements incompatibles avec l'article 3 en cas d'extradition, la Cour adopte des critères rigoureux et s'appuie sur l'ensemble des éléments qu'on lui fournit ou, au besoin, qu'elle se procure d'office', *Chamaiev v. Georgia and Russia*, ECHR (2005) RJ&D 2005-III, 336.

(14) *R.C. v. Sweden*, ECHR (2010) Appl. No. 41827/07, para. 52.

(15) *Said v. The Netherlands*, ECHR (2005) RJ&D 2005-VI, 50.

(16) *Hilal v. UK*, ECHR (2001) RJ&D 2001-II.

(17) *N v. Finland*, ECHR (2005) Appl. No. 38885/02, 152.

(18) See Rules of Court, Art. A1.

(19) *N v. Finland, supra* n 17, paras 154–6. In a confusing consideration, the Court apparently sought to limit the gap between its own findings and those of the Finnish authorities. In para. 157 it stated: 'The Court would note in this connection that the Finnish authorities and courts, while finding the applicant's account generally not credible, do not appear to have excluded the possibility that he might have been working for the DSP. Moreover, the Finnish authorities and courts did not have an opportunity to hear K.K.'s testimony with regard to the applicant's background in the DRC. It cannot be said therefore that the position of the Court contradicts in any respect the findings of the Finnish courts.' This is surprising, because the Court's finding that N's statements are credible does contradict the Finnish outcomes. More specifically, in para. 154 the Court stated that the testimony of the other asylum seeker was available to the Finnish authorities when they considered N's application (para. 154), while it now holds that they did not have an opportunity to hear her testimony.

(20) *Nasimi v. Sweden*, ECHR (2004) Appl. No. 38865/02; compare with *A. J. v. Sweden*, ECHR (2008) Appl. No. 13508/07.

(21) *Salah Sheekh v. The Netherlands,* ECHR (2007), Appl. No. 1948/04, para. 136.

(22) *Ibid*.

(23) I am aware that domestic law in the UK has changed as a consequence of the 1998 Human Rights Act. However, the focus here is not the compatibility of UK domestic law with the ECtHR, but the case-law of the ECtHR. As a consequence, UK domestic law is only relevant in as far as, and in the way in which, it is perceived by the Court.

(24) *Vilvarajah v. UK, supra* n 6, para. 90.

(25) *Bensaid v. UK, supra* n 13, para. 28; *Hilal v. UK, supra* n 16, para. 37.

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(26) *Bensaid v. UK, supra* n 13, paras 55–6; *Hilal v. UK, supra* n 16, paras 77–8.

(27) S. Essakkili, 'Marginal Judicial Review in the Dutch Asylum Procedure', VU University Migration Law Papers, No. 2, 2005, at 46–51.

(28) This is the view of the Dutch *Afdeling Bestuursrechtspraak van de Raad van State* (Council of State Administrative Jurisdiction Division), 15 June 2006, JV 2006/290. For the details of the Dutch marginal judicial scrutiny see Essakkili, *ibid*., at 13–41.

(29) *Hilal v. UK, supra* n 16, para. 74.

(30) This interpretation also fits with an aspect of the *Chahal* judgment, where the ECtHR found that a remedy in which the central question is actually an incorrect one constitutes a violation of Art. 13; *Chahal v. UK, supra* n 13, para. 153.

(31) *Mir Isfahani v. The Netherlands*, ECHR (2008) Appl. No. 31252/03 (struck out of the list).

(32) *A and others v. UK*, ECHR (2009) Appl. No. 3455/05.

(33) Case 53/81, *D.M. Levin v. Staatssecretaris van Justitie*, [1982] ECR 1035.

(34) The particulars of this case are based on the case comment of Kees Groenendijk on the *Levin* judgment in T. P. Spijkerboer (ed.), *Rechtspraak Vreemdelingenrecht in 100 uitspraken* (2001), at 592.

(35) *Levin, supra* n 33, Rec. 17.

(36) Case 292/89, *R. v. Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen*, [1991] ECR 1-00745.

(37) Case 370/90, *Surinder Singh*, [1992] ECR I-4265.

(38) For a long time, European law emphatically encouraged persons (women in particular) to join the labour market. M. Kraamwinkel, 'The Imagined European Community: Are Housewives European Citizens?' in J. Conaghan, R. M. Fischl, and K. Klare (eds), *Labour Law in an Era of Globalization, Transformative Practices and Possibilities* (2002), at 321. Although explicit requirements on this point are less prevalent now, the economic rationale of European law still strongly suggests that 'the European citizen works'.

(39) See, for a different perspective on *Akrich*, P. Boeles *et al*., *European Migration Law* (2009), at 76–82.

(40) Case 109/01, *Akrich v. Secretary of State of the Home Department*, [2003] ECR 1-9607.

(41) Case 127/08, *Blaise Baheten Metock and ors v. Minister for Justice, Equality and*

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Law Reform, [2008] ECR I-6241.

(42) In Duncan Kennedy's terms, this issue is one of nesting, ie of locating the issue at hand in a broader and familiar legal dispute. See Kennedy, *supra* n 3, at 219.

(43) Case 291/05, *Minister voor Vreemdelingenzaken en Integratie v. R. N. G. Eind,* [2007] ECR I-10719.

(44) Case 1/05, *Yunying Jia v. Migrationsverket*, [2007] ECR I-00001.

(45) Advocate General Geelhoed in *Akrich v. SSHD, supra* n 40.

(46) Council Regulation 1612/68, [1968] OJ L257/2.

(47) See D. Martin, 'Comments on *Förster* (Case C-158/07 of 18 November 2008), *Metock* (Case C-127/08 of 25 July 2008) and *Huber* (Case C-524/06 of 16 December 2008)' 11 *European Journal of Migration and Law* (2009) 95; A. P. Van der Mei, 'Comments on *Akrich* (Case C-109/01 of 23 September 2003) and *Collins* (Case C-138/02 of 23 March 2004)' 6 *European Journal of Migration and Law* (2004) 277; E. Fahey, 'Going Back to Basics: Re-Embracing the Fundamental of the Free Movement of Persons in *Metock*' 36 *Legal Issues of Economic Integration* (2009) 83; C. Costello, '*Metock*: Free Movement and Normal Family Life in the Union' 46 *CMLR* (2009) 587.

(48) These concerns might be increased by Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779 and Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet*, [2007] ECR I-11767.

(49) *D v. UK*, ECHR (1997) RJ&D 1997-III, para. 37.

(50) *Soering v. UK,* ECHR (1989) Series A, No. 11.

(51) Denial of medical treatment in a non-migration-related setting is usually dealt with under Art. 2 ECHR. The ECtHR has held on several occasions that 'an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally' (*Cyprus v. Turkey*, ECHR (2001) RJ&D 2001-IV, 219; *Nitecki v. Poland*, ECHR (2002) Appl. No. 65653/01; *Pentiacova and ors v. Moldova*, ECHR (2005) RJ&D 2005-I; *Makuc and ors v. Slovenia*, ECHR (2007) Appl. No. 26828/06).

(52) *Bensaid v. UK, supra* n 13.

(53) *N v. UK*, ECHR (2008) Appl. No. 26565/05.

(54) *Salah Sheekh v. The Netherlands, supra* n 21.

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(55) B. Schwartländer *et al*., 'Towards an Improved Investment Approach for an Effective Response towards HIV/AIDS' 377 *The Lancet* (2011) 2031.

(56) *D v. UK, supra* n 49, para. 46; *Bensaid v. UK, supra* n 13, para. 32; *N v. UK, supra* n 53, para. 30.

(57) L. Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (2008).

(58) For an overview of European practice in the 1990s, see P. De Bruycker (ed.), *Regularisations of Illegal Immigrants in the European Union* (2000).

(59) I take this way of putting it from the—entirely different—context of Adorno's work on music, eg his 'On Jazz', in T. W. Adorno: *Essays on Music* (2002) 470.

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