ARTICLES

The Limits of Static Interests: Appreciating Asylum Seekers’ Contributions to a Country’s Economy in Article 8 ECHR Adjudication on Expulsion

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ABSTRACT

This article critiques the European Court of Human Rights’ approach towards assessing asylum seekers’ right to respect for private and family life under article 8 of the European Convention on Human Rights in the context of their expulsion. In balancing the right of the individual against the public interest, it is argued that the court’s case law follows a static perspective. The rigidly defined assumption that the public interest lies in enforcing migration control and that the societal contributions of asylum seekers cannot influence the strength of the public interest is prevalent in jurisprudence yet underexplored in scholarship. The article uses the case of asylum seekers who contribute to a country’s economy to demonstrate that the court currently fails to appreciate the interdependence between these interests. It then suggests a path by which the court’s approach might be adjusted towards more nuance, ultimately allowing the contributions of asylum seekers to European communities to be appropriately reflected in legal determinations.

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I. INTRODUCTION

Navid, an asylum seeker\(^1\) from Afghanistan, moves, while still a minor, to a European country, where he initially settles in a small rural community. He quickly establishes social ties with locals and improves his language skills. As asylum seekers are provided with access to training for skilled workers, Navid begins an apprenticeship at a local company to become a mechatronics technician, a profession for which there is a significant shortage in the region. The company, which had been searching for a suitable candidate for several months, now invests considerable resources in improving Navid’s skills. His asylum application, however, is rejected. The owners of the company, representatives of the regional economic chamber, and government officials fear that deporting Navid – and the many other young people in similar situations – will lead to tangible economic damage. To convince the authorities that he should be allowed to stay, they commission a study to demonstrate the economic damage that would result from deporting individuals like Navid.

Navid’s case, which is based on real circumstances,\(^2\) exemplifies the possible interdependence between the economic interests of the public and the rights of individual asylum seekers. This article argues that the European Court of Human Rights’ (ECtHR) interpretation of article 8 of the European Convention on Human Rights (ECHR)\(^3\) in the context of the expulsion\(^4\) of asylum seekers – including those whose applications for asylum have been rejected – on the basis that this interpretation fails to capture such dynamics. It demonstrates how the court follows a static conception of interests that veils or obscures the contributions made by asylum seekers to European communities, based on an overemphasis on the prerogative of migration control. The article then offers a constructive path for adjusting the court’s approach.

The article begins by contextualizing and defining a ‘static’ conception of interests. It then demonstrates that the court’s article 8 case law in the context of the expulsion of asylum seekers is fundamentally prone to this flawed approach. Arguing for the necessity of revised ECtHR jurisprudence, the article engages with how the diverging domestic systems of selected European countries appreciate the public’s economic

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\(^1\) In this article, the term ‘asylum seeker’ is used to denote any individual present in a country who has made a claim for asylum but has not yet received residence rights. Thus, both asylum seekers whose applications are still being processed, as well as those whose claims have been rejected, fall under this term. Individuals who have been granted international protection status are not included.

\(^2\) This case is largely drawn from the circumstances presented to the Austrian Federal Administrative Court (Bundesverwaltungsgericht) in W271 2174029-1, 4 October 2018.

\(^3\) European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 5 ETS 1 (European Convention on Human Rights) (ECHR).

\(^4\) The term ‘expulsion’ in this article is used broadly to denote all State (in)action directed against the prolonged residence of individuals in the territory of the Contracting State, including removal or deportation. It should be noted, however, that the current case law of the court, as analysed below, does not usually consider removal as an interference with the rights of asylum seekers under art 8 ECHR. Instead, it processes cases under the rubric of positive obligations and thus (only) assesses whether an obligation of States to grant residence rights follows from art 8.
interest in granting residence rights to asylum seekers. It then identifies promising
traces, particularly in the court’s case law on settled migrants, that could lay the ground-
work for an adjusted approach. On this basis, the article concludes with a reflection on
the strategic value of different corrective paths, ultimately suggesting the application of
a higher (intermediate) standard of proof for justifying State (in)action.

The article’s approach is reconstructive.5 The core of the text – the critique and the
concrete suggestions for improvement – is rooted in the practice of the court itself. The
necessity for adjusting the ECtHR’s approach is highlighted through a reflection on
domestic responses. In assessing the strategic strengths of corrective paths, the article
draws on doctrinal literature relating to the court’s adjudication.

2. A STATIC CONCEPTION OF INTERESTS

The fundamental freedoms enshrined in the ECHR are affirmed by its preamble as ‘the
foundation of justice and peace in the world’, and ‘best maintained … by … observance
of the Human Rights upon which they depend’. This principled statement formulates
human rights as State interests. However, the drafters did not intend to extend the guar-
antees of the ECHR to those who seek asylum.6 The criticism of some – referring to the
hundreds of thousands of European post-war displaced persons – that the Consultative
Assembly would discuss ‘merely in the abstract, the protection of human rights, while
giving no more than a passing glance at the misery spread before our eyes’ did not in-
fluence the further debates on the text.7 Indeed, it was this fundamental concern re-
garding the exclusion of refugees from the framework of rights in a State-based order,
their status as ‘anomalies in international law’, that the 1951 Refugee Convention8 had
aimed to address.9

Almost seven decades later, and after significant legal developments, the tension be-
tween the rights of refugees and asylum seekers and the declared interests of receiving

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5 According to Möller, a reconstructive approach ‘is sensitive to both moral value and the prac-
tice it seeks to reconstruct’. See Kai Möller, The Global Model of Constitutional Rights (Oxford
University Press 2012) 20.

6 For example, during the drafting of the ECHR, an explicit reference to excluding foreigners’
rights surfaced. See Marie-Bénédicte Dembour, When Humans Become Migrants: Study of the
European Court of Human Rights with an Inter-American Counterpoint (Oxford University Press
2015) 57–59. In particular, the ECHR project left unaddressed issues of statelessness, asylum,
and freedom of movement. See Hersch Lauterpacht, An International Bill of the Rights of Man
(Oxford University Press 2013). See also Daniel Thym, ‘Residence as De Facto Citizenship?
Protection of Long-Term Residence under Article 8 ECHR in Ruth Rubio-Marín (ed), Human
Rights and Immigration (Oxford University Press 2014) 15.

7 Dembour (n 6) 57.

8 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April
1954) 189 UNTS 137 (Refugee Convention).

9 See eg UN Ad Hoc Committee on Refugees and Stateless Persons, ‘A Study of Statelessness’
(Lake Success, New York, August 1949) UN doc E/1112; E/1112/Add.1. See also Adel-Naim
Reyhani, ‘Anomaly upon Anomaly: The 1951 Convention and State Disintegration’ (2021)
International Journal of Refugee Law (forthcoming).
States is far from resolved. In particular, polarized debates in recent years have strained even further an already vexed relationship. For example, when, in 2016, a national government was confronted with criticism regarding the inability of national authorities to enforce border control during the ‘refugee crisis’, it responded by introducing an annual upper limit on asylum applications. High numbers of applicants would ‘heavily burden’ the national economy and budget ‘for years to come’, the government argued, creating a possible threat to the maintenance of public order, which would thus compel the government to suspend legal obligations towards asylum seekers.

This type of rationale, which relies on a narrative that inexorably places State interests in opposition to the rights of individual asylum seekers, is paradigmatic. Indeed, following a trend since the end of the Cold War, and linked, inter alia, to the emerging view of asylum seekers as ‘economic migrants in disguise’ whose claims for protection are unfounded, the assumption persists that respecting refugee law constitutes an unwelcome barrier that States should circumvent.

As this article will demonstrate, in considering the rights of asylum seekers under article 8 ECHR in the context of expulsion, the ECtHR similarly follows a strikingly dichotomous narrative. It applies a static conception of interests that operates with a rigidly defined default assumption that conceives individual and public interests as competing, independent, and predetermined spheres. Following this view, it is generally assumed that while the individual’s interest is directed only towards stay, the public interest is directed only towards expulsion (or refusal to grant residence rights). Most critically for the present argument, under such an approach, relevant circumstances connected to the private or family life of the individual – while they might, in exceptional cases, outweigh the public interest – would not influence the weight of the public

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10 For a categorization of the literature on human rights versus migration control, see Cathryn Costello, The Human Rights of Migrants and Refugees in European Law (Oxford University Press 2016) 11.

11 Explanatory notes, Entwurf einer Verordnung der Bundesregierung zur Feststellung der Gefährdung der Aufrechterhaltung der öffentlichen Ordnung und des Schutzes der inneren Sicherheit samt Erläuterungen [Draft regulation of the Federal Government to determine risk to the maintenance of public order and protection of internal security] BEGUT_COO_2026_100_2_1276438.

12 For analysis of broader trends in the relationship between international law and migration politics, see eg Thomas Gammeltoft-Hansen and Nikolas F Tan, ‘The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy’ (2017) 5 Journal on Migration and Human Security 28; Thomas Gammeltoft-Hansen and James C Hathaway, ‘Non-Refoulement in a World of Cooperative Deterrence’ (2014) 53 Columbia Journal of Transnational Law 235; Itamar Mann, ‘Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013’ (2013) 54 Harvard International Law Journal 315.

13 Aleinikoff, in his classic article on balancing, points to the dichotomy of viewing interests as either individual or collective. T Alexander Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 The Yale Law Journal 943. His argument also assesses the potential arbitrariness of interest characterizations. See also, in that direction, Janneke Gerards, ‘How to Improve the Necessity Test of the European Court of Human Rights’ (2013) 11 International Journal of Constitutional Law 466.
interest per se. Hence, the balancing of interests would essentially consist of independently assessing the weight of both spheres and assigning respective priority.

3. THE VEIL OF MIGRATION CONTROL

This part engages with the standard position taken by the ECtHR towards asylum seekers\textsuperscript{14} under article 8 ECHR in the context of expulsion. It demonstrates how the court’s interpretation is fundamentally prone to a static view of interests. Other aspects of the court’s case law, which might in practice affect the rights claims of asylum seekers under article 8 ECHR, are only considered if relevant in assessing static tendencies.\textsuperscript{15}

A tendency towards a static conception of interests is, to some extent, not specific to the case of asylum seekers but is rooted in the legal system itself. Both the adversarial character of litigation, as well as the structure of rights subject to restrictions ‘necessary in a democratic society’, predetermine a certain tension between the rights of individuals and public interests. Similarly, the standard interpretation in case law, which establishes the balancing of competing interests as the doctrinal answer to the question whether a right to stay follows from, or an expulsion violates, article 8 ECHR, adopts a dichotomous view. In the literature, scholars have also generally criticized the court’s overly mechanical approach to balancing in the context of an inconsistent application of the proportionality test.\textsuperscript{16} Others have argued

\textsuperscript{14} And other migrants with precarious legal status.

\textsuperscript{15} These include, in particular, the considerable demands pertaining to the asylum seekers’ length of stay and the court’s general reluctance to engage with the private life of migrants (independent of their family life) as a standalone bar to deportation. See Alan Desmond, ‘The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?’ (2018) 29 European Journal of International Law 261.

\textsuperscript{16} See eg Janneke Gerards and Hanneke Senden, ‘The Structure of Fundamental Rights and the European Court of Human Rights’ (2009) 7 International Journal of Constitutional Law 619. The inconsistency has been attributed to: the lack of a conceptualization of individual interests or rights and public interests (Aileen McHarg, ‘Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’ (1999) 62 Modern Law Review 671); the balancing exercise itself (Grégoire Webber, ‘Proportionality and Absolute Rights’ in Vicki C Jackson and Mark V Tushnet (eds), \textit{Proportionality: New Frontiers, New Challenges} (Cambridge University Press 2017) 75; Stavros Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7 International Journal of Constitutional Law 468); lapses between the court’s approach and the ‘proper’ application of the proportionality test (Matthias Klatt and Moritz Meister, \textit{The Constitutional Structure of Proportionality} (Oxford University Press 2012)); and the idea that balancing should rather channel moral reasoning (Mattias Kumm, ‘Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement’ in George Pavlakos (ed), \textit{Law, Rights and Discourse: The Legal Philosophy of Robert Alexy} (Hart Publishing 2007) 148; Kai Möller, ‘Proportionality: Challenging the Critics’ (2012) 10 International Journal of Constitutional Law 709; George Letsas, ‘Rescuing Proportionality’ in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), \textit{Philosophical Foundations of Human Rights} (Oxford University Press 2015)).
that the notion of public interest is ‘undertheorized’; and at best referred to by the court in technical, economic terms.\footnote{McHarg (n 16) 696. This is reflected in the succinct, rather declaratory assessments of the court in finding that an aim falls under the exceptions of arts 8–12. See eg SAS v France App No 43835/11 (ECtHR, 1 July 2014) para 114. These often opaque determinations have also been criticized in the context of arguing for a higher standard of proof to be discharged by the respondent State in order for a public interest-based interference with a right to prevail. See Steven Greer, "“Balancing” and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate" (2004) 63 The Cambridge Law Journal 412.}

Beyond these concerns, the analysis of case law that follows reveals particular peculiarities in the ECtHR’s approach towards asylum seekers. The court’s interpretation not only bears traces of the original exclusion of asylum seekers from the scope of the ECHR. It crucially also veils the contributions of asylum seekers to the communities of Contracting States by valuing their economic activity only in respect of the sphere of individual interest – that is, the strength of their private life – while disregarding possible effects on the economic well-being of the country.\footnote{Note that the term ‘private life’ can include economic or work activities. See eg Niemietz v Germany App No 13710/88 (ECtHR, 16 December 1992).}

Article 8 ECHR stipulates, in its first paragraph, the right of all to respect for their private and family life. The ECtHR’s case law principally establishes the relevance of this provision for different dimensions of immigration, including cases of expulsion, deportation, family reunification, and regularization. However, the court’s default position is based on an emphasis on States’ migration control prerogative. While observing that the ECHR does not provide for a right of individuals to enter or reside in one of the Contracting States, or a right not to be expelled, the court regularly reiterates that, as a matter of international law, States have the right to control entry, stay, and expulsion.\footnote{Beginning with Abdulaziz, Cabales and Balkandali v United Kingdom App Nos 9214/80, 9473/81, and 9474/81 (ECtHR, 28 May 1985).}

The impact of this emphasis on the assessment of the rights of migrants has been viewed as problematic; it has been referred to as a ‘statist assumption’ that is ‘out of place in an age of human rights’,\footnote{Costello (n 10) 10.} and incongruent and a deviation from the text of the ECHR,\footnote{Dembour (n 6) 4, who notes that the court’s tenet constitutes ‘a problematic logical inversion from a human rights perspective.’} as well as revealing ‘the Court’s conception of migrants as aliens subject to state control, rather than just human beings’.\footnote{Desmond (n 15) 265.}

The effects of this tenet are particularly significant in the case of asylum seekers. Crucially, the court finds that toleration of the stay of asylum seekers is solely dependent on their pending asylum application.\footnote{See also Saadi v United Kingdom App No 13229/03 (ECtHR, 29 January 2008) para 65, where the court determined that ‘it does not accept that as soon as an asylum seeker has surrendered himself to the immigration authorities, he is seeking to effect an “authorised” entry’.} Based on this precept, the ECtHR (usually) treats these cases under the rubric of positive obligations,\footnote{Going back to 2006, see Rodrigues da Silva and Hoogkamer v Netherlands App No 50435/99 (ECtHR, 31 January 2006); in some asylum-related cases, the court, however, still adopted a negative obligation approach. See eg Nyanzi v United Kingdom App No 21878/06 (ECtHR, 8 April 2008).} establishing that...
they are different from the cases of settled migrants in which persons ‘have already been granted formally a right of residence in a host country’.25

On one hand, the court holds that, while positive and negative obligations must be treated differently, there cannot be a clear definition of the boundaries between them, and the principles under which they are assessed are similar. In both instances, States must weigh the public and private interests, and they enjoy a certain margin of appreciation.26 On the other hand, however, crucial differentiating factors emerge. In cases where the court has determined it is dealing with a negative obligation, it examines whether interference with a right is justified according to three sub-tests – legality, legitimate aim, and necessity in a democratic society. Failure to comply with any of these requirements is held as a violation of the ECHR. For positive obligations, this step-by-step proportionality assessment collapses into a single overall fair balance test.27 In addition, the court has held that, within the context of such fair balancing, it does not assess whether the public interest falls within the listed legitimate aims in article 8(2), although they may be ‘of certain relevance’.28

As Forder has observed, this ‘general interest’ test gives States more leeway than the legitimate aims test according to article 8(2) and may pose a threat to legal certainty.29 In general, the legitimacy of placing the individual’s interest in diametric opposition to the interests ‘of the community as a whole’ has been called into question.30 Crucially, the relevant public interest in such cases is not enumerated in the text of the ECHR as a

25 Jeunesse v Netherlands App No 12738/10 (ECtHR, 3 October 2014) para 104. Note that in the case of Pormes v Netherlands App No 25402/14 (ECtHR, 28 July 2020), which concerned an applicant who had built up social ties from a young age and was unaware of his precarious legal status, the court has applied a new (third) approach, namely assessment ‘from a neutral starting point’ (para 61).

26 As Klatt and Meister indicate, the court has also remarked that the circumstances may render it irrelevant whether a case is analysed in terms of positive or negative obligations. See Klatt and Meister (n 16) 88.

27 Laurens Lavrysen, Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights (Intersentia 2016) 222. For a detailed analysis of the different tests the court applies in different forms of immigration cases, see Mark Klaassen, ‘Between Facts and Norms: Testing Compliance with Article 8 ECHR in Immigration Cases’ (2019) 37 Netherlands Quarterly of Human Rights 157.

28 The test was developed in Rees v United Kingdom App No 9532/81 (ECtHR, 17 October 1986) para 34, and has been slightly adjusted, although the phrase ‘certain relevance’ in relation to art 8(2) remains the same.

29 Caroline J Forder, ‘Legal Protection under Article 8 ECHR: Marckx and Beyond’ (1990) 37 Netherlands International Law Review 162, 179.

30 Lavrysen (n 27) 224. Challenging the court’s overall depiction, Xenos asks ‘how the individual and the community can ever be subjected to such a rigid division, as if the community is not an inclusive entity for all individuals’. Dimitris Xenos, The Positive Obligations of the State under the European Convention of Human Rights (Routledge 2012) 148.
legitimate aim. As Lavrysen states, ‘such conceptualisation risks ... reconfirming the construction of positive obligations as being something exceptional’.

Based on this approach, the ECtHR has determined in the migration context that ‘the criteria developed in the court’s case law for assessing whether the withdrawal of a residence permit of a settled migrant is compatible with Article 8 cannot be transposed to cases of positive obligations. Given the weak position of not-settled migrants, such as asylum seekers, in relation to the State’s prerogatives, it is only under exceptional circumstances that it would not suffice for States to justify inaction with a mere reference to migration control. Although the court formally only allows a certain margin of appreciation, it appears it de facto applies a wide margin for justifying inaction towards asylum seekers.

The court’s distinction between positive and negative obligations in the migration context thus entails an additional conceptual inconsistency. It is true that, unlike the case of a settled migrant, the stay of an asylum seeker is insecure and dependent on the asylum procedure and its outcome. It is also true that the assessment of rights under article 8 ECHR generally follows the rejection of a claim for international protection status. Yet, the court’s definitions of the terms ‘private life’ and ‘family life’ themselves are, for good reasons, not based on the strength of the legal status. Thus, while it can be considered reasonable to assume a weakening of the weight of an asylum seeker’s interest within the balancing exercise based on the argument that the asylum seeker

31 See Rees (n 28) para 34. Xenos, for instance, refers to it as an arbitrary deviation from the text of the ECHR. See Xenos (n 30) 148.

32 Lavrysen (n 27) 225. It has further been observed that this kind of static construction can lead to attributing more weight to reasons for restrictions rather than rights (within the proportionality test) or even applying the ‘fair balance test’ as a utilitarian calculus. McHarg (n 16) 687, with reference to Pieter van Dijk and Yutaka Arai (eds), Theory and Practice of the European Convention on Human Rights (4th edn, Intersentia 2006) 605. Such balancing then runs the risk of trampling on minority rights. This follows indirectly from McHarg’s argument and is also touched upon by Greer. See McHarg (n 16) and Greer (n 17).

33 Jeunesse (n 25) para 105; see also AS v Switzerland App No 39350/13 (ECtHR, 30 June 2015).

34 See eg BAC v Greece App No 11981/15 (ECtHR, 13 October 2016) para 46; Antwi v Norway App No 26940/10 (ECtHR, 14 February 2012) para 105. It should be noted that the court also refers to the aim of public order. Yet, it can be assumed that this only applies to cases involving criminal convictions or repeated violations of immigration law.

35 For recent cases, see eg Ejimson v Germany App No 58681/12 (ECtHR, 1 March 2018); Abuhmaid v Ukraine App No 31183/13 (ECtHR, 12 January 2017). The latter concerns a complaint under art 13 in conjunction with art 8. In Hoti v Croatia App No 63311/14 (ECtHR, 26 April 2018), the court found a violation of art 8, as Croatia did not provide an effective and accessible procedure enabling the applicant to have his further stay determined with due regard to his private-life interests. But see also Darren Omoregie v Norway App No 265/07 (ECtHR, 31 July 2008), with an analysis in Costello (n 10) 127.

36 The term ‘private life’ is related to a person’s identity and has a physical, as well as a social dimension. It is to be understood broadly and cannot be the subject of a conclusive and precise definition. The ECtHR views economic or work activity as one dimension of private life. See, among many, Niemietz v Germany App No 13710/88 (ECtHR, 16 December 1992) para 29.
developed his or her private and family life on the premise that the period of stay was insecure, a weak legal status cannot justify the broad assumption of non-interference.\footnote{For a similar argument against the differentiation between negative and positive obligations concerning family life, see Klaassen (n 27).} Such differentiation, for example, leads to the result that a person’s dismissal from a job could constitute an interference with article 8, while the expulsion of an asylum seeker that factually also dismisses a person from a position would not.\footnote{Art 8(1) ECHR may also cover business relations and a person’s work. See eg C v Belgium App No 21794/93 (ECtHR, 7 August 1996). Thus, restrictions on access to a profession have been seen as a relevant interference with private life. See eg Sidabras and Džiautas v Lithuania App Nos 55480/00 and 59330/00 (ECtHR, 27 October 2014) para 47.} It is noteworthy that, in recent jurisprudence, the court has assessed a case ‘from a neutral starting point’, and thus confused the strict differentiation between the expulsion of settled migrants and the admission of those seeking residence rights.\footnote{Pormes (n 25) para 61.}

Regardless of whether the court’s overall approach poses an obstacle to claiming the rights of asylum seekers, the critical point here is that such balancing is unable to take into consideration the State’s interest in the economic contribution made by an asylum seeker. Indeed, by emphasizing the primacy of migration control considerations in relation to the weak legal status of asylum seekers, the court establishes a broad assumption that their prolonged stay in the State should generally, and by default, be viewed as a burden. In turn, the State’s migration control efforts would principally benefit the country. From such a static perspective, the rigid defining of the public interest in terms of migration control constitutes a veil, which \textit{ab initio} obscures the possibility that the strength of the public interest could be influenced or weakened by an individual’s contribution to the economic well-being of the country.

Returning to the case of Navid, the young asylum seeker from Afghanistan who faced possible deportation despite the evident public economic interest in his further stay, the case law analysis above indicates that – under the court’s current general approach – the assessment of his case under article 8 ECHR would result in a dismissal, based on the proposition that migration law must be enforced regardless of any economic considerations. The court’s interpretation would thus prevent the legal appreciation of Navid’s contribution to the economic well-being of the country.\footnote{Hilbrink has thus rightly noted: ‘The problem with accepting generic interests in controlling and restricting immigration in a balancing context is that in concrete cases it is impossible to make distinctive, evaluative considerations in respect of the public interest if all we have is the interests in controlling and restricting immigration.’ Eva Hilbrink, ‘Adjudicating the Public Interest in Immigration Law: A Systematic Content Analysis of Strasbourg and Luxembourg Case Law on Legal Restrictions to Immigration and Free Movement’ (Vrije Universiteit 2019) 171.}

### 4. THE NECESSITY FOR ECHR ADJUDICATION

At first sight, the lack of constructive case law at the European level indicates an increased practical relevance of domestic responses. However, three critical national cases
Austria, Germany, and Sweden – reveal the political character of diverging national approaches and reinforce the necessity for a resolution via the ECHR framework.

4.1 Domestic responses: Austria, Germany, and Sweden

Navid’s case is based on the Austrian context. There, while asylum seekers do not generally have access to the labour market, for several years, young asylum seekers were allowed to obtain an employment permit for an apprenticeship in shortage occupations. When it was realised that a significant number of apprentices in similar situations could be affected by deportation, a broad initiative that mobilized numerous high-profile supporters began in 2018 to campaign for their stay in Austria. From an economic perspective, they argued, it would be unreasonable to deport asylum seekers working in relevant occupations, while the Austrian economy was affected by a significant shortage of skilled workers. The campaign included the commissioning of two expert opinions, one demonstrating the economic damage caused by deportation and the other arguing for a resolution under article 8 ECHR.

In Austria, before the final determination of a case, asylum authorities must determine whether a right to stay follows from the right to private and family life after grounds for international protection have been found insufficient. As suggested by commentators, Austrian courts thus also dealt with the dilemma in the context of article 8 ECHR, yet without engaging in a deeper discussion regarding the relevant ECtHR case law. They were initially divided regarding the relevance of the individual’s contribution to the Austrian economy for the balancing exercise. The Federal Administrative Court, in several cases, ruled that a contribution made by asylum seekers to the economy reduces the public interest to deport them. The Administrative (High) Court, however, held that only circumstances relating to the private and family sphere could be taken into consideration in favour of asylum seekers’ residence rights. The fact that the asylum seeker would fill a relevant shortage in the local market must not be considered, as such

41 Based on a 2012 decree of the Ministry of Social Affairs (BMASK-435.006/0005-VI/AMR/7/2012) that was abolished again in 2018 (BMASGK-435.006/0013-VI/B/7/2018).
42 Such a study was indeed produced in Austria; it concluded that the overall economic and business losses in the case of the removal of an apprentice such as Navid amounted to an average of approximately 120,000 euros. See Friedrich Schneider and Elisabeth Dreer, Asylwerbende in Lehre: Kosten und Nutzen, Ergänzungen zur Studie “Ein Bleiberecht für Asylwerbende in Mangelberufen: Berechnung des volkswirtschaftlichen Nutzens für OÖ” [A Right to Stay for Asylum Seekers in Shortage Occupations: Calculating the Economic Benefit for Upper Austria] (2019).
43 Adel-Naim Reyhani and Manfred Nowak, ‘Beschäftigung von Asylsuchenden in Mangelberufen und die Zulässigkeit von Rückkehrentscheidungen’ [Legal Opinion on the Employment of Asylum Seekers in Shortage Occupations and the Admissibility of Return Decisions] (Gutachten 2018).
44 Art 9 BFA-Verfahrensgesetz.
45 Reyhani and Nowak (n 43).
46 See eg case nos W109 2162816, W109 2137953, W159 2172305, W109 2160934, and W271 2174029, referring to the legal opinion in ibid.
interests of the domestic labour market would not be covered by article 8 ECHR, the Austrian court argued.\textsuperscript{47}

As a political response to the campaign, the Austrian Parliament decided on minor legal amendments that would allow asylum seekers to conclude their training before expulsion or removal.\textsuperscript{48} However, these amendments similarly failed to address economic interests adequately.\textsuperscript{49} In the debate, politicians argued that the asylum procedure must be strictly separated from labour migration schemes, suggesting that access to an apprenticeship, when it resulted in the grant of a right to stay, would constitute a pull factor for unwanted migration to Austria.\textsuperscript{50}

In Germany, the discourse concerning whether apprentices should be granted a right to stay intensified in 2015. In contrast to Austria, German courts seem not to have yet dealt with the influence of the economic contributions of asylum seekers on the public interest in the context of the interpretation of article 8 ECHR.\textsuperscript{51} German law, however, is more liberal in that it allows asylum seekers\textsuperscript{52} who train to become skilled workers to acquire residence rights, thus also responding to a growing need in the German economy. In Germany, individuals qualified in vocational training in a State-recognized or similarly regulated occupation who would otherwise be removed from the country can, as a first step, obtain the status of ‘tolerated stay’ (\textit{Duldung}).\textsuperscript{53} In 2020, Germany introduced partly privileged access for asylum seekers to this instrument.\textsuperscript{54} As a significant practical obstacle, however, the possibility of obtaining tolerated stay is limited to cases in which the identity of the asylum seeker has already been established.\textsuperscript{55} Scholars have noted that this requirement might in practice undermine the legal entitlement of asylum seekers to be granted tolerated stay.\textsuperscript{56}

\textsuperscript{47} Administrative Court (\textit{Verwaltungsgerichtshof}) 2019/01/0003, 28 February 2019.
\textsuperscript{48} See \textit{Fremdenpolizeigesetz}, Änderung (87/A).
\textsuperscript{49} First, access to apprenticeships remained revoked, and secondly, the law did not cover the right to stay for those who had concluded their apprenticeships and were ready to begin their work as skilled workers in shortage occupations.
\textsuperscript{50} See discussions as recorded in the protocol of the 6th meeting of the National Assembly of Austria, XXVII, Gesetzgebungsperiode, 11 December 2019.
\textsuperscript{51} In Germany, the right to private and family life according to art 8 ECHR is not assessed within the asylum procedure. Instead, the lawfulness of removal is only decided once the asylum application is rejected.
\textsuperscript{52} Although asylum seekers are provided easier access, residence rights based on an apprenticeship are not restricted to them (§ 60c I 1 Nr 2 AufenthG [Residence Act 2008]). For an analysis, see Philipp Wittmann and Sebastian Röder, ‘Aktuelle Rechtsfragen der Ausbildungsduldung gem § 60c AufenthG’ (2019) 12 Zeitschrift für Ausländerrecht und Ausländerpolitik 412.
\textsuperscript{53} § 60c I 1 AufenthG.
\textsuperscript{54} In contrast to others, for asylum seekers, access to tolerated stay is not dependent on a previous period of tolerated stay (§ 60c II Nr 2 AufenthG). Moreover, asylum seekers can obtain the status of tolerated stay even if removal is imminent (§ 60c II Nr 5 AufenthG).
\textsuperscript{55} § 60c II No 3 AufenthG.
\textsuperscript{56} Sebastian Röder and Philipp Wittmann, ‘Spurwechsel Leicht Gemacht? Überlegungen zur Neuen Ausbildungs- und Beschäftigungsduidung’ [Changing Lanes Made Easy? Considerations on the New Training and Employment Conditions for Tolerated Stay] (2019) 8–9 Asylmagazin 23.
Along with the grant of tolerated stay, asylum seekers obtain the right to work.\(^{57}\) Formally, the status of tolerated stay cannot be characterized as a residence title. In the case of successful completion of the apprenticeship and further employment, however, asylum seekers can subsequently obtain a renewable residence title.\(^{58}\) Amongst other reasons, the German Parliament introduced this pathway to a secure legal status as a response to a significant shortage of skilled labour.\(^{59}\)

In Sweden, the discussed dynamic plays out differently again, as asylum seekers have been granted access to the Swedish labour market for almost three decades. In contrast to the situation in many other Contracting States, in Sweden asylum seekers are encouraged to take up work upon their arrival and support themselves, and are directed towards the local unemployment agency for this purpose.\(^{60}\) The legal approach has been to exempt an adult individual who applies for asylum in Sweden from the requirement of a work permit.\(^{61}\) This exemption, however, does not apply to asylum seekers who lack proof of identity and have been uncooperative in efforts to establish their identity, amongst other matters.\(^{62}\) If asylum seekers have worked legally during the period in which their asylum claim is processed, and the asylum application is then denied, they have the right to apply for residence, based on standard labour regulations. When the necessary requirements are fulfilled, they are routinely granted the title.\(^{63}\) It is worth noting that, in this respect, the Swedish system generally does not pay regard to whether the work is ‘skilled’ or whether it concerns a shortage occupation.

This right to work for asylum seekers with an ensuing right to residence was established to prevent a long and passive waiting period for asylum seekers.\(^{64}\) Initially, the right to work was limited to cases where the processing of the asylum application was estimated to exceed more than four months. There was concern that immediate access to the labour market would lead to an increase in asylum applications based on de facto economic motives and that this increase might undermine the overall system.\(^{65}\) However, in 2010, asylum seekers were granted access to the labour market regardless

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\(^{57}\) § 60c I § 3 AufenthG.

\(^{58}\) § 19d I AufenthG.

\(^{59}\) See Deutscher Bundestag, Drucksache 18/8615, 18. Wahlperiode, Gesetzesentwurf, 31 May 2016, 1, stating: ‘The German labour market needs a large number of skilled workers. This demand can also be partially met by people seeking protection in Germany. At the same time, the society and the labour markets of the countries of origin also benefit from qualifications acquired in Germany in the event of a return’ (authors’ translation). See also § 18 I 2, 3 AufenthG.

\(^{60}\) See eg the directions of the Swedish Migration Board: <https://www.migrationsverket.se/Privatpersoner/Skydd-och-ansv-i-Sverige/Medan-du-vantar/Arbeta.html> accessed 4 May 2021.

\(^{61}\) 5 ch 4 § Utlänningsförordningen (2006:97), any application according to 4 ch 1, 2 or 2 a § Utlänningslagen (2005:716).

\(^{62}\) 5 ch 4 § pp 1–3 Utlänningsförordningen (2006:97); 8 ch 19 § Utlänningslagen.

\(^{63}\) See eg the directions of the Swedish Migration Board: <https://www.migrationsverket.se/Privatpersoner/Arbeta-i-Sverige/Anstalld/Du-som-redan-ar-i-Sverige/Asylsokande-som-fatt-arbete.html> accessed 7 May 2021.

\(^{64}\) Proposition 1990/91:195, 108.

\(^{65}\) Proposition 1993/94:94, 37.
of the length of the time taken to process their applications – a reform designed to facilitate integration into the local community, as well as decrease the costs of administering the reception of asylum seekers. In addition to humanitarian grounds and social cohesion concerns, the Swedish travaux préparatoires specifically mention asylum seekers’ economic contributions to the economy as one of the benefits of the current system.66

As in Germany, the question whether and how economic contributions by an asylum seeker under article 8 ECHR may mediate the public interest has not been explicitly addressed in jurisprudence.67 In Sweden, because there is already a system in place that recognizes asylum seekers’ contributions to society through their work and also grants them residence rights, this longstanding legal construct seems to de facto supplant an article 8 ECHR assessment in this regard.

4.2 Beyond political preferences

These cases highlight some critical realities. For States like Austria, where residence rights do not follow from employment while the asylum application is being processed, the ECtHR’s current approach would be decisive in solidifying outcomes based on a static conceptualization of interests. Interestingly, among the three case studies discussed here, only Austria’s administrative courts have dealt directly with the challenge posed by asylum seekers’ economic contributions to the interpretation of article 8 ECHR.

For States like Germany and Sweden, migration law at the domestic level factors in the asylum seeker’s contribution to the economic well-being of a country, albeit outside the ECHR framework. These cases might signify a potential emerging consciousness as to the limitations of the assumption that it is only the State’s own separate work immigration schemes that can serve the country’s well-being, while the asylum route primarily attracts ill-intentioned migrants who burden the State. Does this presumed trend suggest that, after all, States’ migration policies could be in a better position to conclusively take into account possible economic interests? If so, is the court’s emphasis on the State’s prerogative in migration control not just a reflection of this fact?

Clearly, the arbitrariness which arises from these diverging domestic approaches points to the necessity for constructively adjusted ECtHR case law. In addition, and even more importantly, the political character of national responses must be considered. If the court cedes the field to States, this could result in a situation in which States could theoretically justify any (in)action through defining their preferences based on transient political grounds without being bound by the authority of international human rights adjudication. In practical terms, it would legitimize, for example, the policies of States which insist on only seeking workers through separate

66 See eg relevant preparatory work: Proposition 2007/08:147 ‘Nya Regler för Arbetskraftsinvandring’ [New Rules for Labour Immigration] 41–45.

67 The Swedish Supreme Migration Court has determined that an asylum seeker’s work under the current system which amounted to a year was not in itself decisive for the art 8 assessment preceding removal. However, the court here was not concerned with the public’s potential economic interest (Migrationsöverdomstolens dom 2012-09-28 UM 11040-11 (MIG 2012:13)).
migration schemes or, going further, hold that they politically prefer to do without skilled foreign workers while accepting the resultant economic damage. It thus follows as a logical consequence of this tenet – that views the political discretion of States as sufficient to justify expulsion or abstention from the grant of residence rights – that human rights adjudication would disregard the concrete effects of policies on the individual and public sphere in individual cases. Undoubtedly, this would constitute a serious challenge to the underlying ethos of giving practical effect to rights subject to reservations.

It follows that the ECtHR’s case law must adjust to the reality of interdependent interests. In the following part, traces within the court’s case law that offer a foundation for building a reconstructive approach towards corrective action are identified. On this basis, part 6 then engages with strategic suggestions for adjusting the court’s approach.

5. LIFTING THE VEIL

As indicated above, a fundamental obstacle in the court’s case law on asylum seekers to overcoming a static perspective lies in the overemphasis on the migration control prerogative, usually under the heading of positive obligations. It is only once the court identifies exceptional circumstances based on a casuistic approach that a basis for moving towards higher scrutiny and departing from static definitions of public interest can be discerned.

Consider, for example, the case of *Jeunesse v Netherlands*, in which the court held that the State had positive obligations towards a woman who had entered the country on a tourist visa, had made numerous unsuccessful attempts to obtain a residence permit, and had meanwhile married and had three children, all of whom had Dutch nationality. ‘In view of the particular circumstances of the case’, the court stated, ‘it is questionable whether general immigration policy considerations of themselves can be regarded as sufficient justification for refusing the applicant residence in the Netherlands’.

Despite the court’s reasoning in exceptional cases, its general approach towards asylum seekers in the context of expulsion, however, remains a significant obstacle to appreciating their societal contributions. Notwithstanding the concern of the weak application of the enumerated legitimate aims of article 8 ECHR under the rubric of

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68 *Jeunesse* (n 25).
69 ibid para 121. In a similar direction, see also *Butt v Norway* App No 47017/09 (ECtHR, 4 March 2013). In *BAC* (n 34), the court held that art 8 ECHR was breached due to Greece’s inactivity in respect of an asylum application.
70 Note also Judge Pinto de Albuquerque in his Concurring Opinion in *Biao v Denmark* App No 38590/10 (ECtHR, 24 May 2016), where he argues that, through such decisions, ‘the Court has gradually eroded the apparently untouchable principle that Article 8 cannot be considered to impose on a State a general obligation to respect a family’s choice of country for their residence or to authorise family reunification on its territory’ (para 30 of the Opinion).
positive obligations, the court’s interpretation thus needs a fundamental revision that
 dismisses the assumption of rights as exceptions.\(^\text{71}\)

So far, the economic activity of individuals, be they settled migrants or not, has only
 been taken into consideration in valuing the strength of the individual interest.\(^\text{72}\) As
the following analysis demonstrates, however, once critical unsatisfactory ramifications
of the differentiation between settled migrants and asylum seekers are addressed, the
approach of the court provides a certain ground for lifting the veil and thus also appreci-
ating the effects of individuals’ economic contributions on the public interest.\(^\text{73}\) In the
court’s article 8 case law on settled migrants, there is not only a softening of the ‘rights
as exceptions’ approach but also, although to a limited extent, closer adherence to the
enumerated legitimate aims of the ECHR text. This crucially entails that cases would
be treated under the rubric of the economic well-being of a country, thus theoretically
opening the door towards practically challenging a static conception of interests.

In the court’s interpretation of the proportionality test for negative obligations, the
legitimate aims in article 8(2) are positioned in structural connection to the require-
ment of ‘necessity in a democratic society’ to justify interference with the rights of in-
dividuals. The ECtHR generally follows a rather liberal approach, according to which
almost any State measure could serve a purpose under article 8(2) ECHR.\(^\text{74}\)

On an ad hoc basis, however, the court has engaged in in-depth assessments.\(^\text{75}\)
Significantly, it has held that the weight of the public interest can be subject to the dy-
namics and particular circumstances of the individual case. It may be called into ques-
tion, for example, by the State’s failure to prevent long-term unlawful residence and the
fact that the duration of the proceedings is imputable to the State.\(^\text{76}\)

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\(^{71}\) See eg *Nnyanzi v United Kingdom* App No 21878/06 (ECtHR, 8 April 2008), where the court
treated the case of a not-settled migrant under negative obligations, yet legitimized the removal
based on the assessment that the applicant’s stay has ‘at all times been precarious’ (para 76). Overall,
the assessment by Thym, writing in 2008, that there was a ‘new readiness to oblige the Contracting
Parties to grant residence permits to irregular migrants’ thus only partly materialized. See Daniel
Thym, ‘Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human
Right to Regularize Illegal Stay?’ (2008) 57 International & Comparative Law Quarterly 87, 89.

\(^{72}\) See eg the reasoning in *Biao* (n 70) para 125.

\(^{73}\) Note also that a failure to meet income requirements may justify the denial of residence based on
the economic well-being aim. See Hilbrink (n 40) 53.

\(^{74}\) See eg Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention: Ein
Studienbuch* [European Convention on Human Rights: A Study] (6th edn, CH Beck/Helbing
Lichtenhahn Verlag/Manz’sche Verlags/Universitätsbuchhandlung 2016) 13. The court has it-
self noted its practice to ‘be quite succinct’ as regards the question of the legitimate aim.

\(^{75}\) SAS (n 17). While the court’s practice is to be ‘quite succinct’ when it verifies the existence of a le-
gitimate aim, as in the present case, the substance of the objectives invoked and strongly disputed
by the applicant, called for an in-depth examination.

\(^{76}\) See eg *Boultif v Switzerland* App No 54273/00 (ECtHR, 2 August 2001); *Maslov v Austria* App No
1638/03 (ECtHR, 12 February 2010); *AH Khan v Netherlands* App No 6222/10 (ECtHR, 20
February 2011); BAC (n 34). But see also, concerning positive obligations, the court’s statement in *Butt*:
‘Also, the Court cannot but note the observation made by the High Court (in 2008) that, in view of the
unusually long duration of the applicants’ unlawful stay in Norway, it was questionable whether general
immigration policy considerations would carry sufficient weight to regard the refusal of residence “ne-
cessary in a democratic society”. *Butt* (n 69) para 85. See also, with a similar direction, *Jeunesse* (n 25).
The case law moreover provides that States are not always free to choose which legitimate objective is pursued by a specific measure. Most crucially, for the purposes of the assessment here, in cases where the prerogative of migration control is referred to in the context of the expulsion of settled migrants who have not committed relevant (criminal or administrative) offenses, the court has stated that migration control is legitimate under the terms of the goal of economic well-being. In Biao v Denmark, for example, the court stated: ‘Moreover, the Court has, on many occasions, accepted that migration control, which serves the general interests of the economic well-being of the country, pursued a legitimate aim within the meaning of article 8 of the Convention.’

The court thus establishes a clear connection between the legitimate aim of economic well-being and the notion of migration control. Taking into consideration the court’s succinct determinations in assessing the legitimate aim, as well as the diverging areas to which the aim of economic well-being is applied, it is, however, difficult to identify a general understanding of the court as to the exact relationship or interplay between the two. The travaux préparatoires to article 8 do little to resolve this dilemma.

Against the backdrop of this obscurity, some scholars have argued that the ECtHR could view immigration control – in the case of settled migrants also – as a legitimate aim per se, and thus independent of the real economic interest of the country. To support this view, Costello cites the case of Berrehab v Netherlands, where the court ‘equated a general immigration law enforcement prerogative with concern for population density and labour market regulation’. This reading demands careful review. The court in Berrehab recalled that: the applicants’ submission had mentioned that the authorities had not pursued any of the

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77 See eg Berrehab v Netherlands: App No 10730/84 (ECtHR, 21 June 1988).
78 Biao (n 70) para 117.
79 See also eg Nacic v Sweden App No 16567/10 (ECtHR, 5 May 2012) para 79. It is true that the court has previously referred to immigration control as a legitimate aim per se, although only in relation to not-settled migrants, as in Nnyanzi (n 71) para 76.
80 In cases outside the migration control context, the barriers between economic well-being and other aims such as the public order or the freedoms and rights of others, appear more diffuse, as the court accepts that a measure serves both purposes without further clarification, see eg Buckley v United Kingdom App No 20348/92 (ECtHR, 29 September 1996) paras 62–63, and Hatton v United Kingdom App No 36022/97 (ECtHR, 8 July 2003) para 121.
81 Government measures directed towards upholding structures and systems which serve the economic well-being are frequently invoked, ranging from immigration measures to various city and urban planning measures, including large public projects such as expanding an airport; see Hatton (n 80); Chapman v United Kingdom App No 27238/95 (ECtHR, 18 January 2001) and Berrehab (n 77).
82 From the travaux préparatoires to art 8, it emerges that the phrase ‘economic well-being’ was inserted at a late stage in the drafting process, with the reason cited that the article lacked the powers of inspection necessary to assess the economic well-being of the country. Council of Europe, ‘Preparatory Work on Article 8 of the European Convention of Human Rights’, Strasbourg, 9 August 1956.
83 Berrehab (n 77).
84 Costello (n 10) 127. For a similar view, see also Hilbrink (n 40).
legitimate aims in article 8(2); the government considered the expulsion necessary in the interests of public order; and the Commission had noted that the decisions served the legitimate purposes of prevention of disorder and the protection of the rights and freedoms of others. Against this background, the court stated that it had reached the same conclusion (as the Commission), and added: ‘It points out, however, that the legitimate aim pursued was the preservation of the country’s economic well-being within the meaning of paragraph 2 of Article 8 … rather than the prevention of disorder: the Government were in fact concerned, because of the population density, to regulate the labour market’.85

Thus, although the exact relationship between the two concerns – economic well-being and migration control – is left open to further interpretation, the case of Berrehab cannot challenge the general observation that the court views migration control as technically falling under the aim of economic well-being. An interpretation of the court’s case law in harmony with the terms of the ECHR – migration control is not mentioned in article 8(2) – would arrive at the same conclusion. Thus, while the court provides considerable latitude to States to control migration, critically emphasizes the State’s prerogative in this area even for settled migrants, and notes that migration control serves the economic well-being of the country, it has not yet found the latter to be a legitimate standalone aim in the meaning of article 8(2) ECHR.

To summarize, the ECtHR’s case law on asylum seekers in exceptional cases and its general approach towards the expulsion cases of settled migrants provide relevant reference points upon which a dynamic interpretation of individual and public interests can draw. Once the legitimate aim is clearly identified, the court would be in a position to engage in a closer review.86 Through softening the ‘rights as exceptions’ approach towards asylum seekers and, at a minimum, strengthening the role of legitimate aims (also under positive obligations), the court could lift the veil for then overcoming a static conception of interests as will be explored in the next part of the article.

6. ADJUSTING THE LENS OF THE COURT

Assuming the lifting of the veil of the overemphasis on migration control that entirely obscures the view of the contributions of asylum seekers to the public interest, the article now turns to the balancing exercise itself. If the ECtHR were to clarify that migration control also promotes economic well-being with respect to asylum seekers, three possible corrective adjustments to the court’s methodology would emerge to enable movement beyond static interests: first, closer engagement with the notion of economic well-being as it relates to migration control; secondly, strengthening the review approach of the court by applying a higher standard of proof; thirdly, harnessing the

85 Berrehab (n 77) para 26.

86 As demonstrated eg by Slivenko v Latvia App No 48321/99 (ECtHR, 9 October 2003), where the court held (para 121): ‘However, it seems that in this context the authorities did not examine whether each person concerned presented a specific danger to national security or public order. ... The public interest instead seems to have been perceived in abstract terms underlying the legal distinctions made in domestic law’.
procedural turn. After disregarding the first possible adjustment for pragmatic reasons, the promise in the latter two is assessed.

6.1 Defining economic well-being

The analysis above suggests that for the court to engage more fully with asylum seekers as contributors to economic well-being, a deeper discussion of the notion of economic well-being itself and its relationship to the aim of migration control could be warranted. Indeed, looking beyond the sparse articulations and elucidations of the court and the travaux préparatoires, there is an encouraging convergence in recent theorization on economic well-being and public interest theories that also highlights the interdependence between the individual and the public interests.

However, for several reasons, it is both unlikely and undesirable for the court to follow such a path. First, it would be a sharp departure from its current long-held stance to largely defer to State authorities in the assessment of the legitimate aims dimension. Furthermore, the complex and evolving nature of the concept of economic well-being and relevant economic calculations makes it impractical for the court to engage directly with such assessments. This complexity increases when attempting to measure the economic and fiscal impact of asylum seekers on host countries. While some studies strongly suggest an overall neutral or positive result, the growing body of research assessing the impact of recent refugee flows is complex and, in some respects, still nascent. Moreover, naturally, economic effects differ among the Contracting States. Even

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87 See eg Lars Osberg and Andrew Sharpe, ‘The Index of Economic Well-Being’ (2010) 53 Challenge 25. See also McHarg (n 16).

88 A mere attempt to define the concept in economic terms is illustrative. For a discussion of traditional and recent models, see Glenn-Marie Lange, Quentin Wodon, and Kevin M Carey, ‘Executive Summary’ in Glenn-Marie Lange, Quentin Wodon, and Kevin M Carey (eds), The Changing Wealth of Nations 2018: Building a Sustainable Future (World Bank Group 2018); Osberg and Sharpe (n 87). On the increased role of human and social capital, education as well as sustainability, see Tom Healy, ‘The Well-Being of Nations: The Role of Human and Social Capital’ (OECD 2001).

89 See eg Hippolyte d’Albis, Ekrame Boubtane, and Dramane Coulibaly, ‘Macroeconomic Evidence Suggests that Asylum Seekers Are Not a “Burden” for Western European Countries’ (2018) 4 Science Advances 1, evaluating the economic and fiscal effects of the inflow of asylum seekers to Western Europe between 1985 and 2015.

90 Kancs and Lecca highlight that, while the potential socio-economic consequences of asylum seekers’ contributions are often discussed, little scientific evidence has supported the policy debate in the context of the current refugee inflows into the EU. See d’Artis Kancs and Patrizio Lecca, ‘Long-Term Social, Economic and Fiscal Effects of Immigration into the EU: The Role of the Integration Policy’ (2018) 41 The World Economy 2599. For other relevant studies, see Michael A Clemens and Lant Pritchett, ‘The New Economic Case for Migration Restrictions: An Assessment’ (2019) 138(C) Journal of Development Economics 153; Francesco Furlanetto and Ørjan Robstad, ‘Immigration and the Macroeconomy: Some New Empirical Evidence’ (2019) 34 Review of Economic Dynamics 1; William Betz and Nicole B Simpson, ‘The Effects of International Migration on the Well-Being of Native Populations in Europe’ (2013) 2 IZA Journal of Migration 12.
in instances where studies would generally suggest economic gains through the asylum route, this would not allow definite conclusions as regards the impact of the behaviour of an individual asylum seeker on the economy. Finally, the politically sensitive nature of migration control, and its close association with national sovereignty,91 suggests that – when considering the court’s cautious, incremental approach in such areas – strong direct engagement from the court at this point appears rather unrealistic.92

6.2 Applying a higher standard of proof

As the present analysis of the case law suggests, the generally lax requirements for justifying State (in)action, resting on the emphasis on the State’s prerogatives in controlling migration, are a significant concern for overcoming static interests. The indirect approach of an advanced suitability or effectiveness test might thus constitute a prudent and realistic path that resonates with general calls for the ECtHR to structure and enhance its approach through a means and ends assessment. This implies a closer look not just at the means and aims themselves, but crucially also at the connection between them, assessing whether the mean is fit for purpose, regardless of whether less intrusive actions are available.93 Arguably, this stage of the proportionality assessment best accommodates the dynamic exchange between the individual’s actions and the public interest.94

Connected to the need for a proper effectiveness test is the approach of applying an appropriately high standard of proof for justification of a rights interference, or in demonstrating whether State inaction sufficiently respects the right in question. Although a robust effectiveness test is not synonymous with a high standard of proof – the standard of proof may not necessarily be directed at effectiveness – they are likely indicative of each other. While a reference to an effectiveness test may not be as meaningful in the context of positive obligations – where the court’s ‘fair balance test’ lacks a systematic application of the different steps of the proportionality assessment – the court could nevertheless strengthen a means and ends assessment by applying a higher standard of proof for justification.

91 During the drafting of the text of the ECHR, the notion of asylum ‘touched too sensitive a European nerve to be positively discussed as the Convention was debated’. See Dembour (n 6) 59.

92 Gerards elaborates on this form of incrementalism, citing, for instance, the court’s approach to cases involving the question of abortion in Ireland. See Janneke Gerards, ‘Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights’ (2018) 18 Human Rights Law Review 507–08.

93 This type of test is generally articulated in relation to art 14 ECHR: ‘if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised’. See eg DH v Czech Republic App No 57325/00 (ECtHR, 13 November 2007) para 175; Burden v United Kingdom App No 13378/05 (ECtHR, 29 April 2008) para 60.

94 This is because in determining whether there are less intrusive means available, the relationship between the means and the ends is more or less fixed. The least harm test/strict necessity test therefore does not capture whether the factual considerations of the case render the original means unsuitable.
The application of such a standard is naturally only possible if the burden of proof falls on the State. Under negative obligations, the claimant bears the responsibility to demonstrate interference with a right. At the same time, the State must generally show that this interference was necessary for pursuing a legitimate aim. Although there has been some criticism that the court at times does not adhere to this allocation – for instance, when it confuses assessments of determination of the scope of the right with the necessity of its interference – this overall approach has been confirmed by the court for article 8 assessments of negative obligations. In the context of ‘fair balancing’ in positive obligation cases, however, it is not clear where the burden of proof falls. While the court in these cases does not formally place it on the applicant, it has been suggested that the practice of the court tends towards assuming precisely that. A similar tendency has been noted when determinations relating to the scope of the right and the necessity for interference are bundled together into one question as to whether there was a breach of an ECHR right. This de facto allocation of the burden of proof is problematic for two reasons. First, it departs from the procedural principle on which the court generally relies and its explicit approach to evidence and proof in article 8 assessments. Secondly, the court does not provide a rationale as to why the allocation of the burden of proof should be different in cases of positive obligations.

To resolve this issue, the court could rely on its flexible approach to evidence and proof. Indeed, there is significant leeway for the court to clarify and adjust its course without directly contradicting itself. The court has noted that the ‘specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States

95 The burden of proof is referred to here as a burden of persuasion: ‘if the factual contentions of the party bearing the burden of proof are not in the end proved to the appropriate standard, that party will lose on the relevant point’. See Tobias Thienel, ‘The Burden and Standard of Proof in the European Court of Human Rights’ (2007) 50 German Yearbook of International Law 543.

96 ibid 551–53.

97 Gerards and Senden (n 16).

98 The State must prove that the interference corresponds to a pressing social need and that it is proportionate to the legitimate aim pursued, in relation to migration cases eg Berrehab (n 77) para 28. See also eg ibid 643.

99 Lavrysen notes that the court does not seem to place the burden either on the State, or formally on the applicant, resulting in a form of bias favouring preserving the status quo ante. Lavrysen (n 27) 263.

100 See eg Botta v Italy App No 153/1996/772/973 (ECtHR, 24 February 1998), and for a general discussion ibid; Gerards and Senden (n 16).

101 Thienel (n 95) 552. Departing from a step-by-step analysis and asking whether a fair balance has been struck may tend towards assuming the applicant bears the overall burden of proof. See Lavrysen (n 27) 234–36.

102 Gerards and Senden (n 16) 645 also argue that for both positive and negative obligations the burden of proof should be applied accordingly; see also Juliane Kokott, The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems (Kluwer Law International 1998) 228.

103 See eg Lavrysen (n 27) 236, who states the court operates on the basis of ‘some implicit presumption of Convention compliance’ which shifts the burden of proof to the applicant.
of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof.” 104 When the court has elaborated on this, it adopts a determinedly flexible approach. 105 Provided that the burden of proof is allocated according to the principle of incidence – as generally happens for negative obligations under article 8 ECHR – it is possible to now assess how the standard of proof can best be applied.

It has been argued that an intermediate standard corresponding to the terms ‘clear, strong and cogent’ when balancing public and private interests would stay true to the ECHR’s foundational principles of giving priority to rights while also rhyming with much of the court’s dicta. 106 And, indeed, the ECtHR has demonstrated – in the migration context – that, when it applies such a standard, this allows a consideration of the influence of the individual’s actions on the strength of the public interest. This is reflected in the court’s approach towards interference with the rights of settled migrants who have, for example, as minors, committed criminal offences or repeatedly violated immigration law, and whose removal aims at preventing disorder or crime. In such cases, the court has indicated that ‘the period of time which has passed since the offence was committed and the applicant’s conduct throughout that period are particularly significant’. 107

As has been noted, ‘the public interest in the deportation of foreign criminals has a moveable rather than fixed quality’. 108 If the person has reintegrated into society and rehabilitated him- or herself, ‘the Government are required to provide further support for their contention that the applicant can reasonably be expected to cause disorder or to engage in criminal activities such as to render ... deportation necessary in a democratic society’. 109 The ECtHR has held: ‘In particular, the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has an impact on the assessment of the risk which the applicant poses to society’. 110 While the individual and public interests were still considered as separate spheres, conduct within the sphere of the individual interest weakened the public interest. It led the court to assume that deporting a well-integrated individual requires a more thorough review. It can be concluded that the better an individual is integrated, the more the court requires the State to move beyond abstract justifications with an excessively static view of interests.

Similarly, then, for the case setting discussed here, a solid effectiveness test or the application of an intermediate standard of proof would mean paying appropriate attention to the way in which removal of an asylum seeker who, for example, is filling a shortage

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104 Nachova v Bulgaria App Nos 43577/98 and 43579/98 (ECtHR, 6 July 2005) para 14.
105 ibid. On the court’s adherence to the principle of affirmanti incumbit probatio, see eg Orhan v Turkey App No 25656/94 (ECtHR, 18 June 2002) para 266, and for the court’s approach in context, see Kokott (n 102) para 218.
106 Greer uses the Hatton case as the primary example of how the court should favour a higher standard of proof in the balancing of interests. Greer (n 17) 432–33. See also David J Harris, Michael O’Boyle, and Colin Warbrick (eds), Law of the European Convention on Human Rights (4th edn, Oxford University Press 2018) 383.
107 AA v United Kingdom App No 8000/08 (ECtHR, 20 September 2011) para 68.
108 Akinyemi v Secretary of State for the Home Department (2019) EWCA Civ 2098 (4 December 2019).
109 AA (n 107) para 68.
110 ibid para 63.
in the country’s labour market serves the economic well-being of the country. In such a scenario, the State could consequently be requested to demonstrate it had assessed the economic impact of the expulsion in the individual case in the context of the (alleged) general economic value of migration control. Thus, while the court itself would not take the challenging path of assertively defining economic well-being and how it relates to migration control, the application of an intermediate standard of proof would require States to assess more closely the real economic implications of an individual expulsion decision.111 Regardless of where such an analysis leads, such a higher standard of proof would thus clarify that a blanket assumption of the suitability of migration control to serve the economic well-being of the State would be inadequate.

6.3 Harnessing the procedural turn

In general, whether the ECtHR is likely to request such a standard for asylum seekers who contribute to the economy depends on several factors. According to the court’s pronouncements, the level of persuasion necessary for reaching a conclusion is linked to the facts, the nature of the allegation, and the right concerned. It is in this context that the notion of the margin of appreciation for the evidentiary burden assumes critical relevance.112

The court has repeatedly stated that, while the final say regarding what constitutes a violation of article 8 ECHR lies with the ECtHR, in ‘ascertaining whether the impugned measures struck a fair balance between the relevant interests, the national authorities enjoy a certain margin of appreciation.’113 In theory, the level of the standard of proof is linked to the width of the margin of appreciation: a wide margin of appreciation would indicate a low standard, a narrow margin a high standard, and ‘a certain’ margin an intermediate standard.114

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111 See eg also the court’s approach towards defining ‘national security’: ‘It is true that the notion of “national security” is not capable of being comprehensively defined … However, that does not mean that its limits may be stretched beyond its natural meaning.’ CG v Bulgaria App No 1365/07 (ECtHR, 24 April 2008) para 43. As Hilbrink reflects: ‘In considering that the alleged acts could hardly be said to affect the national security, the Court in fact evaluated whether the circumstances of the case at hand provided a sound justification for the decision concerned.’ Hilbrink (n 40) 37.

112 Here, ‘margin of appreciation’ means the doctrine which mediates factors affecting the intensity of the court’s review – what has been referred to as the ‘structural’ or ‘original’ margin of appreciation. See Letsas (n 16).

113 See Slivenko (n 86) para 113, and Berrehab (n 77) para 28. In this context, it is also relevant to note that the court often allows States a wide or at least a certain margin of appreciation when dealing with politically sensitive areas and cases concerning positive obligations. See eg Andrew Legg, The Margin of Appreciation in International Human Rights Law: Deference and Proportionality (Oxford University Press 2012). See also Hämäläinen v Finland App No 37359/09 (ECtHR, 16 July 2014) para 67 and cases cited therein that affirm this general rule. The margin of appreciation can, of course, be determined by other particularities of the case. Other aspects, such as the broadening of rights and the caseload of the court, are also invoked. See Łukasz Gruszczynski and Wouter Werner (eds), Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation (Oxford University Press 2014).

114 Mónika Ambrus, ‘The European Court of Human Rights and Standards of Proof’ in Gruszczynski and Werner (eds) (n 113) 235.
As the analysis above of the court’s approach towards asylum seekers under article 8 ECHR confirmed, however, the court’s diverse and often obtuse application of the margin of appreciation leaves its contours and import unclear. As noted, it might formally allow only a certain margin, whereas de facto provide wide latitude. While the court must adapt the margin of appreciation to the circumstances of the case, where several factors may impact the margin, it is generally observed that the width of the margin in practice is not always indicative of the strictness of the scrutiny applied. In some instances, the width of the margin is not identified at all.\textsuperscript{115} Although the court increasingly refers to the margin of appreciation, such pronouncements may tend to pay lip service to subsidiarity rather than be indicative of the court’s actual assessment.\textsuperscript{116} There has therefore been discussion of the inflation and even the demise of the doctrine.\textsuperscript{117}

At the same time, however, in the context of the ECtHR’s increasing reliance on procedural review, there is a recent tendency in the case law to embrace the margin of appreciation ‘as the tool through which to give consideration to the quality of domestic decision-making processes increased weight’.\textsuperscript{118} Relevant to adjusting the court’s lens to see beyond static constructions, three general observations related to the trend of proceduralization are offered: (1) procedural diligence can ‘function to open up the margin of appreciation while defective procedures narrow it down’;\textsuperscript{119} (2) proceduralization stimulates evidence-based approaches in national courts and authorities;\textsuperscript{120} and (3) procedural review with complete deference on the substantive merits of the balancing exercise is currently still unlikely.\textsuperscript{121}

Developments relating to procedural review, combined with the lack of clarity concerning the margin of appreciation, may thus assist in gradually adjusting the standard of proof in favour of closer scrutiny. For instance, while the State retains a certain margin of appreciation in the case of positive obligations towards asylum seekers, strategic argumentation may help hold the respondent State to an intermediate standard of proof in relation to the aim of economic well-being, not only because the court does not consider itself bound by the margin, but also by directing the court’s attention towards procedural deficiencies. As a former judge at the ECtHR, for instance, acknowledges, one factor determining the court’s reliance on procedural review is the

\textsuperscript{115} Gerards (n 92) 498–515.
\textsuperscript{116} ibid 500.
\textsuperscript{117} See eg Jan Kratochvil, ‘The Inflation of the Margin of Appreciation by the European Court of Human Rights’ (2011) 29 Netherlands Quarterly of Human Rights 324; Gerards (n 92) 498.
\textsuperscript{118} Oddný M Arnardóttir, ‘The “Procedural Turn” under the European Convention on Human Rights and Presumptions of Convention Compliance’ (2017) 15 International Journal of Constitutional Law 9, 15.
\textsuperscript{119} ibid 34.
\textsuperscript{120} Patricia Popelier, ‘Evidence-Based Lawmaking: Influences, Obstacles and the Role of the European Court of Human Rights’ in Janneke Gerards and Eva Brems (eds), Procedural Review in European Fundamental Rights Cases (Cambridge University Press 2017).
\textsuperscript{121} Although some commentators predict that in circumstances where there is already a wide margin of appreciation procedural review may in certain cases exhaustively replace substantive review. See eg Janneke Gerards, ‘Procedural Review by the ECtHR: A Typology’ in Gerards and Brems (eds) (n 120) 127; Arnardóttir (n 118) 11, 20, 21.
parties’ argumentation. An insistence on procedural deficiencies or aspects relating to the scrutiny of the rights involved may influence the court to include these aspects in its assessment.\footnote{122} In this way, the tendency to rely on procedural review when there is a wide or certain margin of appreciation may influence the substantive direction of the standard of proof, but not necessarily its strength \textit{per se}. Although the court may find it prudent to defer to State authorities on the factors that constitute the link between expulsion or residence rights and the economic well-being of the State, it can still demand that a relatively robust proportionality test be undertaken, that includes examination of whether the purported effectiveness of expulsion in achieving economic gains has been assessed in the individual case.\footnote{123} The fact that the State has a wide margin in ‘choosing the means’ of responding to its positive obligation\footnote{124} does not bar scrutiny that the chosen means is at all effective – regardless of alternative instruments. Overall, then, such an approach would align well with the increasing role of evidence-based approaches prompted by proceduralization.

A concrete way in which a certain margin of appreciation could allow a more robust procedural review surfaces in the discussed case law relating to the reintegration of settled migrants following criminal convictions. There, the court identified a set of factors or criteria to be considered in the balancing exercise.\footnote{125} According to the court, these were designed to help evaluate the extent to which the applicant can be expected to cause disorder, despite previous criminal activities. It has been suggested that, in such cases, the review of the decision-making process at the national level be confined to analysing whether national courts have taken into account the relevant factors determined by the court and limit substantive review to controlling for arbitrariness.\footnote{126} Similarly, therefore, one way in which a higher standard of proof could manifest itself in the cases of asylum seekers discussed here would be the establishment of criteria which include, as a consideration for the weight of the public interest, their contributions to the economic well-being.

\footnote{122} Angelika Nußberger, ‘Procedural Review by the ECHR: View from the Court’ in Gerards and Brems (eds) (n 120) 166.
\footnote{123} See eg Konstantin Markin v Russia App No 30078/06 (ECtHR, 22 March 2012), where the court questioned the absence of evidence in favour of the State’s assumptions related to the legitimate aim: ‘There is no indication that any expert study or statistical research was ever made by the Russian authorities’. For a similar approach, see Krivitska and Kryvitskyy v Ukraine App No 30856/03 (ECtHR, 2 December 2010) and Soltysyak v Russia App No 4663/05 (ECtHR, 10 February 2011), where the court questioned whether the means (refusal to issue travel documents) served the legitimate aims (national security).
\footnote{124} ‘[W]here the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State’s margin of appreciation.’ Fadeyeva vs Russia App No 55723/00 (ECtHR, 9 June 2005) para 96.
\footnote{125} See eg Üner v Netherlands App No 46410/99 (ECtHR, 18 October 2006) para 57–58, Boulîtif (n 76) para 48; Maslov (n 76).
\footnote{126} Nußberger (n 122) 174. In several cases, this is a strategy that the court adopts where it deems national courts are in a better position to assess evidence. See eg Von Hannover v Germany App Nos 40660/08 and 60641/08 (ECtHR, 24 June 2004) para 107; Axel Springer AG v Germany App No 39954/08 (ECtHR, 7 February 2012) para 88.
The suggestion to adjust the ECtHR's approach towards article 8 ECHR in the context of the expulsion of asylum seekers who contribute to the country's economy through applying an intermediate standard of proof is not alien to the court's practice. Based on a reconstructive method, it primarily draws from the ECtHR's case law. Yet, the extent and quality of the adaptations necessary in the court's case law – particularly its overemphasis on the migration control prerogative – and the current overall political climate render any short-term expectations of success naïve. It is thus also the role of scholarship to explore the legal implications of further cases that exemplify the limits of static interests.

As the analysis of domestic cases has demonstrated, some States have already begun to recognize the benefit to the public interest of asylum seekers' economic contributions, and thus provide them legal pathways to residency. It can be assumed that this discussion will gain more importance when legislation strengthens asylum seekers' access to the labour market. A move beyond static interests in the ECtHR's case law would reinforce this tendency and allow a legal appreciation of asylum seekers' contributions to receiving countries, irrespective of political preferences. Crucially, an improved review would moreover challenge overly dichotomous conceptions. In doing justice to the view reflected in the preamble of the ECHR, it would prompt a reflection beyond the insistent narrative of human rights versus State interests.

127 Regarding upcoming EU legislation on this matter, see art 15 in the 'Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)' COM(2016) 465 final.