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Boultif v. Switzerland: The ECHR Fails to Provide Precise Criteria for Resolving Article 8 Deportation Cases

I. INTRODUCTION

In 1996, Mr. Boultif, a resident alien of Switzerland, was convicted of a violent robbery for which he received a two-year unconditional prison sentence.¹ After Mr. Boultif served his time, the Swiss government ordered his expulsion.² Nevertheless, Mr. Boultif assertively resisted deportation to avoid separation from his wife, a Swiss citizen.³

His domestic remedies exhausted,⁴ Mr. Boultif took his case to the European Court of Human Rights (Court) claiming that by ordering his expulsion, the Swiss government violated his right to privacy and respect for family life guaranteed under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).⁵ Specifically, he alleged that the violation occurred when the Swiss government refused to renew his residence permit, thus separating him from his wife.⁶ Luckily for Mr. Boultif, the Court ruled in his favor, found an

1. *Boultif v. Switzerland*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, 1179, 1181 (2001). Originally, Mr. Boultif was convicted in 1995 by the Zurich District Court but the conviction was quashed due to lack of legal representation. *Id.* Mr. Boultif's original sentence of eighteen months was increased to a two-year unconditional prison sentence by the Court of Appeals in 1997. *Id.*

2. *Id.* at 1182.

3. *Id.* at 1181–82.

4. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 35 [hereinafter Convention for the Protection of Human Rights]. Applicants must wait six months from the date of the final decision before bringing a case to the Court. *Id.*; see also *infra* Part III.A.

5. *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1184.

6. *Id.*

Article 8 violation,⁷ and ordered the Swiss government to pay Mr. Boultif's costs and expenses.⁸

When filing his case with the Court, however, Mr. Boultif faced an uphill battle. This was due to difficulty inherent in predicting the outcome of cases alleging violations of Article 8, which is easily the most comprehensive yet obscure provision of the Convention.⁹ The reason for this unpredictability is the majority's case-by-case approach to Article 8 cases, an approach which has received a great deal of criticism from many dissenting judges.¹⁰ Accordingly, a number of those judges have called for the adoption of specific criteria to aid the Court in adjudicating these claims.¹¹

This Note examines the Court's decision in *Boultif*, focusing initially on the vague "guiding principles" offered by the Court. Part II presents background of the conflict between the Swiss government and Mr. Boultif. Part III outlines the development of the Court's interpretation of Article 8 cases, while addressing the disproportionate treatment of second-generation immigrants, also known as integrated aliens, facing deportation for criminal acts. Part IV describes how the Court arrived at its decision in *Boultif*. Part V critiques the Court's lack of clarity in applying its "guiding principles" to the issues in *Boultif*. Part VI proposes that the Court must clarify its stance on the deportation of second-generation immigrants in order to remedy its lack of clarity in Article 8 deportation decisions. Finally, this Note predicts what impact the holding in *Boultif* will have on future deportation cases.

7. *Id.* at 1189.

8. *Id.* at 1179-80. Mr. Boultif did not claim pecuniary damage in this case. *Id.* at 1189. Damages, however, are applied to cases via Article 41 of the Convention, which provides that the Court may, if necessary, award just satisfaction to the injured party if the Court finds a violation of the Convention or one of the Protocols, and if the domestic law of the respondent Contracting State allows for only partial reparation to the injured party. *Id.* The Court, however, "cannot award anything other than compensation and costs; it cannot order the state to take, or refrain from taking, any particular action." LUKE CLEMENTS ET AL., *EUROPEAN HUMAN RIGHTS: TAKING A CASE UNDER THE CONVENTION* 79 (2d ed. 1996).

9. *Id.* See also CLEMENTS, *supra* note 8, at 177.

10. Ann Sherlock, *Deportation of Aliens and Article 8 ECHR*, 23 EUR. L. REV. H.R. 62, 70 (1998).

11. *Boujlifa v. France*, App. No. 24404/94, 30 Eur. H.R. Rep. 419, 438-39 (1997) (Morinella, J., dissenting); *Boughanemi v. France*, App. No. 22070/93, 22 Eur. H.R. Rep. 228, 249-51 (1996) (Martens, J., dissenting); *Nasri v. France*, App. No. 19465/92, 21 Eur. H.R. Rep. 458, 478-79 (1996) (Pettiti, J., concurring).

II. FACTS

Mr. Boultif arrived in Switzerland in December 1992 on a tourist visa and married a Swiss citizen approximately three months later.¹² Shortly thereafter, a Swiss Court convicted him for “robbery and damage to property by attacking, together with another person, a man . . . by tearing him to the ground, kicking him in the face and taking 1,201 Swiss Francs . . . from him.”¹³

After a number of failed appeals,¹⁴ Mr. Boultif began serving a two-year prison sentence on May 11, 1998.¹⁵ Nine days later, the Swiss government refused to renew his residence permit.¹⁶ For Mr. Boultif, this refusal meant not only deportation, but also separation from his Swiss wife.¹⁷ The couple had no children, but Mrs. Boultif claimed that she would be unable to find work if required to follow her husband to Algeria, Mr. Boultif’s country of origin.¹⁸ Moreover, Mrs. Boultif claimed she would not be able to function in Algerian society because she spoke French, not Arabic.¹⁹

Although Mr. Boultif was prematurely released from prison on August 2, 1999,²⁰ both an administrative court and a federal court dismissed his appeal of the deportation.²¹ In both decisions, the Swiss government relied on sections of the Federal Aliens’ Domicile and Residence Act (Act) to support its case for deportation.²² The Federal Court discussed Section 10 of the Act, which states that “the criminal conviction of a foreigner serve[s] as a ground for expulsion,” and reasoned that a refusal to renew an alien’s residence permit did not violate Article 8 if the measure

12. *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. at 1181.

13. *Id.*

14. *Id.*

15. *Id.* at 1182. Mr. Boultif was convicted in the District Court on May 17, 1995 but the judgment was overturned and remanded on appeal because he lacked legal representation in court. *Id.* When the case was heard again in District Court, a sentence of eighteen months imprisonment was then suspended, and he was granted probation. *Id.* Finally, on appeal, Mr. Boultif was sentenced to a two-year unconditional prison term for robbery and property damage on January 31, 1997. *Id.*

16. *Id.* at 1182. An appeal by his attorney was dismissed on October 21, 1998. *Id.*

17. *Id.* at 1184.

18. *See id.* at 1182.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

was taken in the interest of public order and security.²³ Despite losing his appeal on the federal level, Mr. Boultif took his case to the European Court of Human Rights alleging an Article 8 violation, and won.²⁴

III. BACKGROUND

A basic understanding of the history and structure of the Court and its relationship with the Contracting States of Europe is necessary to understand how the Court's decisions impact the laws of those States.

A. *The European Court of Human Rights*

The Council of Europe was established in 1948 in response to the atrocities of the Second World War to promote unity, aid in social and economic progress, and protect human rights.²⁵ Inspired by the U.N. Universal Declaration of Human Rights, the Council promptly created the Convention for the Protection of Human Rights and Fundamental Freedoms, an enforceable proclamation of human rights drafted as an international treaty, which was adopted in 1950.²⁶ At first, the Convention's scope was limited to those rights that the original fifteen member states were willing to adopt.²⁷ Since then, the scope of human rights has increased through the addition of a number of protocols.²⁸

The addition of Protocol 11 to the Convention on November 1, 1998 dramatically changed the Court's structural system of enforcement.²⁹ Protocol 11 created an absolute right for individuals or nongovernmental groups to petition the Court,³⁰ which has the power to issue decisions regarding Convention

23. *Id.* at 1182, 1184.

24. *Id.* at 1189.

25. CLEMENTS, *supra* note 8, at 13.

26. *Id.*

27. *Id.*

28. *Id.* Jurisdiction of the Court depends on each Member State's voluntary ratification of each Protocol to the Convention. *Id.* at 4. There are currently forty Contracting States. *Id.* at 3.

29. *Id.* at 13.

30. Convention for the Protection of Human Rights, *supra* note 4, art. 34. Article 34 places an obligation on the contracting States to allow individuals to bring complaints and also obliges those states not to hinder applicants in seeking this right. *Id.* The Court's jurisdiction is limited by the admissibility criteria set out in Article 35 of the Convention. *Id.* art. 35.

violations and to order the state to pay compensation and costs to the applicant.³¹ The Court may receive applications from “any person, non-governmental organization or group of individuals claiming to be the victim of a violation” of one of the Contracting States.³²

Although Protocol 11 gives individuals the absolute right to petition,³³ a number of conditions must be met before the Court will take an applicant’s case under the Convention.³⁴ First, an applicant must file a complaint within six months of the final decision by the federal government.³⁵ Second, the applicant must be sure that the Contracting State has actually ratified the particular protocol under which the applicant submits a complaint.³⁶ If the particular protocol has been ratified, any individual has the right to file a complaint.³⁷ Finally, an applicant filing a complaint in the Court must exhaust all domestic remedies.³⁸

B. Criminal Deportation

1. Requirements of Article 8

Article 8 states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

31. Convention for the Protection of Human Rights, *supra* note 4, art. 41. The Court receives complaints, decides admissibility, and delivers judgments that are binding on the parties. *Id.*

32. *Id.* art. 34. Before a complaint is deemed admissible, the applicant must have exhausted all domestic remedies. *Id.* art. 35.

33. Convention for the Protection of Human Rights, *supra* note 4, art. 34.

34. CLEMENTS, *supra* note 8, at 24.

35. Convention for the Protection of Human Rights, *supra* note 4, art. 35.

36. CLEMENTS, *supra* note 8, at 24.

37. *Id.* For example, under the pre-Protocol 11 system, a Member State may have ratified a protocol but could choose not to accept the right of individual petition under that protocol. This is no longer allowed. CLEMENTS, *supra* note 8, at 24.

38. CLEMENTS, *supra* note 8, at 25. The Court’s rationale for this rule is its belief that the Court should fulfill a supervisory role, stepping in only after domestic authorities, who are in the best position to provide an adequate remedy, have failed to do so. KAREN REID, A PRACTITIONER’S GUIDE TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS 21 (1998). The government must prove that such remedies exist. The applicant must then show either: (1) the remedy was exhausted, (2) the remedy was not sufficient under the circumstances, or (3) the applicant was exempt from meeting the requirement because of the special circumstances. *Id.* The Court looks to a list of specific criteria in evaluating each Contracting State’s domestic remedies. *Id.* at 22–24.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.³⁹

In other words, if a resident alien poses a threat to society, the State retains the right of expulsion.⁴⁰ Although the Convention protects the family, it does not guarantee an alien the right to remain in a particular country, nor does it shelter the alien from expulsion.⁴¹ If, however, the expulsion of an alien threatens to separate an existing family,⁴² the expulsion may constitute an Article 8 violation.⁴³

2. Unpredictability of Article 8 cases

Due to the case-by-case approach adopted by the Court, it has been difficult for applicants and their attorneys to predict the outcome of Article 8 cases.⁴⁴ Further, reconciling the caselaw is especially difficult in light of the Court's judgments in cases involving the expulsion of second-generation immigrants. For example, the Court has found no Article 8 violation in several cases involving the deportation of applicants who were long-time residents of their host countries.⁴⁵ Conversely, in other cases with

39. Convention for the Protection of Human Rights, *supra* note 4, art. 8.

40. CLEMENTS, *supra* note 8, at 131.

41. *Id.*; Goran Cvetic, *Immigration Cases in Strasbourg: The Right to Family Life Under Article 8 of the European Convention*, 36 INT'L & COMP. L.Q. 647 (1987).

42. Abdulaziz v. U.K., App. Nos. 9214/80, 9473/81, 9474/81, 7 Eur. H.R. Rep. 471, 495-96 (1985) (ruling that engaged couple is an existing family); Berrehab v. Netherlands, App. No. 10730/84, 11 Eur. H.R. Rep. 322, 322 (1988) (finding that deportation of a Moroccan man after his divorce from a Dutch national violated Article 8 because he was separated from his daughter).

43. CLEMENTS, *supra* note 8, at 131. If the expulsion of an alien will result in mistreatment, it may also violate Article 3, Prohibition of Torture. *Id.*

44. Sherlock, *supra* note 10, at 70.

45. *C. v. Belgium*, App. No. 21794/93, 12 Eur. Ct. H.R. 915 (1996) (finding no Article 8 violation regarding a Moroccan national convicted of drug possession even though he lived in Belgium since the age of eleven and had a Belgian-born son); *Boughanemi v. France*, App. No. 22070/93, 22 Eur. H.R. Rep. 228 (1996) (finding no Article 8 violation regarding a Tunisian national living in France since the age of 8 after serving prison time for burglary and assault); *Boujlifa v. France*, App. No. 24404/94, 30 Eur. H.R. Rep. 419 (1997) (finding no Article 8 violation regarding the deportation of applicant even though he had been living in France for twenty years, since the age of five, and had parents and eight siblings also living in France); *Bouchelkia v. France*, App.No. 23078/93, 25 Eur. H.R.

substantially similar facts, the Court has found Article 8 violations, seemingly ignoring the long-time resident status of applicants.⁴⁶

Though the outcome of Article 8 cases may be highly unpredictable, the Court must analyze such cases according to the three elements of Article 8.⁴⁷ First, the Court looks to whether the deportation by the state was in accordance with the law of that country as required by paragraph 2 of Article 8.⁴⁸ If so, the Court must decide whether the state's interference had a legitimate aim.⁴⁹ Finally, the Court must decide whether the state's interference is necessary in a democratic society, by balancing the state's need for order against the applicant's right to protection of family life.⁵⁰ This requirement is known as "the test of proportionality."⁵¹ In *Boultif*, the Court focused on this balancing test, and, in particular, establishing the relevant criteria for spouses to stay together and live in the non-alien spouse's country of origin.⁵²

Rep. 686 (1997) (finding no violation of Article 8 where the applicant, who had lived in France from the age of two and served time for aggravated rape also had a wife and child in France, because the child had been born after his deportation order was officially filed); *Dalia v. France*, App. No. 26102/95, 33 Eur. H.R. Rep. 26 (1998) (finding no Article 8 violation regarding deportation of Algerian national due to drug charges although she was a single mother of a French child, and her entire family lived in France).

46. See *Moustaquim v. Belgium*, App. No. 12313/86, 13 Eur. H.R. Rep. 802 (1991) (ruling that deportation of an applicant who lived in Belgium since the age of less than two violated Article 8 because he committed offenses as an adolescent); *Nasri v. France*, App. No. 19465/92, 21 Eur. H.R. Rep. 460 (1996) (ruling that deportation of a deaf mute convicted of gang rape and other crimes violated Article 8 due to his special circumstances and because he had lived most of his life in France); *Mehemi v. France*, App. No. 25017/94, 30 Eur. H.R. Rep. 739 (1997) (ruling that deportation of an applicant convicted of drug possession and conspiracy to import hashish violated Article 8 in light of his separation from wife and three French minor children); *Beldjoudi v. France*, 234 Eur. Ct. H.R. 5 (ser. A) (1992), (ruling that deportation of an applicant convicted of serious offenses ruled an Article 8 violation in light of his twenty year marriage to a French woman who would be unable to follow the applicant to Algeria).

47. See, e.g., *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1186.

48. Convention for the Protection of Human Rights, *supra* note 4, art. 8(2).

49. *Id.* The legitimate aims set out in Article 8(2) are "national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." *Id.*; see also *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1186.

50. *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1187.

51. CLARE OVEY AND ROBIN WHITE, JACOBS & WHITE, EUROPEAN CONVENTION ON HUMAN RIGHTS 209 (3rd Edition) [hereinafter OVEY AND WHITE, EUROPEAN CONVENTION].

52. *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1187.

IV. COURT'S ANALYSIS

In *Boultif*, the Court held that Mr. Boultif's deportation violated his right to respect for private and family life pursuant to Section 1 of Article 8,⁵³ even though the interference accorded with domestic law and pursued a legitimate state interest.⁵⁴ In reaching its decision, the Court set out eight guiding principles for determining whether Mr. Boultif's deportation was necessary in a democratic society.⁵⁵ Ultimately, the Court held that the Swiss government breached Article 8 because the government's legitimate interest in preventing crime and maintaining public order was outweighed by Mr. Boultif's Article 8 right to preserve his family life.⁵⁶

A. Accordance With the Law and Pursuit of a Legitimate Aim

The *Boultif* Court began its analysis by addressing the first two elements of the Article 8 analysis: (1) interference in accordance with domestic law, and (2) interference in pursuit of legitimate state aim.⁵⁷ First, the Court decided that Switzerland's refusal to renew Mr. Boultif's residence permit was in accordance with the Federal Aliens' Domicile and Residence Act, which provides in paragraph 1 of Section 7 that the privilege of a residence permit afforded to a foreigner, who has married a Swiss citizen, may be revoked if there are grounds for that person's expulsion.⁵⁸ Second, the Court determined that the government's refusal to renew Mr. Boultif's residence permit pursued the legitimate aim of "the prevention of disorder and crime" under the meaning of paragraph 2 of Article 8.⁵⁹

B. Necessary in a Democratic Society

Next, the *Boultif* Court laid out eight "guiding principles" for analyzing whether the deportation of an applicant is necessary in a

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 1189.

57. *Id.* at 1186.

58. *Id.*

59. *Id.* at 1187.

democratic society.⁶⁰ The Court must consider: (1) the nature and seriousness of the offense; (2) the length of the applicant's stay in the country; (3) the time elapsed since the offense was committed, and the applicant's conduct within that period; (4) the nationalities of the persons concerned; (5) the applicant's family situation, such as the length of marriage; (6) whether the non-alien spouse knew of the offense when he or she entered into a family relationship with the applicant; (7) whether there are children in the marriage, and, if so, their age(s); (8) the seriousness of the difficulties the non-alien spouse is likely to encounter in the applicant's country of origin.⁶¹ The mere fact that a non-alien spouse may face some difficulties following the applicant to his or her country of origin, however, cannot per se bar an expulsion.⁶²

The Court began its analysis of *Boultif* by focusing on its first guiding principle, the nature and seriousness of Mr. Boultif's offense.⁶³ The Court noted the Swiss government's primary considerations in Mr. Boultif's case. First, Mr. Boultif's crime was particularly brutal in nature.⁶⁴ Second, he committed the crime only sixteen months after he arrived in Switzerland. Finally, his initial, two-year prison sentence was unconditional.⁶⁵

The Court, however, decided that Mr. Boultif's meritorious behavior following his conviction mitigated his culpability and alleviated the Swiss government's concern that he posed a danger to society.⁶⁶ His early release and his blemish-free conduct during incarceration were significant facts in the Court's opinion.⁶⁷ The Court also examined Mr. Boultif's behavior between the years 1998 and 2000, during which he worked as a gardener and an electrician, noting that Boultif's former employers were willing to continue to employ him in the future.⁶⁸ The Court further decided

60. *Id.* Whether a measure is necessary in a democratic society requires the Court to ask whether the interference corresponded to a "pressing social need" and was "proportionate to the legitimate aim pursued." *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1188.

64. *Id.* He was convicted of severely beating and robbing his victim by "tearing him to the ground" and "kicking him in the face" with the assistance of an accomplice. *Id.* at 1181.

65. *Id.* at 1188.

66. *Id.*

67. *See id.*

68. *Id.*

that the original, lighter sentence imposed by the Zurich District Court also weighed in Mr. Boultif's favor.⁶⁹

Finally, the Court determined that it would be extremely difficult for the Boultifs to establish a family life in Algeria because of the difficulties it would impose on Mrs. Boultif.⁷⁰ Although Mrs. Boultif was fluent in French and had some contact with her mother-in-law in Algeria, the Court concluded that she would suffer great hardship if forced to move there.⁷¹ Among the factors the Court considered were her Swiss citizenship, her unfamiliarity with the Arabic language, and her lack of ties with the country.⁷² In addition, the Court determined that the Boultifs could not establish a family life somewhere other than Switzerland or Algeria,⁷³ even though, before living in Switzerland, Mr. Boultif had lawfully resided in Italy for three years and was once again living there at the time of the trial.⁷⁴ The Court simply stated it was not persuaded by arguments that both spouses would be able to gain authorization to "reside lawfully, and as a result, to lead their family life in Italy."⁷⁵ Thus, the Court ruled that Mr. Boultif was no longer a threat to society and that the Swiss government should have permitted him to continue residing in Switzerland with his wife.⁷⁶

V. CRITICAL ANALYSIS

The *Boultif* decision is an attempt by the Court to clarify its policy regarding the rights of married couples to reside in the non-alien spouse's country of origin.⁷⁷ However, the *Boultif* decision does little to clarify the Court's position on deportation as punishment, particularly in light of cases involving the deportation of second-generation immigrants.⁷⁸

69. *Id.* Initially, the Zurich District Court decided that a conditional sentence of eighteen months imprisonment suspended on probation was adequate punishment for his crime. *Id.* The Swiss government, however, later obtained a two-year unconditional prison sentence on appeal. *Id.* at 1181.

70. *See id.* at 1188.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1189.

76. *See id.*

77. *See id.* at 1186.

78. *See id.* at 1189.

The concurring justices praise the *Boultif* opinion for establishing the “relevant criteria” for spouses to remain together in the non-alien spouse’s country.⁷⁹ The opinion, however, provides no real guidance for practitioners attempting to apply these guiding principles to future cases. Mr. Boultif was new to Switzerland and newly married when he committed a violent crime.⁸⁰ A practitioner might expect factors such as the short length of Mr. Boultif’s marriage and his lack of ties to Switzerland to weigh in favor of the state’s right to deport him;⁸¹ however, unlike many prior cases, the *Boultif* Court virtually ignored these factors.⁸² Instead, the Court’s opinion focused primarily on Mr. Boultif’s marital status,⁸³ his post-sentencing behavior,⁸⁴ and the difficulties his wife would face in following him to Algeria.⁸⁵ Thus, the Court’s reasoning makes little sense in light of its prior judgments involving second-generation immigrants. Moreover, through the *Boultif* opinion, the Court gives greater deference to a childless applicant in a newly formed marriage than it has given to former second-generation immigrant applicants with long-term family ties to their countries.

A. Accordance With the Law and Pursuit of a Legitimate Aim

The *Boultif* Court correctly assessed the first two elements of the Article 8 analysis: first, whether the deportation order was in accordance with domestic law, and second, whether it was in pursuit of a legitimate aim by the Swiss government.

The Court noted that the Federal Aliens’ Domicile and Residence Act permitted the Swiss government to refuse renewal of Mr. Boultif’s residence permit.⁸⁶ According to the Act, a foreigner who has married a Swiss citizen is entitled to a residence

79. *Id.*

80. *See id.* at 1181.

81. *See* P. VAN DIJK AND G.J.H. VAN HOOFF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 520 (3rd ed. 1988) (citing cases in which the Court found a violation of Article 8 because of the applicants’ close family ties and long stay in the host countries) [hereinafter VAN DIJK AND VAN HOOFF, THEORY AND PRACTICE].

82. *See Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1188.

83. *Id.* The traditional heterosexual marital relationship is at the top of the Court’s hierarchy of relationships, even more so than the relationship between parent and child. OVEY AND WHITE, EUROPEAN CONVENTION, *supra* note 51, at 223.

84. *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1183.

85. *Id.* at 1182.

86. *Id.* at 1186.

permit; however, this right may terminate if there are grounds for expulsion.⁸⁷ Next, the Court decided that Mr. Boultif's expulsion was in pursuit of a legitimate state aim, namely, the prevention of disorder and crime.⁸⁸

In general, the first two elements in the Court's Article 8 analysis are straightforward and require less of the Court's time than number three,⁸⁹ whether the deportation of a particular applicant is necessary in a democratic society. Ambiguity arises when the Court considers this third element of the Article 8 analysis.⁹⁰

B. Necessary in a Democratic Society

Although the *Boultif* Court sets out "guiding principles" to determine whether the deportation of a criminal is necessary in a democratic society, it does little to clarify its nebulous position on the application of these factors.⁹¹ The Court begins its analysis by reiterating the well-established principle that the Contracting States may maintain order by deporting aliens convicted of criminal offenses, subject to international law and treaty obligations.⁹² If the deportation of an applicant conflicts with the rights set out in paragraph 1 of Article 8 of the Convention, such actions must be "justified by a pressing social need"⁹³ and "proportionate to the legitimate aim pursued."⁹⁴

Thus, the main issue becomes how to achieve a fair balance between Mr. Boultif's right to respect for his family life and the right of Contracting States to prevent disorder and crime by refusing to renew his residence permit.⁹⁵ The *Boultif* Court supports its holding by applying the guiding principles to the facts of the case.⁹⁶

87. CLEMENTS, *supra* note 8, at 179.

88. *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1187.

89. CLEMENTS, *supra* note 8, at 175-77.

90. HUMAN RIGHTS PRACTICE, § 8.058 (Jessica Simor & Ben Emmerson, Q.C. eds., 2000).

91. *See Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1187.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1187-88.

1. Nature and seriousness of the offense and behavior following conviction

The first factor named by the *Boultif* Court is the nature and seriousness of an applicant's offense, including the length of the sentence imposed by the Contracting State.⁹⁷ In previous cases, the Court gave this factor a great deal of weight in deciding whether an applicant's deportation violated Article 8.⁹⁸ In fact, caselaw suggests that if the crime is serious and the sentence is substantial, an applicant's good behavior following conviction, the third factor, will not sway the Court to rule in the applicant's favor.

For example, in *Boughanemi v. France*, the Court did not find an Article 8 violation, basing its decision primarily on the violent nature of Mr. Boughanemi's crime—assault and burglary—even though he was a second-generation immigrant with very strong family ties to France.⁹⁹ Prior to his hearing before the Court, Mr. Boughanemi lived in France for over twenty years.¹⁰⁰ He was educated in France and his parents, his ten siblings, and his young child all resided in France.¹⁰¹

In spite of his numerous family ties with France, the Court found that Mr. Boughanemi's deportation did not violate Article 8.¹⁰² Instead, the Court concentrated on the severity of his unconditional four-year sentence¹⁰³ and the violent nature of his crime.¹⁰⁴ Conversely, the *Boultif* Court did not concentrate on the severity of his crime, emphasizing the mild sentence imposed by the Zurich District Court, even though the Court of Appeal ultimately gave him a two-year unconditional sentence.¹⁰⁵

Further, contrary to the Court's analysis in *Boujlifa v. France*,¹⁰⁶ the *Boultif* Court placed great value on Mr. Boultif's

97. *Id.* at 1187. Whether a measure is necessary in a democratic society requires the Court to ask whether the interference corresponded to a "pressing social need" and was "proportionate to the legitimate aim pursued." *Id.*

98. LEADING CASES OF THE EUROPEAN COURT OF HUMAN RIGHTS, 385 (R.A. Lawson & H.G. Schermers eds., 1997) [hereinafter LEADING CASES].

99. *Boughanemi v. France*, App. No. 22070/93, 22 Eur. H.R. Rep. 228, 247–48 (1996).

100. *Id.* at 248. Mr. Boughanemi arrived in France at the age of eight. *Id.*

101. *Id.*

102. *Id.* at 248.

103. *Id.* Mr. Boughanemi received a four-year sentence, non-suspended. *Id.* at 247.

104. *Id.* at 230. Mr. Boughanemi was convicted of "living on the earnings of prostitution with aggravating circumstances." *Id.*

105. *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1181.

106. App. No. 24404/94, 30 Eur. H.R. Rep. 419, 437–48 (1997).

good behavior after his prison term.¹⁰⁷ For example, in *Boujlifa*, the applicant was a long-time resident who had been living in France since the age of five and behaved well following his incarceration. The Court, however, attached little value to Mr. Boujlifa's good behavior.¹⁰⁸ Instead, the Court agreed with the French government that Boujlifa's crime of armed robbery was a serious offense. His six-year sentence reflected the gravity of the offense and aided the Court in concluding that his deportation was proportionate to the government's aim of preventing crime.¹⁰⁹ In contrast, the *Boultif* Court viewed good behavior as a key factor in their decision, placing little weight on the violent, aggressive nature of Mr. Boultif's crime.¹¹⁰

In *Beldjoudi v. France*, the Court added more confusion to this issue by ruling that deportation of a criminal with a long record of offenses violated Article 8.¹¹¹ In *Beldjoudi*, however, the Court emphasized the applicant's forty years of residence in France and his twenty-year marriage.¹¹² In contrast, Mr. Boultif was newly married and relatively new to Switzerland at the time of his conviction and expulsion. Thus, the Court's position on these factors remains unpredictable.

Moreover, the Court's case-by-case approach allows for too much subjectivity in cases involving crimes that a Contracting State categorizes as particularly immoral or corrupt. For instance, the Court has little mercy for crimes of rape, prostitution, and drug trafficking, and usually does not find Article 8 violations if an applicant was convicted of one or more of these crimes.¹¹³

107. *Boultif* 33 Eur. H.R. Rep. 50, at 1183, 1187.

108. See *Boujlifa v. France*, App. No. 24404/94, 30 Eur. H.R. Rep. 419, 437-48 (1997).

109. *Id.*

110. See *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1188.

111. *Beldjoudi v. France*, 234 Eur. Ct. H.R. 5, 9 (ser. A) (1992).

112. REID, *supra* note 38, at 277. Mr. Beldjoudi was born in France but later lost his French nationality because after Algeria became independent from France, the family did not declare their French Nationality within the stated deadline. VAN DIJK AND VAN HOOF, *THEORY AND PRACTICE*, *supra* note 81, at 520. He was also married to a French woman for over twenty years. *Id.*

113. See *Bouchelkia v. France*, App. No. 23078/93, 25 Eur. H.R. Rep. 686 (1997) (upholding the applicant's deportation to Algeria after serving a sentence for aggravated rape, although the applicant had been living in France for over twenty years (since the age of two), and the rape was committed when applicant was seventeen years of age); *Boughanemi v. France*, App. No. 22070/93, 22 Eur. H.R. Rep. 228 (1996) (upholding the deportation of a Tunisian national living in France for twenty years, after serving a three-year sentence for prostitution). *But see* *Nasri v. France*, App. No. 19465/92, 21 Eur. H.R. Rep. 458 (1996) (finding a violation of Article 8 due to special circumstances, even though

One example is *Dalia v. France*, where the Court approved the expulsion of an applicant convicted of drug trafficking even though she had considerable family ties to France.¹¹⁴ Although the applicant spent only one year in prison and was the mother of a French-born child, the Court did not consider her expulsion to be a breach of Article 8.¹¹⁵ The Court explained its uncompromising position on drug trafficking:

[T]he exclusion order made as a result of her conviction was a penalty for dangerous dealing in heroin. In view of the devastating effects of drugs on people's lives, the Court understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge. Irrespective of the sentence passed on her, the fact that Mrs. Dalia took part in such trafficking still weighs as heavily in the balance.¹¹⁶

The Court took a similar position on drugs in *El Boujaidi v. France*, finding that the applicant's expulsion from France was not a violation of Article 8, even though he had spent most of his life in France, received his education there, and had parents and four siblings living there as well.¹¹⁷ Mr. El Boujaidi was convicted of heroin trafficking by the French government and received a six-year prison sentence followed by an expulsion order. After his release, Mr. El Boujaidi committed armed robbery while residing unlawfully in France.¹¹⁸ His case was further complicated by the birth of his French child in 1993, and his cohabitation with the child's French mother.¹¹⁹ He pleaded with the Court to recognize his strong family ties to France. Further, he explained that he committed armed robbery only because he had no way to support himself as a result of his exclusion from French territory, not

applicant was convicted of taking part in gang rape: applicant was a deaf mute with family only in France).

114. *Dalia v. France*, App. No. 26102/95, 33 Eur. H.R. Rep. 26, 645 (2001). Having lived there for many years, three out of her seven siblings were French nationals. *Id.* at 628. She also had a child born in France. *Id.* at 629.

115. *Id.* at 645.

116. *Id.*

117. *El Boujaidi v. France*, 30 Eur. H.R. Rep. 223, 231-31 (1997). Mr. El Boujaidi arrived in France from Morocco at the age of seven and lived there lawfully until his expulsion in 1993. *Id.* at 231.

118. *Id.* at 226.

119. *Id.* at 227.

because he wished to continue a life of crime.¹²⁰ The Court, however, reasoned that there was no breach of Article 8 due to the "seriousness" of the crime of drug trafficking and Mr. El Boujaïdi's criminal conduct after being released from prison.¹²¹

In *Mehemi v. France*, however, the Court took a different position, ruling that the French government's deportation of Mr. Mehemi violated Article 8 even though he was convicted of drug possession and conspiracy to import hashish.¹²² The *Mehemi* Court stressed other factors in its attempt to reach a fair decision, considering the applicant's thirty-three year residency, his marriage to a French national, and their three children.¹²³ Once again, the *Mehemi* decision illustrates the Court's lack of uniformity in its decision-making process.

2. Family ties and length of stay in the country

The *Boultif* Court failed to explain its rationale for practically ignoring Mr. Boultif's brief stay in Switzerland while emphasizing his relatively recent marriage.¹²⁴ Mr. Boultif lived in Switzerland for only sixteen months prior to committing a violent robbery.¹²⁵ As punishment, the Swiss government imprisoned him and refused to renew his residence permit.¹²⁶

In contrast, prior case law involving the deportation of non-nationals for criminal offenses focused on the strength of the applicant's family ties and the length of the applicant's stay in the country.¹²⁷ For example, in *Moustaquim v. Belgium*, the Court held that the deportation of a twenty-two year old applicant, who had lived in Belgium for over twenty years, violated Article 8 in spite of his numerous past offenses.¹²⁸ The Belgian government argued that because the applicant, charged with 147 offenses, had neither become nor desired to become a Belgian citizen,

120. *Id.* at 237-38.

121. *Id.* at 238-39. The Court did not consider the consequences deportation would have on his relationship to his child and the child's mother, because these relationships began after his expulsion order took effect. *Id.*

122. *Mehemi v. France*, App. No. 25017/94, 30 Eur. H.R. Rep. 739, 742 (1997).

123. *See id.* at 749.

124. *See Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1188-89.

125. *Id.* at 1185.

126. *Id.*

127. *See REID, supra* note 38, at 277-79.

128. *Moustaquim v. Belgium*, App. No. 12313/86, 13 Eur. H.R. Rep. 802, 815 (1991).

deportation would not be disproportionate punishment.¹²⁹ The Court disagreed.¹³⁰ The applicant was raised in Belgium since the age of two, was educated in France, and had visited Algeria, the country to which he was deported, on only two occasions.¹³¹ Moreover, most of Mr. Moustaquim's criminal acts were committed during his adolescence.¹³²

Similarly, in the cases of *Berrehab v. Netherlands*, *Nasri v. France*, *Beldjoudi v. France*, and *Mehemi v. France*, the Court ruled that the disputed deportation orders violated Article 8 because of the strength of the applicant's family ties and the length of their residence in the country.¹³³ These holdings, however, do nothing to assist practitioners in reconciling the Court's decisions in *Boughanemi*, *Boujlifa*, and *Boultif*.¹³⁴

3. Length of applicant's marriage and difficulties for spouse

The *Boultif* decision centered its analysis on Mr. and Mrs. Boultif's marriage and their right to stay together, even though they were married for only a short time and had no children.¹³⁵ In fact, two subsequent cases have referenced the *Boultif* decision as setting guidelines for the Court regarding spouses and deportation as punishment for crime.¹³⁶

Mr. Boultif married a Swiss citizen after visiting the country for only three months on a tourist visa, and was living in Switzerland for only sixteen months before committing a violent crime.¹³⁷ The Court felt that expulsion in Mr. Boultif's case would place a great hardship on his wife.¹³⁸ Similarly, the majority in *Beldjoudi* emphasized the hardship that deportation would place on the applicant's wife, noting that she was "born in France of

129. *Id.* at 814.

130. *Id.* at 814–15.

131. *Id.* at 815. All of the applicant's close relatives lived in Belgium. *Id.*

132. *Id.*

133. See *Berrehab v. Netherlands*, App. No. 10730/84, 11 Eur. H.R. Rep. 322 (1988); *Beldjoudi v. France*, 234 Eur. Ct. H.R. 5 (ser. A) (1992); *Nasri v. France*, App. No. 19465/92, 21 Eur. H.R. Rep. 458 (1996); *Mehemi v. France*, App. No. 25017/94, 30 Eur. H.R. Rep. 739 (1997).

134. See *supra* Part V.B.1.

135. See *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1187–88.

136. *Amrollahi v. Denmark*, App. No. 56811/00, Judgment of Jul. 11, 2002, para. 35, at <http://www.echr.coe.int/Eng/Judgments.htm>; *Yildiz v. Austria*, App. No. 37295/97, Judgment of Oct. 31, 2002, para. 41, at <http://www.echr.coe.int/Eng/Judgments.htm>.

137. *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1184.

138. *Id.* at 1188.

French parents, has always lived there, and has French nationality."¹³⁹ Thus, the Court felt that uprooting Mrs. Beldjoudi to Algeria would create great personal and legal difficulties, and noted that such interference might "imperil the unity or even the very existence of the marriage."¹⁴⁰ The Beldjoudis, however, were married for over twenty years,¹⁴¹ whereas the Boultifs were married for less than two years at the time of his arrest.¹⁴²

The significance of the hardship that deportation may cause a spouse, especially in a childless marriage, is an area of controversy for the Court.¹⁴³ For instance, Judge Pettiti's dissent in *Beldjoudi* criticized the majority for finding an Article 8 violation where a repeat criminal offender spent forty-one years of his life in France and was married to a French citizen for twenty-two years.¹⁴⁴ Additionally, Judge Valticos' dissent in *Beldjoudi* questioned whether Article 8 even applied to cases involving an alien married to a citizen of the host country.¹⁴⁵ Judge Valticos warned, however, that interpreting Article 8 as a tool for keeping a criminal in a country "might open the way to many abuses."¹⁴⁶

C. Treatment of Second-Generation Immigrants

The concurring judges in *Boultif* pointed out that a lack of uniformity in the Court's policy on second-generation immigrants is still an issue in need of attention.¹⁴⁷ Most second-generation aliens view deportation as unfair because nationals cannot be deported from their own state, while Contracting States retain the right to deport aliens who commit crimes.¹⁴⁸ An alien who commits a crime is punished under the same laws as a national, but, if the crime is serious, the alien can be expelled.¹⁴⁹ As Judge Pettiti commented in *Beldjoudi*:

139. *Beldjoudi v. France*, 234 Eur. Ct. H.R. 5, 28 (ser. A) (1992).

140. *Id.*

141. *Id.* The couple had been married for twenty-two years. *Id.*

142. *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1184.

143. REID, *supra* note 38, at 276-77.

144. *Beldjoudi*, 234 Eur. Ct. H.R. 5, 32-34 (Pettiti, J., dissenting).

145. *Id.* at 36 (Valticos, J., dissenting).

146. *Id.*

147. *See Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1190-91 (Baka, J., Wildhaber, J., and Lorenzen J., concurring).

148. LEADING CASES, *supra* note 98, at 385.

149. Convention for the Protection of Human Rights, *supra* note 4, protocol 4, art. 3, § 1.

The right of an alien to reside on the territory of a High Contracting Party is not guaranteed as such by the Convention. Similarly, the right of asylum and the right not to be deported do not appear as such in the series of rights and freedoms guaranteed by the Convention.¹⁵⁰

More importantly, critics have singled out the treatment of second-generation immigrants as a significant factor that contributes to a lack of predictability in Article 8 criminal deportation cases.¹⁵¹

Although Mr. Boultif was not a second-generation immigrant, Judges Baka, Wildhaber and Lorenzen also criticized the *Boultif* Court's failure to set concrete standards for the deportation of second-generation immigrants.¹⁵² These judges noted that a considerable amount of Article 8 cases seem to ignore the status of second-generation immigrants.¹⁵³ The Court found in several cases that deportation of second-generation immigrants did not violate Article 8 "even where the applicant had stayed all or most of his life in the country and had rather close family ties there."¹⁵⁴ For example, in *Dalia*, the severity of the applicant's crime of heroin trafficking influenced the Court to support her expulsion by the French government. The Court affirmed the government's decision,¹⁵⁵ even though the applicant was the mother of a French born child, and in spite of expert opinion that separation from her family would cause serious psychological problems for both mother and child.¹⁵⁶

Similarly, the applicant expelled from Belgium in *C. v. Belgium* had lived in the country since the age of eleven and fathered a Belgian-born son.¹⁵⁷ Further, the applicant expelled in *Bouchelkia v. France* was a long-time resident who arrived in France at the age of two.¹⁵⁸ Conversely, in five other cases involving second-generation immigrants in similar circumstances

150. *Beldjoudi*, 234 Eur. Ct. H.R. 5, at 32 (Pettiti, J., dissenting).

151. *Boughanemi v. France*, App. No. 22070/93, 22 Eur. H.R. Rep. 228, 250 (1996) (Martens, J., dissenting).

152. *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1190-91 (Baka, J., Wildhaber, J., and Lorenzen J., concurring).

153. *Id.*

154. *Id.*

155. *Dalia v. France*, App. No. 26102/95, 33 Eur. H.R. Rep. 26, 638 (1998).

156. *Id.* at 630.

157. *C. v. Belgium*, App. No. 21794/93, 12 Eur. Ct. H.R. 915, 919 (1996).

158. *Bouchelkia v. France*, App. No. 23078/93, 25 Eur. H.R. Rep. 686, 688 (1998).

the Court found Article 8 violations,¹⁵⁹ adding further confusion for practitioners and applicants wishing to bring their cases to the Court.

Several members of the Court condemn this inconsistency.¹⁶⁰ For example, Judge Martens commented that the Court's case-by-case approach leads to a "lack of legal certainty" in Article 8 criminal deportation cases.¹⁶¹ The *Boultif* decision highlights this uncertainty because it emphasizes factors that had almost no credence in previous Court opinions.¹⁶² For example, the *Boultif* Court discussed the mildness of Mr. Boultif's first sentence, his good behavior, and the hardships his wife would incur were she to follow him to Algeria.¹⁶³ The Court, however, paid little attention to Mr. Boultif's short residence in the country, his lack of family ties with the country, or the violent nature of his crime.¹⁶⁴ This analysis does not make sense in light of the Court's imprecise position on the deportation of second-generation immigrants. The concurrence in *Boultif* suggested that the case-by-case approach taken by the majority is a major issue¹⁶⁵ that has caused many problems within the Court for over a decade.¹⁶⁶

Certain Judges have suggested that if the Court clarifies its position on second-generation immigrants, this will bring some measure of predictability to Article 8 deportation cases.¹⁶⁷ Members of the Court have suggested three basic approaches. First, Judges De Meyer and Morenilla assert that second-generation immigrants should be treated the same way as nationals, who cannot be expelled from a country as punishment for committing a crime under any circumstances.¹⁶⁸ In the *Boujlifa*

159. *Moustaquim v. Belgium*, App. No. 12313/86, 13 Eur. H.R. Rep. 802, 815 (1991); *Beldjoudi v. France*, 234 Eur. Ct. H.R. 5, 28 (ser. A) (1992); *Nasri v. France*, App. No. 19465/92, 21 Eur. H.R. Rep. 458, 471 (1996); *Mehemi v. France*, App. No. 25017/94, 30 Eur. H.R. Rep. 739, 753, (1997); *Ezzouhdi v. France*, App. No. 47160/99, Eur. Ct. H.R. 2001, available at <http://www.echr.coe.int/Eng/Judgments.htm>.

160. *Sherlock*, *supra* note 10, at 70.

161. *Boughanemi v. France*, App. No. 22070/93, 22 Eur. H.R. Rep. 228, 249 (1996) (Martens, J., dissenting).

162. *See Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50.

163. *Id.* at 1188.

164. *Id.* at 1187-88.

165. *See id.* at 1190-91 (Baka, J., Wildhaber, J., and Lorenzen J., concurring).

166. *Sherlock*, *supra* note 10, at 70.

167. *Id.* at 72-73.

168. *Boujlifa v. France*, App. No. 24404/94, 30 Eur. H.R. Rep. 419, 440 (1997) (Morinella, J., De Meyer, J., dissenting).

dissent, Judge Morenilla described the deportation of a second-generation immigrant, who lived in France since the age of five, as “an aggravation of the criminal penalty . . . in relation to those imposed on French nationals, so that it is discriminatory.”¹⁶⁹ He reasoned further that deportation is also unjust to the country that is forced to take in the alien, because that country is not responsible for the “antisocial”¹⁷⁰ behavior of a criminal with whom it has no ties.¹⁷¹

Judge Martens, on the other hand, has recommended a more moderate approach. In *Boughanemi*, he suggested that greater certainty could be achieved in Article 8 criminal deportation cases by allowing deportation of second-generation immigrants only under “exceptional circumstances.”¹⁷² Judge Martens defined exceptional circumstances as “serious crimes against the state, political or religious terrorism or holding a leading position in a drug trafficking organisation.”¹⁷³ Moreover, he criticized the majority’s approach, calling it “a source of embarrassment because it obliges the Court to make well-nigh impossible comparisons between the merits of the case before it and those from which it has already decided.”¹⁷⁴ In *Nasri*, Judge Wildhaber reasoned similarly, suggesting that only second-generation immigrants who have committed “very serious crimes (such as murder, rape, massive drug trade)” should be expelled from a Contracting State.¹⁷⁵

Finally, certain judges support giving Contracting States broad discretion to control crime through the threat of deportation. For instance, although Judge Pettiti advocates developing precise criteria in Article 8 deportation cases, he points out that the threat of deportation is one of the most effective deterrents to crime.¹⁷⁶ He explains further:

169. *Id.* at 438–39 (Morinella, J., dissenting).

170. *Id.*

171. *Id.*

172. *Boughanemi v. France*, App. No. 22070/93, 22 Eur. H.R. Rep. 228, 250 (1996) (Martens, J., dissenting).

173. *Id.*

174. *Id.* at 249 (Martens, J., dissenting). Judge Martens went on to comment that the majority’s decision was “tainted with arbitrariness,” stating that the Court was unable to derive any real guidance from prior case law in the area. *Id.*

175. *Nasri v. France*, App. No. 19465/92, 21 Eur. H.R. Rep. 458, 481 (1996) (Wildhaber, J., concurring).

176. *Beldjoudi v. France*, 234 Eur. Ct. H.R. 5, 33 (ser. A) (1992) (Pettiti, J., dissenting).

Each member State . . . retain[s] the right to define the severity of sentences. In many States deportation is an exemplary penalty in addition to the sentence. In countries with a high proportion of aliens in the population, it is deportation much rather than the threat of prison which is a safeguard against repeated offending . . . [a] deportation measure, as accepted in criminology and criminal policy, is also a measure of protection for the potential victims of repeated offenders, especially in countries with a serious increase in crime and a high concentration of organised crime.¹⁷⁷

In spite of the diverse views present in the Court, the majority maintains that a case-by-case approach is the most adequate way to settle these claims in a just manner.¹⁷⁸ The Court continues to measure proportionality through a balancing test, comparing the right of the state to control crime against the applicant's right to respect for private and family life.¹⁷⁹ Moreover, the Court stands firmly behind the right of a Contracting State to use deportation as an effective means of controlling crime.¹⁸⁰

VI. IMPACT

In *Boultif*, the Court decided that Mr. Boultif's deportation violated Article 8, the right to respect for private and family life, because expulsion was disproportionate to the government's need to prevent crime and disorder.¹⁸¹ In prior cases, the Court developed several factors for measuring whether an applicant's deportation is necessary in a democratic society.¹⁸² In *Boultif*, the Court attempted to refine these factors, naming them guiding principles, to be used to assess whether deportation of an applicant is necessary in a democratic society.¹⁸³

The lack of bright-line rules for dealing with cases similar to *Boultif* is frustrating to applicants and their attorneys, leaving them with no measuring stick for evaluating the probable outcome of their claims. The Court's emphasis on Mr. Boultif's rehabilitation and its lack of emphasis on the violent nature of his

177. *Id.*

178. See Sherlock, *supra* note 10, at 70.

179. *Id.* at 64.

180. *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1187.

181. *Id.* at 1188.

182. LEADING CASES, *supra* note 98, at 382-85.

183. See *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1187.

crime differs from the Court's analysis in prior case law.¹⁸⁴ Nevertheless, the *Boultif* Court's analysis comports with other recent cases by examining the hardships that expulsion would impose on the spouse of a deported applicant.¹⁸⁵ The Court's analysis in *Boultif* attempts to clarify, but is yet another example of its case-by-case approach to criminal deportation cases alleging Article 8 violations.

Because of the majority's case-by-case approach, the *Boultif* decision is only helpful to future applicants in approximately the same factual situation as Mr. Boultif and his wife. The majority maintains that because their decisions affect the families, spouses and children of applicants in Article 8 cases, a case-by-case approach is the only way to adjudicate each claim in a just and fair manner.¹⁸⁶ Nevertheless, the Court's must reconcile its holding in *Boultif* with its position on the deportation of second-generation immigrants. Until then, the Court's holdings will continue to have seemingly disproportionate effects on applicants. The Court's failure to clarify its reasoning or to set out a reasonably predictable way of dealing with similar cases makes *Boultif* yet another frustrating decision in a confusing series of decisions by the Court. In spite of the *Boultif* decision, judges will continue to battle for a more predictable yet fair way of adjudicating these cases.

*Sally Frontman-Cain**

184. See Sherlock, *supra* note 10, at 70–74.

185. See REID, *supra* note 38, at 276–78.

186. *Boultif*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, at 1188–89.

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