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RESEARCH ARTICLE

Social Identity and the Right to Belong – The ECtHR's Judgment in *Hoti v. Croatia*

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The article analyses the judgment of *Hoti v. Croatia* of the European Court of Human Rights which has to be seen as a landmark case for the rights of stateless persons in Europe. Recognizing the particular vulnerability of stateless persons, the Court finds a violation of the right to private life in Croatia's failure to provide for an effective and accessible regularisation mechanism. Moreover, as this contribution argues, the *Hoti* case can be seen as a consolidation of the ECtHR's social identity approach to protect the social ties of migrants in respect of the right to remain, the right to a legal status and the right to citizenship in the state of residence.

Keywords: Human Rights; ECHR; Right to Private Life; Citizenship; Nationality; Statelessness; Social Identity; Regularisation

1 Introduction

On 26 April 2018, the European Court of Human Rights (ECtHR) delivered its judgment in the case of *Hoti v. Croatia*.[1] The judgment is a landmark case for the rights of stateless persons under the European Convention on Human Rights (ECHR).[2] The Court recognises the applicant's statelessness as a central feature of the case. Having the particular background of the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY) in mind, it examines how statelessness affects Mr Hoti's access to the rights guaranteed by the Convention and how the lack of documentation and of access to official registers impedes every attempt to regularise his legal status as a long-time resident in Croatia and thus fails to protect his right to private life.

A second noteworthy aspect of the case of *Hoti v. Croatia* is how the Court consolidates its social identity approach to safeguard the rights of non-citizens in Convention states.[3] Even though the ECHR does not explicitly guarantee a right to a particular legal status or to citizenship, the case law under Article 8 ECHR recognises the relevance of a person's social ties from a human rights perspective. Questions of membership, belonging and citizenship form the core of a person's identity and private life.[4] As will be argued, this approach to migrants' social identity entails an implicit recognition of a right to remain, a right to a legal status and a right to citizenship for non-citizens on the basis of their center of life.

After first setting out the facts of the case (2), this contribution will summarize the judgment in *Hoti v. Croatia* and discuss how the Strasbourg judges approach the issue of statelessness as well as the right to regularisation and a stable residence status (3). The article will then trace the development of the Court's social identity approach and argue that the recognition of migrants' social ties and networks becomes increasingly important in safeguarding the rights of non-citizens to residence and membership under the Convention (4).

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1 *Hoti v. Croatia* [2018] ECtHR Application No. 63311/14.

2 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5; See also Katja Swider, '*Hoti v. Croatia* – a Landmark Decision by the European Court of Human Rights on Residence Rights of a Stateless Person' (*European Network on Statelessness Blog*, 3 May 2018) <https://www.statelessness.eu/blog/hoti-v-croatia-landmark-decision-european-court-human-rights-residence-rights-stateless-person> accessed 3 January 2019; Hélène Lambert, 'Nationality and Statelessness Before the European Court of Human Rights: A Landmark Judgment but What about Article 3 ECHR?' (*Strasbourg Observers*, 16 May 2018) <https://strasbourgobservers.com/> accessed 3 January 2019.

3 For the categories of non-citizens see David Weissbrodt and Michael Divine, 'Unequal Access to Human Rights: The Categories of Noncitizenship' (2015) 19 Citizenship Studies 870.

4 See also the Dissenting Opinion of Judge Pinto de Albuquerque in *Ramadan v. Malta* [2016] ECtHR Application No. 76136/12.

2 Displacement, State Succession and Rejected Permits: The Facts

Bedri Hoti was born in 1962 in Kosovo which was at that time part of the Socialist Federal Republic of Yugoslavia.[5] His parents had previously fled Albania and were granted refugee status in Kosovo. In 1979, the applicant moved to Croatia (also one of the republics of SFRY). Mr Hoti has been living and working in the same town of Novska in Croatia ever since.[6] He is not married, has no children and has lost contact to other members of his family after his parents have died.[7] Apart from a driving licence, Mr Hoti has no travel or identity documents and all attempts to obtain documents failed.[8] His birth certificate—issued by Kosovar authorities—notes that Mr Hoti does not have a nationality.[9] The Croatian authorities considered him to be a citizen of Serbia and Montenegro, Kosovo or Albania.

After the independence of Croatia from the SFRY and the subsequent war, Mr Hoti applied for Croatian citizenship in 1992.[10] The application failed because Mr Hoti was not able to submit evidence that he had renounced his—alleged—Albanian citizenship within a period of two years, even though he theoretically fulfilled all requirements to acquire Croatian citizenship.[11] A second application three years later was rejected because the applicant did not have a registered residence in Croatia for an uninterrupted period of five years—as he was only registered with the local authorities since 1993.[12] Similarly, an application for a permanent residence permit was rejected in 2001 because Mr Hoti did not fulfil the requirements for such permit.[13]

Even though Mr Hoti's repeated attempts to regularise his legal status in Croatia since 1987 were futile, he nevertheless stayed in Croatia, sometimes irregularly although informally tolerated by the authorities, sometimes with a temporary residence permit on humanitarian grounds valid for a couple of months.[14] When he tried to prolong this temporary residence permit for the fourth time in 2014 his request was denied as he failed to provide a valid travel document. His appeal against this decision was still pending when Mr Hoti lodged his complaint with the ECtHR in 2014. After the case was communicated to the Croatian government, the applicant was again granted a temporary residence permit on humanitarian grounds.[15]

3 Particular Vulnerability of Stateless Persons and a Right to Regularisation: The Judgment

In his complaint to the ECtHR, Mr Hoti argued that the 'insecurity of his residence status in Croatia due to the fact that he had not had an effective possibility to regularise his residence status' violated the right to private life protected by Article 8 ECHR.[16]

The Croatian government, by contrast, maintained that the applicant was in the meantime granted another temporary residence permit on humanitarian grounds and thus lacked victim status and that he had not pursued the relevant steps for regularising his residence status in Croatia failing to exhaust domestic remedies. On the merits, Croatia disputed that the applicant was stateless but that he had Albanian citizenship. Thus, the government argued, he could have regularised his residence status any time by providing a valid travel document.

The Court first underlined the complexity of the factual and legal situation of the case.[17] Then it weighed the arguments of the parties and came to a unanimous verdict: Croatia had not complied with its positive obligation under Article 8 ECHR to provide an effective and accessible procedure enabling Mr Hoti to have his stay and status in Croatia determined with due regard to his private life interests.[18]

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[5] *Hoti v. Croatia* (n 1) para 5 ff.

[6] *Hoti v. Croatia* (n 1) para 7.

[7] *Hoti v. Croatia* (n 1) para 8 and 21.

[8] *Hoti v. Croatia* (n 1) para 35 and 38.

[9] *Hoti v. Croatia* (n 1) para 58.

[10] *Hoti v. Croatia* (n 1) para 18 ff.

[11] *Hoti v. Croatia* (n 1) para 25.

[12] *Hoti v. Croatia* (n 1) para 26 ff.

[13] *Hoti v. Croatia* (n 1) para 34 ff.

[14] Lambert (n 3).

[15] *Hoti v. Croatia* (n 1) para 55 f. Croatia's request to strike the application out of the list of cases as being resolved on the basis of the new permit was rejected by the Court as the 'effects of the temporary residence status on humanitarian grounds cannot be said to amount to a measure removing the uncertainty of the applicant's residence status of which he complains' (para 82).

[16] *Hoti v. Croatia* (n 1) para 75.

[17] *Hoti v. Croatia* (n 1) para 109.

[18] *Hoti v. Croatia* (n 1) para 141. The complaints raised under Article 14 in conjunction with Article 8 ECHR and Article 1 of Protocol No. 12 were declared manifestly ill-founded.

Three points seem of particular interest and shall be discussed in more detail in the following outline: 1) the ECtHR's acceptance of the applicant's statelessness and the recognition of stateless persons as belonging to a particular group which is exposed to particular vulnerability (3.1); 2) the Court's finding of a right to an accessible, fair and effective regularisation procedure under Article 8 ECHR (3.2); and 3) the particular circumstances of the case at hand in the context of the collapse of the SFRY (3.3).

3.1 Statelessness as a Factor of Particular Vulnerability

A central element of the case was the question of whether Mr Hoti was, in actuality, stateless and what impact this had on his life. The Croatian government had disputed this, arguing that the applicant was not stateless but Albanian citizen by descent through his parents.[19] On the other side, the applicant's claim that he was, in fact, stateless was supported by UNHCR as a third-party intervention stressing that the disintegration of the SFRY had left thousands of former SFRY citizens stateless.[20]

Dissolution and succession of states indeed are highly complex situations that expose the population of the predecessor states to the risk of statelessness.[21] Mr Hoti's biography mirrors the complex and multifaceted history of statehood and citizenship on the Balkan. He was born to Albanian parents in Kosovo, then an autonomous province of Serbia, which was itself one of the republics of the SFRY. He later settled in another republic of the SFRY: Croatia. After the dissolution of the SFRY, Serbia, Croatia and, a bit later, Kosovo became independent states.[22] Albania transitioned to a parliamentary system in 1991.

The Court acknowledged that Mr Hoti's birth certificate did not state a nationality, that none of the involved successor states accepted him as a citizen and that it cannot be reconstructed which nationality he had at which point in time. Moreover, the ECtHR was of the opinion that acquiring Albanian nationality was not an effective and realistic option for Mr Hoti.[23] Recalling the relevant provisions of the Convention relating to the Status of Stateless Persons[24] and without requiring any further proof, the Court accepted that 'according to the available information, the applicant is at present stateless'.[25]

This straightforward recognition of Mr Hoti's statelessness is important.[26] The Court refrained from placing the burden of proving a negative—the fact that he was not a national of neither Albania, Kosovo nor Serbia—on the applicant and implicitly rejected interpretations of Article 1 of the 1954 Convention according to which the impossibility of re-acquiring a nationality was a precondition for recognizing statelessness.[27]

At the same time, the Court recognised 'stateless migrants' as belonging to a specific group which is at particular risk of becoming a victim of human rights violations[28]—and who are often required to meet requirements which by virtue of their status they are unable to fulfil[29].[30] This finding differs substantially

[19] *Hoti v. Croatia* (n 1) para 100.

[20] *Hoti v. Croatia* (n 1) para 105 ff.

[21] See among many Ineta Ziemele, 'State Succession and Issues of Nationality and Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014); Jeffrey Blackman, 'State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law' (1998) 19 Michigan Journal of International Law 1141; Christine Kreuzer, 'Kommentar: Die Bedeutung der Menschenrechte für die Regelung der Staatsangehörigkeit' in Kay Hailbronner and Eckart Klein (eds), *Flüchtlinge – Menschenrechte – Staatsangehörigkeit: Menschenrechte und Migration; Beiträge anlässlich des Symposiums am 9./10. Oktober 2000 in Potsdam* (Müller 2002). The need to protect individuals from statelessness is also reflected in Article 3 of the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession of 2006, ETS No. 200, and Article 4 of the ILC Draft Articles on Nationality of Natural Persons in relation to the Succession of States of 1999 which call upon states to take the necessary measures to prevent statelessness in the context of state succession.

[22] See on the history of citizenship in the SFRY and of its dissolution also the ECtHR's judgment in *Kurić and Others v Slovenia (Chamber)* [2010] ECtHR Application No. 26828/06, para. 19 ff. as well as Andreas Zimmermann, 'Dissolution of Yugoslavia' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011); Christine Kreuzer, *Staatsangehörigkeit und Staatensukzession : die Bedeutung der Staatensukzession für die staatsangehörigkeitsrechtlichen Regelungen in den Staaten der ehemaligen Sowjetunion, Jugoslawiens und der Tschechoslowakei* (Duncker und Humblot 1998).

[23] *Hoti v. Croatia* (n 1) para 136.

[24] Convention Relating to the Status of Stateless Persons, 28 September 1954, 360 UNTS 117 (1954 Convention).

[25] *Hoti v. Croatia* (n 1) para 110.

[26] See also Swider (n 3).

[27] Switzerland, for example, only recognises individuals as stateless if they have lost their nationality through no fault of their own and have no means of reinstating it, see Federal Tribunal, 2C_1/2008, judgment of 28 February 2008, E. 3.2. This practice is in contradiction to the interpretation of the 1954 Convention by UNHCR and now also seems to contradict the case law of the ECtHR. See also the criticism voiced by UNHCR regarding this practice, UNHCR Büro für die Schweiz und Liechtenstein, Staatenlosigkeit in der Schweiz, November 2018, <https://www.unhcr.org/dach/wp-content/uploads/sites/27/2018/11/CH_UNHCR-Statelessness_in_Switzerland-GER-screen.pdf> accessed 28 December 2018.

[28] See also Swider (n 3); Lambert (n 3).

[29] *Hoti v. Croatia* (n 1) para 137.

[30] See also David Weissbrodt and Clay Collins, 'The Human Rights of Stateless Persons' (2006) 28 Human Rights Quarterly 245.

from the ruling in the case of *Ramadan v. Malta*[31] where the Court doubted whether the applicant was stateless, required him to present proof and rejected statelessness as a factor of particular vulnerability.[32]

Stateless migrants, according to *Hoti v. Croatia*, had to be distinguished from both erased persons as well as settled migrants. Mr Hoti, the Court noted, complained about the uncertainty of his situation and the impossibility to regularise his residence status after an uninterrupted stay in the country—sometimes legally, sometimes tolerated—of almost forty years.[33] The case was not about access to the territory but concerned the situation of a stateless migrant who after decades of residence had no legal status and no effective means of acquiring such legal status. It concerned, according to the Court, 'private life and immigration *lato sensu*, both of which had to be understood in the context of the complex circumstances of the dissolution of the former SFRY'.[34] The judges thus suggested having a broad view on the immigration and private life issues brought to the fore by the case. Unlike stateless persons erased from the registers like the applicants in *Kurić and Others v. Slovenia*,[35] Mr Hoti neither had SFRY nationality nor registered domicile or residence in Croatia at the time of independence.[36] 'Settled migrants', on the other hand, were 'persons who had already been formally granted a right of residence in a host country and where a subsequent withdrawal of that right, with a possibility of expulsion, was found to constitute an interference with his or her right to respect for private and/or family life'.[37] Further, the case was different from the situation of persons seeking admission to a country on the basis of family ties.[38] This recognition of stateless migrants as a particular category of non-citizens acknowledges the particular vulnerability of stateless migrants when it comes to access to a legal status or even citizenship.[39]

3.2 A Right to an Accessible, Fair and Effective Regularisation Procedure and a Stable Residence Status

The main dispute in *Hoti v. Croatia* was whether Croatia had violated its positive obligations under Article 8 ECHR to ensure everyone within their jurisdiction with an effective enjoyment of their private and family life by failing to allow Mr Hoti to regularise his stay in the country.[40]

The ECtHR recalled that Article 8 ECHR protects the totality of social ties between a migrant and the community in which he or she lives.[41] Even though the Convention does not guarantee non-citizens a right to enter or reside in a particular state or a right to a particular residence permit, it may entail a positive obligation to ensure effective enjoyment of the right to private and family life by providing a concrete and accessible solution for the individual concerned. It then referred to its case law according to which the positive obligation under Article 8 imposes on states an obligation to provide for an effective and accessible means of protecting the right to respect for private and family life.[42]

With regard to the case at hand, the Court then noted that the uncertainty of the applicant's residence status in Croatia has adverse repercussions on his private life. He is dependent on the authorities to prolong his residence permit every year, his prospects of finding employment are hampered without a stable legal status, and he has difficulties securing normal health insurance and pension rights.[43] In addition, the Court has identified four features which made the situation of Mr Hoti unique: the breakup of the former SFRY, Mr

[31] *Ramadan v. Malta* [2016] ECtHR Application No. 76136/12.

[32] See Marie-Bénédicte Dembour, '*Ramadan v. Malta*: When Will the Strasbourg Court Understand That Nationality Is a Core Human Rights Issue?' (*Strasbourg Observers*, 22 July 2016) <http://blogs.brighton.ac.uk/humanrights/2016/07/22/ramadan-v-malta-when-will-the-strasbourg-court-understand-that-nationality-is-a-core-human-rights-issue/> accessed 3 December 2019. See also the Dissenting Opinion of Judge Pinto de Albuquerque in *Ramadan v. Malta* (n 4).

[33] *Hoti v. Croatia* (n 1) para 117.

[34] *Hoti v. Croatia* (n 1) para 117.

[35] *Kurić and Others v. Slovenia* (n 22).

[36] *Hoti v. Croatia* (n 1) para 111.

[37] *Hoti v. Croatia* (n 1) para 115. Referring to landmark cases such as *Üner v. The Netherlands* [2006] ECtHR Application No. 46410/99; *Maslov v. Austria* [2008] ECtHR Application No. 1638/03 and *Jeunesse v. the Netherlands* [2014] ECtHR 12738/10.

[38] *Hoti v. Croatia* (n 1) para 116.

[39] See on the lack of documentation as an impediment to regular migration for stateless persons Sophie Nonnenmacher and Ryszard Cholewinski, 'The Nexus Between Statelessness and Migration' in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 254 ff.

[40] *Hoti v. Croatia* (n 1) para 75.

[41] *Hoti v. Croatia* (n 1) para 119.

[42] *Hoti v. Croatia* (n 1) para 123.

[43] *Hoti v. Croatia* (n 1) para 126.

Hoti's statelessness, his lack of ties to any state other than Croatia and the fact that the applicant was always tolerated by the Croatian authorities even if he had no residence permit.[44]

In its assessment of the regularisation procedures open to Mr Hoti, the Court criticized the national authorities for failing to take into account the applicant's private-life considerations. Moreover, contrary to the principles of the 1954 Convention the authorities were requiring the applicant to provide documents which by virtue of his statelessness he was unable to provide and did not offer any assistance in acquiring these documents.[45]

Finally, it found that the discretionary procedure to be granted a temporary residence permit on humanitarian grounds could not provide the necessary accessibility, effectiveness and stability required by the right to private life. Taking all these factors into consideration, the Court concluded that Croatia had not complied with its positive obligation to provide an effective and accessible procedure or a combination of procedures that would have enabled Mr Hoti to have the issues of his further stay and status in Croatia determined with due regard to his private-life interests.[46] This failure to provide for a regularisation procedure, so the conclusion of the ECtHR, amounted to a violation of Article 8 ECHR.[47]

3.3 A Unique Situation? The Status of Stateless Migrants after the Dissolution of Former Yugoslavia

In its judgment, the Court repeatedly hinted at the complexity of the situation after the dissolution of the SFRY and Mr Hoti's statelessness that distinguish the case from other migration cases. In particular, the complexity of the situation after the dissolution of the former SFRY created a 'very specific factual and legal situation'.[48] The collapse of the SFRY, the succession process and the subsequent wars in the successor states had additional negative effects on Mr Hoti's residence status.[49]

The argument of the ECtHR of the exceptionality of the context of state succession seems to imply that the case of Mr Hoti is unique, and the Court's ruling does not have implications for non-citizens in other situations. This exceptionality-argument is not entirely convincing. While the particular circumstances of the case explain why Mr Hoti is stateless, his statelessness is not alone decisive for the failure of Croatia to fulfil its positive obligations under Article 8 ECHR. Even though the Court distinguishes the situation of stateless migrants from persons, who were erased from registers, or from persons who are threatened with withdrawal of their residence permit and removal, the right to private life applies to everyone alike, provided that a person has established a private life which is to be protected. What ultimately seems decisive in the case of *Hoti v. Croatia* is the fact that the applicant had lived in Croatia for more than forty years; that he has no social or other links with any other country that his presence had been tolerated by the Croatian authorities; and that he was able to make a living and build a life in Croatia during all those years.[50] In other words, what was decisive was that Mr Hoti had such close ties to Croatia and none to any other country. Given that he is stateless, he, moreover, had no other country to turn to. Therefore, the ECtHR concluded, not having access to a regularisation procedure that would allow the applicant to stay in the country lawfully and permanently would violate Mr Hoti's right to private life.

Coming to the conclusion that not the particular circumstances of the case and the applicant's statelessness as a consequence of the dissolution of the SFRY was ultimately decisive for the finding of the violation of Article 8 ECHR, also sheds a new light on the question of the relevance of the judgment in the context of access to citizenship. Not being called upon to examine whether the applicant should be granted Croatian citizenship, the Court was able to leave this question open in the judgment. Consequently, it also rejected the argument of the government that Mr Hoti could have tried to acquire Croatian citizenship and underlines that an alien may wish to continue living in a state without necessarily acquiring its nationality.[51]

Does this mean that Mr Hoti would also have had a legitimate claim to acquire Croatian nationality under Article 8 ECHR if that would have been the subject of the case? Even though the Court implicitly states that

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[44] *Hoti v. Croatia* (n 1) para 127 ff.

[45] *Hoti v. Croatia* (n 1) para 138.

[46] *Hoti v. Croatia* (n 1) para 141.

[47] The 1954 Convention, by contrast, does not oblige states to provide stateless persons with a right to enter or remain, see Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2008) 248 f.

[48] *Hoti v. Croatia* (n 1) para 109.

[49] *Hoti v. Croatia* (n 1) para 127.

[50] See for a similar argument David Owen, 'On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights' (2018) 65 Netherlands International Law Review 299, 314.

[51] *Hoti v. Croatia* (n 1) para 131.

there is no right to a particular nationality, just as there is no right to a particular type of residence permit, the ruling seems to leave room for such a conclusion. The Court has repeatedly recognised that access to citizenship can fall under the right to private life[52] and in the case of *Hoti v. Croatia* does not depart from that position. The case of *Hoti v. Croatia* thus seems in line with earlier case law recognizing the right to citizenship under the Convention as part of a person's social identity.

In the following, the relevance of the concept of social identity as part of a person's private life in migration cases before the ECtHR shall be discussed in more detail. An analysis of the Court's social identity approach shows that the social ties of non-citizens are directly relevant for their right to remain in their host country and to have their rights protected through a certain legal status.

4 The ECtHR's Social Identity Approach

Mr Hoti's social ties to Croatia have been decisive for the Court's finding of a violation of his right to private life. As the ECtHR reiterated at the outset of its ruling, 'Article 8 protects, inter alia, the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity. Thus, the totality of social ties between a migrant and the community in which he or she lives constitutes part of the concept of private life under Article 8'.[53] With the reference to a person's social identity under Article 8 ECHR, the Court had aligned the *Hoti* judgment with other judgments where it has developed its 'social identity' approach. In this line of case law the Court expanded its protection of the rights and social ties of non-citizens from covering a right to remain for settled migrants (4.1), to a right to a legal status (4.2), and ultimately a right to citizenship (4.3).

4.1 Social Identity and Deportation

The first time the Court qualified a person's social identity as part of her private life under Article 8 in a migration case was in the case of *Üner v. The Netherlands*.[54] In that case, the Court found that 'as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of "private life" within the meaning of Article 8'.[55] Prior to that judgment, the Court had only invoked the concept of social identity as a right to establish relationships with other human beings in cases concerning a person's name, gender, religion, sexual orientation, and or parental ties.[56]

In *Üner v. The Netherlands*, the Court had still rejected a violation of Article 8. By contrast, in the case of *Maslov v. Austria*, it found for the first time a violation of the right to private life in a case concerning a young migrant who grew up in Austria because of the impact a removal of this man would have on his social identity.[57] The Court found that even though the applicant had not established sufficient family ties to rely on the right to family life, he could, as a 'settled migrant', invoke the right to private life to protect the relationship he has developed with other human beings and the outside world.[58] In its subsequent case law, the European Court of Human Rights developed this jurisprudence. It stressed the need to protect the right to remain of settled migrants and highlighted the risk of deportations violating Article 8 ECHR if they do not strike a fair balance between the interests of the state involved and the impact on the individual concerned.[59]

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[52] See, for example, *Karassev v. Finland (Decision)* [1999] ECtHR Application No. 31414/96; *Kurić and Others v. Slovenia* (n 22) para 353; *Slivenko v. Latvia* [2003] ECtHR Application No. 48321/99 [77]; *Genovese v. Malta* [2011] ECtHR Application No. 53124/09 [30]; *Ramadan v. Malta* (n 31) para 62.

[53] *Hoti v. Croatia* (n 1) para 119.

[54] *Üner v. The Netherlands* (n 37).

[55] *Üner v. The Netherlands* (n 37) para 59.

[56] See e.g. *Mikulić v. Croatia* [2002] ECtHR Application No. 53176/99 [53]; *Pretty v. The United Kingdom* [2002] ECtHR Application No. 2346/02 [61]; *Paradiso and Campanelli v. Italy* [2017] ECtHR Application No. 25358/12 [159 and 161]; *S and Marper v. The United Kingdom* [2008] ECtHR Application Nos. 30562/04 and 30566/04 [66]. See also William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 375 ff.

[57] *Maslov v. Austria* (n 37).

[58] *Maslov v. Austria* (n 37) para 63.

[59] Subsequent cases where the Court invoked the concept of social identity are the cases of *AA v. The United Kingdom* [2011] ECtHR Application No. 8000/08; *Khan AW v. The United Kingdom* [2010] ECtHR Application No. 47486/06; *Khan v. Germany* [2015] ECtHR Application No. 38030/12; *Levakovic v. Denmark* [2018] ECtHR Application No. 7841/14; *MPEV and Others v. Switzerland* [2014] ECtHR Application No. 3910/13; *Novruk and Others v. Russia* [2016] ECtHR Application No. 31039/11; *Omojudi v. The United*

4.2 Social Identity and Legal Status

The Court, however, not only applied the social identity approach to cases concerning the deportation or removal of settled migrants. It soon expanded its case law to other cases concerning non-nationals with extensive social ties in their host state. The case of *Kurić and Others v. Slovenia* concerned the situation of persons 'erased' from the permanent residents' registers after the dissolution of the SFRY and the Slovenian independence. The Chamber compared the situation of citizens of the SFRY who were without documentation after the state succession to the situation of long-term migrants and found that the former had a stronger residence status.[60] Considering that the applicants had all spent a substantial part of their lives in Slovenia and that they had developed a network of personal, social, cultural, linguistic and economic ties that make up their private live, Slovenia interfered with their right to private life by refusing to regulate their situation and to issue permanent residence permits.[61]

In the case of *Osman v. Denmark,* the Court referred to the social identity approach in the context of a case of a young woman who grew up in Denmark but was forcibly sent to Kenya by her father and thus lost her residence permit. Invoking Article 8 ECHR she complained that by refusing to reinstate her residence permit Denmark violated her right to private and family life considering that she had spent her formative years in Denmark and still significant social ties to the country. The Court accepted that 'very serious reasons' were required to justify the authorities' refusal to issue her a residence permit and ultimately found a violation of Article 8 ECHR.[62]

The case law above shows that the Court also applies the social identity approach in cases concerning the regularisation of the stay of a person with substantial ties to the host society.[63] It is within this category of cases like *Kurić and Others v. Slovenia* and *Osman v. Denmark* concerning access to a residence status that we also find the case of *Hoti v. Croatia.* However, in the *Kurić* and *Osman* cases, the applicants previously had a right of residence and were erased from the registers or lost it. The *Hoti* case, in contrast, concerns a stateless person who claims access to a residence status for the first time and the difficulties faced by stateless persons to fulfil the formal requirements to acquire a legal status in the first place.

4.3 Social Identity and Citizenship

In parallel, the Court also applied the idea of social identity as part of a person's private life to cases concerning citizenship, even though the Convention does not guarantee a right to citizenship[64] and the Court has often been reluctant to scrutinize domestic nationality laws.[65]

In fact, it was shortly before the Üner case that the idea of a link between a person's social identity and her citizenship was brought up in a partly dissenting opinion by Judge Maruste in *Riener v. Bulgaria.*[66] The applicant had complained, *inter alia,* the refusal of the Bulgarian authorities to accept her renunciation of Bulgarian citizenship violated her rights under the Convention. The Court examined the complaint under Articles 8 and 13 ECHR and denied a violation arguing that the refusal to accept her renunciation of citizenship did not interfere with her right to private life.[67] In his dissenting opinion, Judge Maruste argued that 'I see nationality (citizenship) as part of someone's identity. If Article 8 covers the right to self-determination in respect of, for example, sexual orientation and so forth, it undoubtedly also covers the right to self-determination [*sic*] in respect of nationality and citizenship'.[68] Even though the Convention does not guarantee a right to citizenship, there should be a right to apply for citizenship and also a negative right to renounce it based on the general ideas of freedom, freedom of choice, and self-determination. 'This', he argues, 'is part

Kingdom [2009] ECtHR Application No. 1820/08; *Palanci v. Switzerland* [2014] ECtHR Application No. 2697/08; *Samsonnikov v. Estonia* [2012] ECtHR Application No. 52178/10; *Vasquez v. Switzerland* [2013] ECtHR Application No. 1785/08.

60 *Kurić and Others v. Slovenia* (n 22) para 357.

61 *Kurić and Others v. Slovenia* (n 22) para 359 ff.

62 *Osman v. Denmark* [2011] ECtHR Application No. 38058/09 [65].

63 Another case where the Court applied the social identity approach to a regularisation situation is the case of *Abuhmaid v. Ukraine.* However, *in casu,* the Court concluded that the applicant had access to effective procedures to determine his stay and status in the Ukraine and thus Article 8 was not violated, *Abuhmaid v. Ukraine* [2017] ECtHR Application No. 31183/13 [126].

64 See already *X v. Austria* [1972] ECtHR Application No. 5212/71. See also Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention : Ein Studienbuch* (6. Auflage, Beck 2016) ch 22 para 14; Schabas (n 56) 378.

65 Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 144 ff.

66 *Riener v. Bulgaria* [2006] ECtHR Application No. 46343/99.

67 *Riener v. Bulgaria* (n 66) para 159.

68 Dissenting Opinion Judge Maruste in *Riener v. Bulgaria*, p. 31.

of the social, cultural and political self-determination of the individual which, to my mind, also falls within the general scope of Article 8'.[69]

In 2011, in *Genovese v. Malta,* the Court adopted this interpretation and ruled that 'the denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person's social identity'.[70] The Court concluded that nationality is part of a person's social identity and thus protected by the right to private life under Article 8 ECHR.[71] As a result, the Court expands its social identity approach even further to include also access to (and loss of) citizenship.[72] Judge Valenzia opposed this interpretation in a dissenting opinion, where he argued that the ruling pushes the concept of social identity too far.[73] He considers the Court had failed to define social identity and to explain how citizenship could define determine a person's own identity. 'Denial of citizenship always has an impact in a general way on any person, so this alone cannot be taken as the reason why social identity has been affected'.[74]

The Court nevertheless confirmed this new jurisprudence later on in the case of *Ramadan v. Malta.*[75] It recalled the ruling from *Genovese* that the notion of private life is wide enough to embrace aspects of a person's social identity—however, it denied an impact on the applicant's social identity that would amount to a violation of the right to private life.[76]

With the jurisprudence initiated in *Genovese* and confirmed in *Ramadan* the Court hence expanded the social identity approach to cases concerning acquisition and loss of citizenship. The concept of a non-citizens social identity—her ties to the host society based on social relationships, duration of residence or on familial links—has been applied in different migration cases, from the question of removal of settled migrants, in particular second-generation migrants, to the question of regularisation of stay to the right to citizenship. It thereby has become an important element for the protection of the right to private life in migration cases.

5 Defining Social Identity

In *Hoti v. Croatia*, the ECtHR had strengthened its social identity approach, applying it also to the context of stateless persons claiming access to effective regularisation mechanisms in their respective host states. By recognising stateless migrants as a special category and acknowledging the particular risks they face to safeguard their rights under the Convention, the case is a landmark case for the rights of stateless persons to regularisation, residence and membership based on one's social identity.

Looking at *Hoti v. Croatia* and the earlier case law of the Court further helps to define the notion of social identity. It becomes clear that connecting factors such as long-term residence, parentage, social ties and integration, including his/her (former) legal status, can form elements of one's social identity. As shown in the *Hoti* case, the notion of social identity therefore encapsulates more than family ties. It remains to be seen how the Court develops its social identity approach further to protect migrants' social identity and to strengthen their right to remain, to a legal status and to citizenship based on their center of life. The case of *Hoti v. Croatia* thus timidly contributes to the long due recognition of citizenship as a fundamental element of a dignified life under the Convention.

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Competing Interests

The author has no competing interests to declare.

[69] Dissenting Opinion Judge Maruste in *Riener v. Bulgaria*, p. 31 f.

[70] *Genovese v. Malta* (n 52) para 33. See also Andreas Zimmermann, 'Europäische Menschenrechtskonvention und Staatsangehörigkeitsrecht der Konventionsstaaten' [2014] ZAR 97, 99.

[71] See Gerard-René de Groot and Olivier Vonk, 'Nationality, Statelessness and ECHR's Article 8: Comments on *Genovese v. Malta*' (2012) 14 European Journal of Migration and Law 317, 317.

[72] See Rabia Amor, 'La CEDH et la question de la nationalité: Arrêt de la Cour EDH Genovese c. Malte du 11 octobre 2011' [2015] Actualité du droit des étrangers [jurisprudence et analyses] 27, 33. Critical with regard to the impact of the *Genovese* case, Dembour (n 65) 145 f.

[73] Dissenting Opinion Judge Valenzia in *Genovese v. Malta,* p. 12 f.

[74] Dissenting Opinion Judge Valenzia in *Genovese v. Malta*, p. 12.

[75] *Ramadan v. Malta* (n 31). The aspect of social identity was, however, not discussed in the case of *Fehér and Dolnik v. Slovakia* [2013] ECtHR Application No. 14927/12.

[76] *Ramadan v. Malta* (n 31) para 62 ff. See the criticism on the judgment by Dembour (n 32).

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