



WRITTEN OBSERVATIONS

*submitted to the European Court of Human Rights
in the case*

*Isam Al-Bayati v. Germany
(Application No. 12538/19)*

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Introduction

Facts and procedure

1. The applicant, Isam Al-Bayati, is an Iraqi citizen living in Bochum, Germany, who has been convicted of terrorism-related activities. Reportedly, since his last conviction in 2006, he has not distanced himself from these activities. On December 28, 2009, the Government of Upper Bavaria ruled to deport him from the territory of the Federal Republic of Germany and prohibit him from returning.
2. The Administrative Court of Augsburg, addressed by the applicant, prohibited this deportation by a judgment of January 18, 2011. This judgment was quashed on appeal on October 27, 2017 (Munich, second instance); a further appeal by the applicant, seeking a review of this judgment, was rejected on April 25, 2018 (Leipzig, third instance). Isam Al-Bayati's final appeal to the Federal Constitutional Court in Karlsruhe was declared inadmissible on October 10, 2018. Invoking his right to be respected for family life, which is protected under Article 8 of the European Convention on Human Rights (hereinafter "Convention"), Mr. Al-Bayati lodged an application with the European Court of Human Rights (hereinafter "ECHR" or "Court") on February 28, 2019.
3. The re-entry ban was initially permanent. Then, followed the applicant's request, the Bochum Immigration and Naturalization Service reduced the ban to 20 years and then 15 years on January 15, 2020. Isam Al-Bayati, considering this period as too long, is planning to bring an action against this recent decision of this service in a parallel procedure before the Gelsenkirchen court. As provided for by German law, the 15-year period begins when the applicant leaves German territory. Furthermore, he may, exceptionally, be allowed to return to Germany during that period for serious reasons.¹

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Clarifications on "family life"

4. Since the applicant is married and his children are from that union, the link between him, his wife, and his children constitutes a family life within the meaning of Article 8 of the Convention.
5. An alien has no right to live in a particular place. On the one hand, Article 8 does not enshrine such right.² On the other hand, the right to freedom of movement is exercised in the context of a lawful stay in a State, and it is limited only to the movements within that State or to leave the State (Article 2 §§ 1 and 2 of Protocol No. 4). Therefore, there is no right for the applicant to remain in a State of which he is not a national.
6. The Al-Bayati family is composed of four members, each with an individual right to be respected for family life. It is, therefore, up to Mrs. Al-Bayati to determine her own interests and exercise her right to respect for family life. However, unlike other comparable cases,³ she is not an applicant; Mr. Al-Bayati is the sole applicant. The wife and daughters, who are not the

¹ *Cabucak v. Germany*, no. 18706/16, 20 December 2018, § 31.

² *Ward v. the United Kingdom* (dec.), no. 31888/03, 9 November 2004, § 2; *Codona v. the United Kingdom* (dec.), no. 485/05, 7 February 2006.

³ *Cherif and Others v. Italy*, no. 1860/07, 7 April 2009, § 52.

subject of a deportation order, can choose either to settle with him in Iraq or Turkey or to remain in Germany and integrate there. Their interests cannot be presumed.

7. According to Article 8, upon the applicant's deportation from Germany, the State does not have the general obligation to allow the applicant, despite his status as husband and father,⁴ to resettle in the territory in the event his wife and two daughters' decision to remain in the country.

Issue raised by the case

8. For a person to be together with his or her spouse and children is a fundamental element of family life. Measures that prevent them from doing so constitute an interference against the right protected by Article 8,⁵ unless they meet at least one of the legitimate aims listed in Article 8 § 2, and weigh in proportionate to the aims of a democratic society. The Member State must respect these requirements, balancing the rights and interests involved.
9. The Court first relied on Article 8 in relation to a situation of deportation in the case of *Berrehab v. the Netherlands* in 1988.⁶ Since then, this issue has given rise to numerous judgments and decisions, including the ones by the Grand Chamber,⁷ which have enabled the ECHR to identify and develop "guiding principles," enabling it to review the requirements of "proportionality" and "pressing social need."

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Purpose of the observations

10. These written observations are intended to apply the Court's approach to the present case, as well as to contribute to its reflection on the interaction between the right to respect for family life and the deportation of aliens. By deporting the applicant, the German State intends to fulfill its core tasks, which serve several legitimate objectives of interference with the right to respect for family life (I). The assessment criteria usually used by the ECHR are sufficient to demonstrate the necessity of such interference (II). These criteria, in order to assess such an issue even better, would benefit from being supplemented and weighted (III).

I- The fulfillment of the core tasks of a nation-state

11. The possibility for a State to deport aliens is a necessary means to fulfill its core tasks effectively, such as guaranteeing public security and protecting its nationals. The German State is particularly attached to this means, as evidenced by its third-party intervention in the case of *Üner v. the Netherlands*, judged by the Grand Chamber in 2006.⁸ The German Government had recalled, in support of the Netherlands,⁹ that the possibility of deporting aliens as part of national sovereignty.

⁴ *Youth v. Netherlands* [GC], no. 12738/10, 3 October 2014, § 107; *Biao v. Denmark* [GC], no. 38590/10, 24 May 2016, § 117.

⁵ See for example: *Zorica Jovanović v. Serbia*, no. 21794/08, 26 March 2013, § 68; *Elsholz v. Germany* [GC], no. 25735/94, 13 July 2000, § 43; *K. and T. v. Finland* [GC], no. 25702/94, 12 July 2001, § 151.

⁶ *Berrehab v. the Netherlands*, no. 10730/84, 21 June 1988.

⁷ See in particular the first judgment in which the Grand Chamber ruled on the question: *Üner v. the Netherlands* [GC], no. 46410/99, 18 October 2006.

⁸ *Üner* [GC], *op. cit.* §§ 52 and 53.

⁹ *Ibid.*

A) Ensuring national security

12. The protection of national security is one of the legitimate objectives of interference with the right to respect for family life (Article 8 § 2). Terrorist acts, such as those for which the applicant has been convicted, are obviously a serious threat to national security. Not only are their deadly violence, their repetition and their unpredictability a danger to society, but also challenging the State's monopoly of the legitimate use of physical force destabilizes the State itself. The latter is, therefore, particularly legitimate to deport an alien convicted of terrorist acts and likely to reoffend.
13. At least two other legitimate objectives (art. 8 § 2) are pursued by the deportation of Isam Al-Bayati: the prevention of crime and the protection of the rights and freedoms of others. Indeed, in its third intervention in the *Üner* case, the German Government had specified that the deportations were not intended to be punitive, such as a criminal sanction, but preventive, in order to guarantee security for the future.¹⁰ According to the ECHR, States “*have the right to take measures to protect society (...) in respect of persons convicted of criminal offenses (...) which are preventive rather than punitive in character.*”¹¹ The prevention of terrorist crimes aims, *inter alia*, to protect the rights of potential victims, in particular their right to life.
14. Protecting the population against terrorist threats is not only a legitimate objective, but also a supremely positive obligation of States. This is, for example, recalled by the Guidelines on the protection of victims of terrorist acts adopted in 2017 by the Committee of Ministers of the Council of Europe.¹² In this respect, the fact that Mr. Al-Bayati's last criminal conviction was in 2006 and that the 2009 deportation order has still not been implemented by February 2020 reveals dysfunction in the judicial system, which undermines this positive obligation.

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B) Protecting the nation

15. The legitimate aims of interference with the right to respect for family life (Art. 8 § 2) have a national dimension, which may be explicit and exclusive (“national” security, economic well-being “of the country”) or implicit and non-exclusive (“others” includes nationals and aliens). According to the German Government, in its third-party intervention in the *Üner* case, the State's purpose in deporting an alien is precisely to fulfill its core task of “protection of its nationals and other aliens residing on its territory.” This protection is, therefore, part of the objectives that legitimize a restriction on the right to respect for an alien's family life.
16. To protect the nation, the State must be able to determine sovereignly whether an alien may stay on its territory in accordance with a well-established principle of international law, which confirmed by the ECHR.¹³ This State's right exists irrespective of whether an alien entered the host country as an adult or at a very young age or was born there.¹⁴ The Court explained it very

¹⁰ *Ibid.*, § 53.

¹¹ *Cherif, op. cit.*, § 59 (free translation).

¹² Committee of Ministers of the Council of Europe, Revised Guidelines on the protection of victims of terrorist acts, adopted at the 127th Session of the Committee of Ministers in Nicosia, [CM\(2017\)44-final](#), 19 May 2017, Preamble.

¹³ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, nos. 9214/80, 9473/81 and 9474/81, 28 May 1985, § 67; *Boujlifa v. France*, no. 25404/94, 21 October 1997, § 42.

¹⁴ *Üner* [GC], *op. cit.*, §§ 54-60.

clearly: “Even if a foreign national has a non-precarious residence status and has achieved a high degree of integration, his or her situation cannot be placed on the same footing as that of a State national when it comes to the aforementioned power of the Contracting States to expel aliens for one or more of the reasons listed in Article 8, paragraph 2, of the Convention.”¹⁵

17. The conventional system thus makes a clear distinction between nationals and aliens.¹⁶ Protocol No. 4 to the Convention prohibits the deportation of nationals by individual measure (Article 3 §1), but not of aliens (Article 4). Moreover, it reserves the right to enter the territory of the State to nationals (Article 3).

This distinction is not discrimination based on national origin. Indeed, presence on a territory is a right for nationals, but a “privilege” for aliens. However, according to former ECHR judge Boštjan Zupančič “discrimination in terms of unequal treatment is applicable to situations that involve rights; it is not applicable to situations that essentially concern privileges,” in particular “situations of special treatment reserved for those who are exceptionally deserving.”¹⁷ The privilege of residing in a country of which one is not a national is at the discretion of the institutions of that country. It, therefore, does not imply the same requirements in terms of non-discrimination. The Court accepted this line of reasoning in the Grand Chamber judgment of 2012 *Boulois v. Luxembourg*.¹⁸

18. By the deportation order of Isam Al-Bayati, the German State is, therefore, pursuing legitimate objectives. As the German Government points out in its third-party intervention in the *Üner* case and according to the Court’s case-law, the margin of appreciation left to the State to take measures to protect national security is wide. It is also wide in matters relating to immigration and the residence of aliens,¹⁹ which the State decides in the light of national social realities. The Court may nevertheless review whether the State has struck a fair balance between the personal interests of the applicant and the public interest, which it has done several times in such cases using its “guiding principles.”

II- “Guiding principles” focused on the individual and his/her family

19. In order to determine whether a deportation order is necessary for a democratic society and proportionate to the legitimate objectives set out in Article 8 of the Convention, the Court has developed criteria in the course of its case-law. There are now ten criteria, as recalled in the

¹⁵ *Cherif, op. cit.*, § 59.

¹⁶ It should be noted that even the judges of the Court who wish to minimise the distinction between aliens and nationals recognise that it exists and that it must have consequences in terms of presence on a territory. For example, in a joint dissenting opinion in the *Üner* [GC] judgment cited above, Judges Costa, Zupančič and Türmen. Having considered, on the basis of international instruments and against the opinion of the majority of the sitting judges, that the legal status of aliens lawfully resident in the territory should be as close as possible to that accorded to nationals, the three judges admitted: “Of course, we are not arguing that all these international instruments – which, moreover, do not all have the same legal force – mean that foreign nationals can never be expelled, as is the case with nationals under Article 3 of Protocol No. 4” (§ 9).

¹⁷ *E.B. v. France*, 22 January 2008, no. 43546/02, dissenting opinion of judge Zupančič.

¹⁸ *Boulois v. Luxembourg* [GC], 3 April 2012, §§ 98-105.

¹⁹ *Berrehab, op. cit.*, dissenting opinion of Judge Thór Vilhjálmsson: “the problem of immigration and residence of foreigners is a very important issue and there is no doubt that restrictions are unavoidable. Generally speaking, in this field the Government must have a wide margin of appreciation when formulating their policy and the necessary legal rules.”

recent *Levakovic v. Denmark* judgment of October 23, 2018.²⁰ They enable the individual situation of the applicant and his or her family to be properly assessed.

A) *Boultif*'s "objective" criteria

20. In the 2001 *Boultif v. Switzerland* judgment,²¹ the Court defined eight guiding principles, which could mainly be described as impartial. Indeed, these eight criteria correspond to various factual elements to be weighed up, such as legal characterizations, durations, legal affiliations, or statutes. Without claiming to be exhaustive, it is worth emphasizing certain elements corresponding to these eight criteria, which we shall list in italics as formulated by the Court. It should be noted that in assessing the family situation of an alien who is the subject of a deportation order, the Court focuses on the moment when the decision has become final.²² According to German law, the decision was final on April 25, 2018 (Leipzig, third instance).

21. The first three *Boultif* criteria are not specific to the issue of the alien's family life. They are:

- *the nature and seriousness of the offense committed by the applicant:*
Isam Al-Bayati actively supported a terrorist organization; he raised funds for that organization and transferred them to Iraq. He has been convicted several times in connection with this jihadist activity, for possession of a weapon found in his car, for violating banking law by transferring money, and for possessing audiotapes calling for armed jihad.
- *the length of the applicant's stay in the country from which he or she is to be expelled:*
Mr. Al-Bayati was born in Kirkuk, Iraq, in 1978, first came to Germany in 1999 and obtained his first residence permit on March 22, 2000.
- *the time elapsed since the offense was committed and the applicant's conduct during that period:*
Mr. Al-Bayati's legal proceedings began in 2005-2006 and ended in 2011. Since then, he has not moved away from his network of Iraqi terrorists, in which he is known as the "banker".
- The other four *Boultif* criteria relate more directly to the family life of the person concerned. They are:
 - *the nationalities of the various persons concerned:*
Mr. Al-Bayati is Iraqi; his wife is Turkish; his children are German and Turkish.
 - *the applicant's family situation, such as the length of a marriage, and other factors expressing the effectiveness of a couple's family life:*
Mr. Al-Bayati married civilly on February 23, 2007; the applicant claims to have married the same woman according to the Islamic rite in 2004: while this has no civil consequences, this rite and the birth of two children testify to the effectiveness of a "family life" since 2004. By April 25, 2018, this family life had lasted 14 years.
 - *whether the spouse knew about the offense at the time when he or she entered into a family relationship:*
Mrs. Al-Bayati may not have been aware of the offenses in 2004, as the legal proceedings had not yet started.
 - *whether there are children from the marriage and, if so, their age:*
Two daughters are born of the marriage: one born on March 25, 2005, the other on June 4, 2006; on April 25, 2018, they are therefore 13 and 11 years old, respectively. They are, therefore, minors and will follow their parents or at least one of them.

²⁰ *Levakovic v. Denmark*, no. 7841/14, 23 October 2018, § 36.

²¹ *Boultif v. Switzerland*, no. 54273/00, 2 August 2001, § 48.

²² *Cabucak, op. cit.*, § 43.

- *the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled:*

Mr. Al-Bayati is Turkmen, i.e., he belongs to an ethnic group representing between one to eight percent of the Iraqi population and living in the north of the country, near the Turkish border. This group speaks Turkmen, which belongs to the Turkish language family; that language is also spoken and understood in other parts of Iraq. Mrs. Al-Bayati is Turkish; the Turkish language family is the only common everyday communication of the Al-Bayati couple. They regularly attend a Turkish mosque together in Germany. Since the couple shares the majority religion of Iraq and the majority language of the applicant's region of origin, the wife will have no difficulty in integrating into it. Moreover, it is also possible that the couple may choose to live in Turkey: Mr. Al-Bayati, his wife, and their daughters have the majority religion and language, and Mrs. Al-Bayati and the daughters are Turkish nationals.

It should be noted that, in its communication of the *Al-Bayati v. Germany* application, the Court chose to highlight two guiding principles, including that one.²³

B) *Üner's* “subjective” criteria

22. In the Grand Chamber *Üner* judgment of 2006, the Court wished to “*make explicit two criteria which may already be implicit in those identified in Boultif.*”²⁴ These two new “guiding principles” are more difficult to be objectivized; this is why we have qualified them as “subjective.” Without claiming to be exhaustive, it is interesting to highlight some elements corresponding to these two criteria, which we shall quote, in italics, as formulated by the Court.

23. It should first be noted that the addition of “guiding principles” reflects the fact that objective criteria were not sufficient. Indeed, a given family situation does not condition the interest of children to stay or not to stay with their parents in their current country; similarly, a period of residence in a country is not in itself sufficient to ensure the existence of strong ties with that country. The addition of “subjective” criteria enables the Court to better grasp the complexity of the migration issue. For example, the years spent in Europe by some aliens have sometimes enabled them not to create links with the host country but to develop a parallel community that is virtually autonomous in relation to society. It is in these communities that Islamist ideology develops and is transmitted from childhood. In these cases, the long duration of residence and unity in the family widen the gap between Muslims of immigrant origin and Western society.

24.

- *the best interests and well-being of the children, in particular, the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled:*

The Al-Bayati daughters are, like their mother, Turkish. For the same reasons as mentioned in § 22 of these observations, it will, therefore, be easy for them, if necessary, to integrate into the Turkmen minority in Iraq or Turkey. There is nothing to prevent Al-Bayati daughters from continuing their schooling in these countries, so that the unity of family life can be preserved outside Germany. Moreover, since the Al-Bayati daughters have German nationality, they will, if necessary, be able to return sometimes to Germany. Finally, it is illusory to believe that their two daughters are currently living peacefully in this socially poor-integrated family in Germany

²³ *Al-Bayati v. Germany*, Application No. 12538/19, communicated on 12 November 2019.

²⁴ *Üner* [GC], *op. cit.*, § 58.

while their father is a convicted terrorist, and their parents are not integrated into German society.

It should be noted that this criterion is the second guiding principle highlighted by the Court in its communication of the *Al-Bayati v. Germany* application.²⁵

25.

- *the solidity of social, cultural, and family ties with the host country and with the country of destination:*

Born in Iraq and having stayed there for his first twenty years, Mr. Al-Bayati is poorly integrated into German society and culture. His acquaintances and friends are Iraqi and speak little or bad German. He is usually not able to mention their surnames. The applicant is currently unemployed; the family's social life is focused on "foreign" mosques. On the contrary, in Iraq, the applicant speaks the language, knows the culture, maintains certain family ties, and shares the majority religion.

26. The application of these "guiding principles" is sufficient to suggest that the deportation of Mr. Al-Bayati respects the right balance between the legitimate aims pursued by the authorities and the requirements of respect for his family life. The fact that the re-entry ban is limited to 15 years is also consistent with the proportionality of the deportation order.

While the criteria currently used by the Court are sufficient to conclude that the decision did not violate Article 8, it might nevertheless be useful to supplement and weight these criteria. This will enable the ECHR to interpret Article 8 "in the light of current conditions."²⁶

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III- A proposal for complementing and weighting the "guiding principles"

27. The criteria for assessing the interaction between the right to respect for family life and the deportation of aliens began to take shape with the *Berrehab* judgment in 1988.²⁷ Then they were formalized with the *Boultif* judgment of 2001²⁸ and were completed and listed in their current form in 2006 by the Grand Chamber in the *Üner* judgment.²⁹ After having evolved for eighteen years, they have therefore been fixed for fourteen years. Nonetheless, they still provide a good understanding of the applicant's family situation but not further than the general local social situation. Moreover, as some judges have already pointed out, and as the Court itself seems to have noted, the criteria must be weighted to avoid a long list of "pros" and "cons" which would make it impossible to settle a dispute effectively.

A) New criteria focused on society

28. When considering proportionality, the Court examines the need for a deportation order in a so-called "democratic" society, characterized in particular by "pluralism, tolerance, and openness."³⁰ Between an alien person and a society, the desire for integration must be mutual, like a synallagmatic (bilateral) contract. The proportionality of a measure must, therefore, relate

²⁵ *Al-Bayati* application, *op. cit.*

²⁶ *Tyler v. the United Kingdom*, no. 5856/72, 25 April 1978, § 31.

²⁷ *Berrehab*, *op. cit.*, § 29.

²⁸ *Boultif*, *op. cit.*, § 48.

²⁹ *Üner* [GC], *op. cit.* §§ 57 and 58.

³⁰ *Handyside v. the United Kingdom*, no. 5493/72, 7 December 1976, § 49.

to the individual situation of the applicant and his or her family, but also the social situation of the country, region, and city concerned, in the light of these three characteristics. After assessing the capacity of an alien threatened with deportation to honor the contract, it is important to assess the capacity of society as well. In order to ensure that society can integrate an alien in a stable and healthy environment, it seems appropriate to suggest two additional guiding principles to the ECHR (§§ 30 and 31). These criteria will refine its proportionality assessment in this case and any similar case.

29.

- *the stability of the society of the host country, in particular its capacity to integrate the applicant into the social, economic, and cultural life of that country:*

German society is marked by a strong divide on migration issues, and there is a growing contestation of immigration, particularly following Islamist attacks since 2016. Moreover, the *Land* of North Rhine-Westphalia in which Mr. Al-Bayati lives has been marked by mass attacks and rapes in the New Year 2016 committed by at least 1,500 non-European immigrants. In this context of reluctance to immigration, the applicant's social and cultural integration would be difficult.

What might argue in favor of a certain ability to integrate Mr. Al-Bayati, as an unemployed person, is the economy. Germany is indeed the Council of Europe's leading economic power (gross domestic product). Its unemployment rate in July 2019 is only 3%, compared to an average in the European Union of 6.3% (Eurostat data).³¹ However, the unemployment rate in North Rhine-Westphalia is almost 30% higher than the German average.³²

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30.

- *the seriousness of the difficulties that society is likely to encounter in removing the applicant from the environment that led him to commit criminal offenses:*

Whether voluntarily or not, the applicant was, in fact, always inserted into an environment of Islamists, within which he had collected funds for terrorist operations (see paragraph 26). The current context in North Rhine-Westphalia and in Bochum in particular, makes it difficult for society to really remove Mr. Al-Bayati from this environment. Indeed, one-third of the Muslims living in Germany are in North Rhine-Westphalia, which allows the most radical currents of Islam to develop there, for example, the Muslim Brotherhood in Bochum.³³ In this German *Land*, despite the will of the authorities, sixteen Islamists had not yet been deported by June 2018.³⁴ Among them was a Salafist preacher residing in Bochum: 'Sami Ben Mohamed A.,' a presumed former bodyguard to Osama Bin Laden. Close to the organizers of the attacks on the *World Trade Center* in 2001 and the Islamic State, Sami Ben Mohamed A. was the object of attempts at deportation by the authorities from 2006 and was effectively deported to Tunisia on July 13, 2018, twelve years later.³⁵ As an asylum-seeker, he had meanwhile received 1,170 euros per month in benefits and had four children with a Tunisian woman, who had German nationality.³⁶ These various facts bear witness to the fact that, at present, the regional and local authorities appear to be powerless in the face of Islamist networks such as that of Mr. Al-Bayati.

³¹ Eurostat, "Euro area unemployment at 7.5%", News Release [133/2019](#), 30 August 2019.

³² Bundesagentur für Arbeit, Arbeitsmarkt im Überblick, [Statistik](#) nach Regionen, January 2020.

³³ "Schulung für Jugendliche durch Muslimbrüder?" [NRW. direkt](#), 19 February 2019.

³⁴ "NRW kann 16 islamistische Gefährder nicht abschieben" [Die Welt](#), 5 June 2018.

³⁵ Kai Biermann and Karsten Polke-Majewski, "Abschieben um jeden Preis", [Die Zeit](#), 16 August 2018.

³⁶ "16 Jihadisten können nicht abgeschoben werden", [NRW. direkt](#), 5 June 2018.

B) The weighting and prioritization of criteria

31. The ECHR already seems to weigh the ten criteria it uses to assess the proportionality of a deportation measure. As noted by former judges Jean-Paul Costa, Boštjan Zupančič and Rıza Türmen, the Court tends to lend “*added weight*” to the “*nature and gravity of the crime*» and thus to identify “*a method which gives priority to one criterion, relating to the offense, and treats the others as secondary or marginal.*”³⁷

In the current context of frequent terrorist acts, it would be interesting for the Court to clarify this weighting, focusing on the two *Boultif* criteria relating to security as well as the second criterion proposed in these observations. Indeed, as a common good, national security must be given primary weight in the assessment.

32. Moreover, in all decisions involving children, the Court considers that their best interests must take precedence. This is also the case in decisions to deport a parent.³⁸ According to the Court, “*whilst alone they cannot be decisive, such interests certainly must be afforded significant weight.*”³⁹ On the contrary, the last *Boultif* criterion, relating to the spouse is the only one to have been downplayed by the Court in the judgment: “*the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion.*”⁴⁰

Given the fragility of children, it would be appropriate to explicitly specify such a weighting. In this way, the two criteria concerning children could also be given primary weight.

33. To summarize the reasoning of §§ 32 and 33, the ECHR could take the opportunity of this case to define five guiding principles as “major,” i.e., having greater weight, and the other seven as “minor.”

The five major criteria would be those relating to the safety and best interests of the child:

1. the nature and seriousness of the offense committed by the applicant;
2. the time elapsed since the offense was committed and the applicant’s conduct during that period;
3. the severity of the difficulties which the society is likely to encounter in removing the applicant from the environment that led him to commit criminal offenses;
4. whether there are children from the marriage and, if so, their age;
5. where appropriate: the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled.

Conclusion

34. The decision to deport Isam Al-Bayati meets the legitimate objectives of protecting national security, preventing crime, and protecting the rights and freedoms of others. It is proportionate to these objectives, given that the minor interference with his family life that may continue abroad, and the already shortened re-entry ban of 15 years. Therefore, Article 8 of the Convention does not appear to be violated by this deportation order, which should be implemented rapidly, after a wait of 11 years. Applying the Court’s usual approach, in particular, its ten guiding principles suffices to establish this non-violation.

³⁷ *Üner* [GC], *op. cit.*, joint dissenting opinion of Judges Costa, Zupančič and Türmen, § 16.

³⁸ *Youth* [GC], *op. cit.*, §§ 117 and 118.

³⁹ *Ibid.*, § 109.

⁴⁰ *Boultif*, *op. cit.*, § 48.

35. That said, the Court could take the opportunity of this litigation to reopen the evolution of these criteria in line with the evolution of reality, as it did between 1988 and 2006. Two new guiding principles could thus be defined, and a hierarchy between major and minor principles could be established. This clarification would provide a better understanding of the interaction between the deportation of an alien and his or her family life, which is an issue that many applicants lodged with the Court. This adaptation of the Court's approach would also serve as a reminder that the right to respect for family life is not a right conflictual with security. The one must not be sacrificed for the other, as they are complementary and interdependent.
36. The ECLJ wishes to recall that the right to respect for family life is indeed based, like other human rights, on human dignity. Through this right, man fulfills his nature, in particular, his natural yearning to live in society. A terrorist, by his acts, does not fulfill this natural yearning but, on the contrary, destroys society. Finally, as recalled in the Preamble to the Universal Declaration of Human Rights, rights are one foundation of freedom, justice, and peace. Security is another foundation of those same three objectives. The fights against terrorism aim to ensure it. These two foundations of freedom, justice, and peace are inseparable and serve the same common good.