COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF AHMUT v. THE NETHERLANDS

(Application no. 21702/93)

JUDGMENT

STRASBOURG

28 November 1996

In the case of Ahmut v. the Netherlands[1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[2], as a Chamber composed of the following judges:

MM. R. BERNHARDT, *President*,
F. MATSCHER,
R. MACDONALD,
N. VALTICOS,
S.K. MARTENS,
A.N. LOIZOU,
J.M. MORENILLA,
U. LOHMUS,
E. LEVITS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 29 June and 26 October 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Kingdom of the Netherlands ("the Government") on 13 September and 5 October 1995 respectively, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 21702/93) against the Netherlands lodged with the Commission under Article 25 (art. 25) on 23 February 1993 by Mr Salah Ahmut, who holds both Moroccan and Netherlands nationality, and Ms Souad Ahmut and Mr Souffiane Ahmut, who are Moroccan nationals.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application

[1] The case is numbered 73/1995/579/665. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

referred to Article 48 (art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 of the Convention (art. 8).

2. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 31).

3. The Chamber to be constituted included ex officio Mr S.K. Martens, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 29 September 1995, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr F. Matscher, Mr B. Walsh, Mr R. Macdonald, Mr N. Valticos, Mr A.N. Loizou, Mr J.M. Morenilla and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr E. Levits, substitute judge, replaced Mr Walsh, who was unable to take part in the further consideration of the case.

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the applicants' memorial on 11 April 1996 and the Government's memorial on 17 April.

5. On 9 May 1996 the Commission supplied certain documents from the file on the proceedings before it which the Registrar had sought from it on the instructions of the President. At the request of the President of the Chamber (Rule 39 para. 1, third sub-paragraph), the Government submitted additional documents which were received at the registry on 30 May and 3 June 1996.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 June 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr H. VON HEBEL, Assistant Legal Adviser,
Ministry of Foreign Affairs, *Agent*,
Mr H.A. GROEN, Deputy Landsadvocaat, *Counsel*;

- for the Commission

Mr H.G. SCHERMERS, *Delegate*;

- for the applicants

Mr J.H.M. NIJHUIS, advocaat en procureur, *Counsel*.

The Court heard addresses by Mr Schermers, Mr Nijhuis and Mr Groen and also their answers to its questions.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Background to the case

7. Salah Ahmut was born in 1945. He has been a Netherlands national since 22 February 1990 although he has retained his original Moroccan nationality. Salah Ahmut currently resides in Rotterdam. He is a trader.

8. Souffiane (or Soufiane) Ahmut is Salah Ahmut's son. Souffiane was born on 27 November 1980 in Morocco. He is a Moroccan national. He currently resides in Tangier.

9. Salah Ahmut married a Ms F.A. in 1967. Five children were born to them, namely Hamid (on 6 February 1969), Fouad (on 2 June 1970), Chaouki Dayaf (on 24 June 1971), Souad (on 28 July 1972) and Souffiane. The applicants have stated that the marriage was dissolved in 1984. However, this statement is not corroborated by documentary evidence. In any event, the children remained with their mother after Salah Ahmut moved to the Netherlands.

10. Salah Ahmut migrated to the Netherlands in September 1986. In November of the same year he married a Netherlands national, Ms K.A., who already had three children from a previous marriage. Her marriage with Salah Ahmut remained childless.

11. The Commission's file contains a sworn translation into English of Ms F.A.'s death certificate, from which it would appear that Ms F.A. died as a result of a traffic accident on 27 March 1987. The Commission's file also contains a sworn translation into French of a notarial statement which was dated 8 March 1991 and countersigned by a judge, from which it appears that Hamid, Fouad, Chaouki Dayaf, Souad and Souffiane are indeed the issue of the marriage of Salah Ahmut and Ms F.A. and that Salah Ahmut is their legal guardian under Muslim and Moroccan law.

12. After their mother's death the children were cared for by Salah Ahmut's mother, Ms C.A.M.

13. Salah Ahmut's eldest son, Hamid, entered the Netherlands without a provisional residence visa (machtiging tot voorlopig verblijf - see paragraph 42 below) in 1987. He was expelled in 1989 after a residence permit (vergunning tot verblijf - see paragraph 44 below) was refused him. He has since resided in Morocco where he is a trader.

14. The Commission's file contains a document in French from a bank in Tangier from which it appears that from April 1986 until October 1990 Ms C.A.M. received financial support in the amount of 80,000 Moroccan dirhams per year. Although these sums were paid to her through an account

with a bank in Tangier in the name of a person with the same family name as Salah Ahmut's second wife, it is not contested that the money was supplied by Salah Ahmut. However, Salah Ahmut never applied to the Netherlands State for child benefits (kinderbijslag) for Souffiane.

15. Salah Ahmut and his second wife, Ms K.A., separated in February 1990. Following divorce proceedings, their marriage was dissolved on 21 December of the same year. On 11 March 1991 Salah Ahmut married a Ms S.Y., a Moroccan national, in the Netherlands. Ms S.Y. had been living in the Netherlands since 9 December 1990. She was granted a residence permit for the purpose of living with her husband on 12 March 1991.

16. Salah Ahmut's second and third sons, Fouad and Chaouki Dayaf, entered the Netherlands in 1989 and 1990 respectively. In October 1990 they were granted residence permits to enable them to prepare for entrance examinations at the Technical University of Delft.

17. The Commission's file contains a document in French claimed to be a sworn translation of a statement by a Tangier physician dated 7 November 1990 to the effect that on that date Ms C.A.M., who was then 80 years old, was suffering from respiratory problems and kidney failure and was receiving treatment as an out-patient.

18. The applicants state that between 28 September 1986 (when Salah Ahmut migrated to the Netherlands - see paragraph 10 above) and 26 March 1990 (the date of Souffiane's arrival in the Netherlands - see paragraph 19 below) Souffiane visited the Netherlands about four times, each time for a period of one month.

B. Events following Souffiane's arrival in the Netherlands

19. Souffiane arrived in the Netherlands on 26 March 1990, in the company of his sister Souad. Neither held a provisional residence visa.

20. Souffiane was enrolled at a primary school in Rotterdam, which he attended until his eventual return to Morocco in September 1991 (see paragraph 32 below).

21. On 3 May 1990, Salah Ahmut, Souad and Souffiane appeared before the officer of the Rotterdam police in charge of matters concerning aliens. As Souffiane's legal representative, Salah Ahmut applied to the Rotterdam police for a residence permit for Souffiane. Souad filed a similar application for herself. The stated purpose of both applications was to enable Souad and Souffiane to reside with their father, who had by then become a Netherlands national (see paragraph 7 above).

22. The same day the Rotterdam police forwarded the applications to the Deputy Minister of Justice (Staatssecretaris van Justitie) with an accompanying note. According to the police, neither the death of Ms F.A. nor the fact of her divorce from Salah Ahmut had been proved by means of documentary evidence. Nor could Salah Ahmut show that he was the

children's legal guardian. For these reasons it was recommended that the Deputy Minister reject the application in respect of Souffiane as inadmissible. It was also recommended to reject Souad's application on substantive grounds, namely that she had not been part of Salah Ahmut's family since 1986 nor had she apparently received financial support from him and that there were other relatives who could take care of her in Morocco.

23. On 26 June 1990 the Deputy Minister gave reasoned decisions rejecting the applications on substantive grounds. The Deputy Minister found that actual family ties between Salah Ahmut on the one hand and Souad and Souffiane on the other had been broken several years earlier, that Salah Ahmut's moral or financial responsibility for Souad and Souffiane had not been established and that it had not been shown that their grandmother or other relatives could not care for them. He noted in addition that this decision did not constitute a violation of the applicants' family life, protected by Article 8 of the Convention (art. 8): to the extent that such family life existed, adherence to a policy restricting immigration was necessary in a democratic society in the interests of the economic well-being of the country. In the same decision he ordered the expulsion of Souad and Souffiane from the Netherlands.

24. On 13 November 1990 Salah Ahmut, Souad and Souffiane lodged requests with the Deputy Minister for revision (herziening) of his decision, reserving the right to state their grounds for so doing at a later stage. On 4 January 1991 the Deputy Minister acknowledged the receipt of these requests and decided that they should have suspensive effect with regard to Souad's and Souffiane's expulsion (see paragraph 53 below).

25. On 18 January Salah Ahmut, Souad and Souffiane filed statements of their grounds for requesting revision. They stated that the Deputy Minister's establishment of the facts had been incorrect; in support of their position they submitted copies of the documents mentioned in paragraphs 14 and 17 above. They also observed that two of Souad's and Souffiane's brothers, Fouad and Chaouki Dayaf, were in the Netherlands for study purposes and submitted statements from the Technical University of Delft to the effect that they had applied for admission.

26. The Deputy Minister referred the matter to the Aliens Advisory Board (Adviescomissie voor vreemdelingenzaken - see paragraph 54 below) for advice on 31 January 1991.

27. As the Deputy Minister did not decide within three months, Salah Ahmut, Souad and Souffiane, acting on the legal assumption that their requests had been refused, lodged an appeal with the Raad van State on 6 March 1991. They based their appeal on the grounds put forward in support of their request for revision, to which the Deputy Minister had not responded.

In view of this appeal, the Deputy Minister took no further action with regard to the request for revision of his original decision although he did not withdraw his request to the Advisory Board for advice.

28. The Aliens Advisory Board held a hearing on 20 March 1991, during which both Salah Ahmut - as Souffiane's legal representative - and Souad were heard. During this hearing it emerged, inter alia, that Salah Ahmut had two brothers living in Morocco and that Souad had become pregnant in the Netherlands by a trader who, although he lived in Morocco, made frequent visits to the country.

The Aliens Advisory Board submitted its advice to the Deputy Minister in a document dated the same day. Not finding it established that Salah Ahmut had been divorced from Ms F.A., it concluded that Souad and Souffiane had never belonged to the family which Salah Ahmut had established in the Netherlands with Ms K.A. Souad had reached an age at which she no longer needed to be cared for and she could, if necessary, take care of Souffiane. To the extent that Souad and Souffiane needed additional care, this could be supplied, if not by Salah Ahmut's mother, then at least by Hamid or by their two uncles. Salah Ahmut could continue to provide financial support from the Netherlands if necessary.

A decision rejecting the applications for a residence permit would not, in the Board's view, violate Article 8 of the Convention (art. 8). Although the bond between Salah Ahmut on the one hand and Souad and Souffiane on the other amounted to "family life", there would be no "interference" with it since it could be continued as before. Moreover, any "interference" could be considered "necessary in a democratic society" in the interests of the economic well-being of the country.

29. On 19 April 1991 the Deputy Minister notified the Rotterdam police that Salah Ahmut, Souad and Souffiane had filed an appeal to the Raad van State and that they would be allowed to await the outcome in the Netherlands.

30. The Deputy Minister filed statements of defence to the single-judge Chamber of the Raad van State on 1 October 1991. His arguments corresponded to the grounds on which the Advisory Board had based its advice (see paragraph 28 above).

31. Following a hearing on 10 August 1992, the single-judge Chamber of the Raad van State dismissed the appeals by an oral judgment on 24 August. Its grounds for so doing were essentially those suggested by the Deputy Minister. It noted in addition that in its view the Netherlands were not under a positive obligation to grant Souad or Souffiane a residence permit, since the latter's interests had to be balanced against the general interest served by the implementation of a restrictive immigration policy.

Its reasoning included the following:

> "[The decision not to admit Souffiane] does not violate Article 8 (art. 8) of the European Convention on Human Rights and Fundamental Freedoms. It cannot be said

that there is an interference with family life [familie- of gezinsleven] as Souffiane is not being deprived of residence rights [verblijfstitel] which formerly enabled him to carry on his family life with the appellant, his father. Nor can any positive obligation incumbent on the respondent to grant him residence rights be derived from Article 8 (art. 8), since Souffiane's above-described circumstances must be balanced against the general interest, which the respondent must uphold, which requires the maintenance of a restrictive immigration policy."

32. Souffiane left the Netherlands on 30 September 1991. As from the same date his name was removed from the municipal population register (bevolkingsregister) of the municipality of Rotterdam.

He has been at a boarding-school in Morocco ever since. The applicants state that he has made frequent visits to his father in the Netherlands, and that the latter has visited him in Morocco.

33. The introductory application to the Commission, which was lodged on 23 February 1993, gives Souffiane's and Souad's place of residence on that date as Tangier. Other members of the Ahmut family at present living in Morocco are Salah Ahmut's eldest son Hamid and two of Salah Ahmut's brothers. It is not known whether Salah Ahmut's mother is still alive.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. General

34. The following is a description of the regime governing the admission of aliens to Netherlands territory which applied, at the time of the events complained of, to aliens in general. Binding rules were, and are, laid down in the Aliens Act (Vreemdelingenwet), the Aliens Ordinance (Vreemdelingenbesluit) and the Aliens Schedule (Voorschrift Vreemdelingen).

35. Until 1 January 1994, the Government's policy was defined in the 1982 Aliens Circular (Vreemdelingencirculaire 1982) and the 1984 Border Guarding Circular (Grensbewakingscirculaire). The competent tribunals have consistently held that it was incompatible with general principles of good governance (algemene beginselen van behoorlijk bestuur) to deviate from the policy rules set out in these documents to the detriment of an alien.

36. Special regimes, not relevant to the present case, applied to nationals of European Union or Benelux member States, to nationals of certain other States (not including Morocco) under bilateral treaties and to refugees as defined in Article 1 A of the Geneva Convention of 28 July 1951 relating to the Status of Refugees (United Nations Treaty Series - UNTS - no. 2545, vol. 198, pp. 137 et seq.) and Article 1 of the Protocol relating to the Status of Refugees of 31 January 1967 (UNTS no. 8791, vol. 606, pp. 267 et seq.).

37. Under section 6 (1) of the Aliens Act, to be allowed access to the Netherlands an alien had to qualify for admission - that is, either fulfil the requirements of section 8 of the Aliens Act (see paragraph 40 below), or possess a residence or settlement permit (see paragraphs 44 and 49 below) - and hold a valid passport or equivalent identity document containing a visa if a visa requirement applied (see paragraphs 41 and 42 below).

38. An alien who was refused access to Netherlands territory had to leave the country as soon as possible and could, if necessary, be forcibly removed (section 7 of the Aliens Act).

39. An alien who had been granted access but did not, or no longer, qualify for admission could be expelled (section 22 of the Aliens Act).

B. Visa requirements

40. Under section 8 of the Aliens Act taken together with section 46 of the Aliens Ordinance, aliens who, upon entering the country, had complied with the required formalities at the border were admitted if and for so long as they conformed with the Aliens Act and delegated legislation, had sufficient means to cover the cost of living in the Netherlands and of the return journey, and did not threaten public peace, public order or national security. The right to admission based on section 8 was a temporary right based directly on the law and therefore not conditional on the grant of any permit. However, in principle, a visa was required (see paragraph 41 below) and the duration of the right was limited: to the period of validity of the visa, or to three months in the case of those aliens not subject to visa requirements.

41. Subject to certain exceptions not relevant to the present case, to be granted access to the Netherlands aliens had to hold a valid passport containing a transit visa (transitvisum), valid for up to three days, or a travel visa (reisvisum), valid for up to three months (section 41 (1) of the Aliens Ordinance).

42. To obtain access to the Netherlands with a view to remaining for more than three months, aliens who had not already been granted a residence permit had to hold a valid passport containing a provisional residence visa (section 41 (1) of the Aliens Ordinance). A provisional residence visa was valid for a period of up to six months (section 8 of the Aliens Act).

43. A provisional residence visa could be applied for abroad, through a consular or diplomatic representative, or in the Netherlands, via the head of the local police. Applications were decided on by the Minister for Foreign Affairs (section 1 of the Aliens Ordinance and section 7 of the Sovereign Ordinance (Souverein Besluit) of 12 December 1813) after consultation with the Minister of Justice (Minister van Justitie). Applications for such a visa were considered according to the same criteria as those applying to

applications for a residence permit, since such a visa would only be issued if the alien concerned was expected to be granted such a permit.

C. The residence permit

44. Aliens wishing to reside in the Netherlands for longer than three months (see paragraph 40 above), had to hold a residence permit (section 9 of the Aliens Act). Such a permit was applied for to, and granted by, the Minister of Justice (section 11 (1) of the Aliens Act). It was valid for up to one year and renewable (section 24 of the Aliens Schedule).

45. A residence permit could be applied for either in the Netherlands (through the head of the local police - section 52 of the Aliens Ordinance) or abroad (through a diplomatic or consular representative). The application had to be submitted by the alien him or herself or, if he or she was a minor, by his or her legal representative (section 28 (4) of the Aliens Schedule).

46. The granting of a residence permit was delegated by the Minister of Justice to the head of the local police in certain cases, including cases where the alien applying for such a permit already held a provisional residence visa. In principle, a residence permit was refused an alien who did not already hold a provisional residence visa (1982 Aliens Circular, Chapter A4, para. 3.3).

47. A residence permit could be made subject to restrictions (section 11 (2) of the Aliens Act).

48. An alien holding a valid residence permit was allowed to re-enter Netherlands territory after having left it.

D. The settlement permit

49. The Minister of Justice could grant a settlement permit (vergunning tot vestiging - section 13 of the Aliens Act); such a permit was normally granted only after the alien had been legally resident in the Netherlands for five consecutive years. After such an initial period, a settlement permit would be granted unless there was no reasonable certainty that the alien would be able to meet the costs of living, or if he or she had committed serious breaches of public peace or public order or constituted a serious threat to national security.

E. Relevant policy

50. Given the situation obtaining in the Netherlands with regard to population size and employment, government policy was, and remains, aimed at restricting the number of aliens admitted to the Netherlands. In general, aliens were only granted admission for residence purposes if:

a) the Netherlands were obliged under international law to do so, as in the case of citizens of the European Union or Benelux member States and refugees covered by the Geneva Convention relating to the Status of Refugees;

b) this served "essential interests of the Netherlands" (wezenlijk Nederlands belang), e.g. economic or cultural interests;

c) there were "cogent reasons of a humanitarian nature".

In addition, aliens who, under this policy, were eligible for admission were in principle expected to have sufficient means at their disposal to cover the costs of living and not to threaten public peace or public order or national security. These were general rules which did not apply in the same way to all categories of aliens, specific criteria having been developed applicable to certain categories (1982 Aliens Circular, Chapter A4, para. 5.1.1.1).

51. Specific criteria applied to the admission of aliens in connection with the reunification or establishment of families involving spouses, partners or close relatives of Netherlands nationals or aliens holding residence or settlement permits. Under these criteria, it was possible that admission could be granted for the purpose of reuniting or establishing a family even if the applicable conditions had not all been met, if there were "cogent reasons of a humanitarian nature" (1982 Aliens Circular, Chapter B19, para. 1.1).

52. Government policy with regard to the admission of aliens with a view to continuing or establishing family life in the Netherlands (gezinshereniging) was defined in Chapter B19 of the Aliens Circular.

This chapter contained an express reference to Article 8 of the Convention (art. 8). It was stated in paragraph 1.2 that the refusal of a residence permit did not constitute an "interference" with the right to family life if the relative with whom the alien wished to continue or establish family life could reasonably be expected to follow the alien to a place outside the Netherlands. There might, however, be a positive obligation incumbent on the Netherlands authorities to grant a residence permit. To determine whether this was the case, the interests of the State in denying such a permit should be weighed against the individual’s interests, taking into account the age of the persons involved, their situation in their country of origin, their degree of dependence on relatives in the Netherlands and, if applicable, the Netherlands nationality of any persons involved. If a residence permit was refused after an examination for compliance with the requirements of Article 8 (art. 8), this fact was to be mentioned in the decision.

Minor children - minority being determined according to Netherlands law (Chapter B19, para. 2.1.2.1) - who "actually belonged to the family" (feitelijk behoren tot het gezin), for instance children from a previous

marriage of a person lawfully resident in the Netherlands, were granted a residence permit (Chapter B19, para. 2.1.2).

F. Legal remedies

53. Until the General Administrative Law Act entered into force on 1 January 1994, an alien could, in the event of a refusal to grant a residence permit, apply in writing to the Minister of Justice for administrative revision of his decision (section 29 (1) of the Aliens Act). If such an application was not decided on within six months, it was deemed to have been refused (section 29 (2)). Such a request for revision did not suspend the alien's expulsion unless it was made more than one month before the expiry of the period during which the alien was allowed to remain in the Netherlands (section 32 (2)). It was, however, open to the Minister to decide that the request would have "suspensive effect".

54. The advice of the Aliens Advisory Board had to be obtained if a request was made for revision of a decision to expel an alien whose main place of residence for three months or more had been in the Netherlands and who had complied with the formalities required by the Aliens Act (section 31 (1) (c) taken together with section 29 (1) (g) of the Aliens Act).

55. In the event of a negative decision, or of failure to decide within due time, an appeal lay to the Judicial Division of the Raad van State (section 34 (1) of the Aliens Act). However, no application could be made to the President of the Judicial Division for a provisional measure or for acceleration of the proceedings (section 34 (3)).

PROCEEDINGS BEFORE THE COMMISSION

56. Salah Ahmut, Souad and Souffiane applied to the Commission on 23 February 1993. They relied on Article 8 of the Convention (art. 8), complaining that the refusal of the Netherlands authorities to grant Souad and Souffiane residence permits for the purpose of residing with their father violated their right to respect for their family life.

57. On 12 October 1994 the Commission declared the application (no. 21702/93) admissible in so far as it concerned Salah Ahmut and Souffiane and inadmissible in so far as it concerned Souad. In its report of 17 May 1995 (Article 31) (art. 31), it expressed the opinion, by nine votes to four, that there had been a violation of Article 8 (art. 8).

The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[3].

FINAL SUBMISSIONS TO THE COURT

58. The applicants concluded their memorial by expressing the opinion that the Commission had "rightly judged that there had been a violation of Article 8 (art. 8)".

The Government concluded that there had been no interference with the applicants' right to respect for their family life; in the alternative, that there was no positive obligation incumbent on them to grant Souffiane permission to remain in the Netherlands; in the further alternative, that any interference, if interference there had been, was justified under Article 8 para. 2 (art. 8-2).

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (art. 8)

59. The applicants contended that the refusal to grant Souffiane a residence permit, which would have allowed him to live in the Netherlands with his father, constituted a violation of their right to respect for their family life. They relied on Article 8 of the Convention (art. 8), which provides:

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

The Commission considered that there had been a violation of that provision (art. 8), whereas the Government did not.

[3] For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-VI), but a copy of the Commission's report is obtainable from the registry.

A. Whether the bond between the applicants amounted to "family life"

60. As the Court has frequently held, it follows from the concept of family on which Article 8 (art. 8) is based that a child born of a marital union is ipso iure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life" (see, as a recent authority, the Gül v. Switzerland judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I, pp. 173-74, para. 32), which subsequent events cannot break save in exceptional circumstances.

It was not suggested that any such exceptional circumstances were present in this case. The existence of "family life" between the applicants is therefore established.

B. Whether the case concerns an "interference" with the exercise of the applicants' right to respect for their "family life" or else an alleged failure on the part of the respondent State to comply with a "positive obligation"

61. The Commission, with whom the applicants concurred, considered that the refusal to grant a residence permit to Souffiane amounted to an "interference" with the applicants' exercise of their right to respect for their family life.

62. The Government, relying on the Court's judgment in the case of Gül v. Switzerland, argued that refusal of initial permission to remain in the country did not constitute an "interference" with aliens' exercise of their right to respect for their family life. Such refusal was to be distinguished from withdrawal of resident status, as occurred in the Berrehab case (see the Berrehab v. the Netherlands judgment of 21 June 1988, Series A no. 138), which interfered with an alien's exercise of the right to respect for his family life by making it impossible to continue it in the way to which he was accustomed.

63. The Court reiterates that the essential object of Article 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision (art. 8) do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole ; and in both contexts the State enjoys a certain margin of appreciation (see, most recently, the above-mentioned Gül judgment, pp. 174-75, para. 38).

The present case hinges on the question whether the Netherlands authorities were under a duty to allow Souffiane to reside with his father in the Netherlands, thus enabling the applicants to maintain and develop family life in its territory. For this reason the Court will view the case as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation.

C. Whether the respondent State has failed to comply with a positive obligation"

1. Arguments before the Court

64. The applicants relied on the fact that the Netherlands immigration authorities had permitted Souffiane to remain in the Netherlands pending the outcome of the application proceedings for a residence permit, thus allowing a situation to arise in which the applicants had developed closer ties than was formerly the case.

They also argued that the Netherlands authorities had had insufficient regard to the particular circumstances of Souffiane's life in Morocco. Souffiane had been 9 years old when he arrived in the Netherlands. His only relatives in Morocco were a brother, two uncles and a grandmother. None of these had registered their willingness to take care of Souffiane, with the exception of the grandmother; she, however, was in her eighties and in poor health and accordingly unable to do so. As regards Souffiane's sister Souad, who had been refused a residence permit at the same time as Souffiane, she was a young unmarried mother and her personal circumstances were such that she could not be expected to take care of Souffiane either.

In any event, Salah Ahmut had Netherlands nationality. He had a business in the Netherlands. In the circumstances it was not realistic to expect him to return to Morocco to continue his family life with Souffiane there.

Finally, they claimed that the decision to send Souffiane to a boarding-school in Morocco in 1991 had been taken because it was at that time unclear whether he would be allowed to remain in the Netherlands, and the time had come to make choices with regard to his education.

65. At the time when it formed its opinion, the Commission was under the impression that Souffiane had never returned to Morocco and that consequently Souffiane had lived with his father for approximately six years. It would in its view have been unreasonable to separate father and son after so long a period.

In addition, it noted that Salah Ahmut was Souffiane's closest living relative, his mother being dead. Like the applicants, it considered that the fact of Salah Ahmut's Netherlands nationality should have been taken into account in the applicants' favour. Finally, it found that it was uncertain to

what extent, if at all, Souffiane's relatives in Morocco might be willing and able to take proper care of him.

In these circumstances, and weighing Souffiane's interests against those of the respondent State to control immigration, the Commission found that the balance struck by the Netherlands authorities had not been fair.

66. The Government denied ever having allowed Souffiane to reside in the Netherlands. The fact that Souffiane had not been expelled was due to the fact that the application for review of the decision to refuse him a residence permit had suspended his expulsion, as had his appeal to the Judicial Division of the Raad van State.

Moreover, the Government's view was that it was not under an obligation to facilitate the development of family life between the applicants on Netherlands territory. Although it was true that Salah Ahmut had acquired Netherlands nationality, this was not decisive; he had also retained his original Moroccan nationality and was free to return to Morocco at any time to resume his family life with Souffiane there.

Disagreeing on this point with the applicants and the Commission, the Government considered that Souffiane's relatives in Morocco could be considered capable of taking proper care of him.

2. The Court's assessment

67. The applicable principles have been stated by the Court in its Gül judgment as follows (loc. cit., para. 38):

a) The extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest.

b) As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.

c) Where immigration is concerned, Article 8 (art. 8) cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory.

68. Accordingly, as in the Gül case, in order to establish the scope of the State's obligations, the facts of the case must be considered.

69. After Salah Ahmut went to the Netherlands in 1986 Souffiane was cared for by others, first Souffiane's mother, and after the latter's death in 1987, his grandmother (see paragraphs 9 and 12 above). Apart from the period between 26 March 1990 and 30 September 1991, which he spent in the Netherlands, and a number of visits to his father (see paragraph 18 above), Souffiane has lived in Morocco all his life. It follows that Souffiane has strong links with the linguistic and cultural environment of his country. In addition, he still has family there, namely his elder brother Hamid, his

sister Souad, two uncles and possibly his grandmother (see paragraph 33 above).

70. The fact of the applicants' living apart is the result of Salah Ahmut's conscious decision to settle in the Netherlands rather than remain in Morocco.

In addition to having had Netherlands nationality since February 1990, Salah Ahmut has retained his original Moroccan nationality (see paragraph 7 above). Souffiane has Moroccan nationality only (see paragraph 8 above).

It therefore appears that Salah Ahmut is not prevented from maintaining the degree of family life which he himself had opted for when moving to the Netherlands in the first place, nor is there any obstacle to his returning to Morocco. Indeed, Salah Ahmut and Souffiane have visited each other on numerous occasions since the latter's return to that country.

71. It may well be that Salah Ahmut would prefer to maintain and intensify his family links with Souffiane in the Netherlands. However, as noted in paragraph 67 above, Article 8 (art. 8) does not guarantee a right to choose the most suitable place to develop family life.

72. By sending Souffiane to boarding-school, Salah Ahmut has arranged for him to be cared for in Morocco. The Court therefore need not go into the question whether Souffiane's relatives living in Morocco are willing and able to take care of him.

73. In the circumstances the respondent State cannot be said to have failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other.

It follows that no violation of Article 8 (art. 8) can be found on the facts of the present case.

FOR THESE REASONS, THE COURT

Holds by five votes to four that there has been no violation of Article 8 of the Convention (art. 8).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 November 1996.

Rudolf BERNHARDT
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 55 para. 2 of Rules of Court B, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Valticos;

(b) dissenting opinion of Mr Martens, joined by Mr Lohmus;

(c) dissenting opinion of Mr Morenilla.

R. B.
H. P.

DISSENTING OPINION OF JUDGE VALTICOS

(Translation)

The decision of the small majority of the Chamber who have held that there has been no breach of the Convention in the instant case is to be regretted.

Few human rights are as important as a father's right to have his son by him, to guide him, to supervise his education and training and to help him choose and begin a career and as it were to prepare the projection of his own life into the future by contributing to a happy and productive life for his child.

Similarly, few rights are as important as an adolescent son's right to live with his father and to take advantage of the atmosphere of affection as well as of the father's help and advice.

Alongside these fundamental factors, the arguments in support of the Netherlands authorities' decision to separate the son from his father (arguments such as the actual length of the son's visits to his father) do not weigh very heavily and even reflect a restrictive spirit incompatible with the very meaning of the Convention and the concept of human rights.

The fact that the son did not live with his father for very long is due to the vicissitudes of the father's marriage, but it has been established that the father has always taken an interest in his son, has helped him and even had him come to stay with him in the Netherlands, even if only for a short period.

To these considerations, which should have been decisive, must be added a troubling feature. The father had acquired Netherlands nationality, and in any country, a national is entitled to have his son join him, even if the son does not have the same nationality. How does it come about that in the present case this right was refused him? I cannot think that it is because the Dutch father was called "Ahmut". However, the suspicion of discrimination must inevitably lurk in people's minds.

It is to be hoped that the Netherlands Government will swiftly remedy this blunder.

DISSENTING OPINION OF JUDGE MARTENS, JOINED BY JUDGE LOHMUS

1. I am unable to persuade myself that, as found by the majority, the Netherlands did not violate Article 8 (art. 8).

2. I am worried that, although this case could have easily been distinguished from that of Gül v. Switzerland (see the Court's judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I, p. 159), a Chamber composed for the most part of different members has chosen to follow that unfortunate precedent. In this context I refer to what I have said in paragraph 15 of my dissenting opinion in the latter case. I fear that the present decision marks a growing tendency to relax control, if not an increasing preparedness to condone harsh decisions, in the field of immigration.

3. For my part, I maintain my views as set out in that dissenting opinion. Consequently, I find that the refusal of the Netherlands authorities to admit Souffiane in principle engages their responsibility under Article 8 para. 1 (art. 8-1). What remains to be ascertained is whether or not their refusal was justified under Article 8 para. 2 (art. 8-2).

4. The refusal was, without any doubt, in accordance with the law and served a legitimate aim. It was, however, in my opinion disproportionate.

5. For the reasons given in my above-mentioned dissenting opinion, I infer from the Court's Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985 (Series A no. 94) that where the issue of family reunification arises in a case of "immigrants who already had a family which they left behind", the State of settlement is in principle bound to respect the choice of immigrants who have achieved settled status there and, accordingly, must as a rule admit members of the family left behind by such settlers. There may, perhaps, be exceptions to this rule. However, in my opinion, where reunion with the immigrant's little children is at stake it is very difficult to admit that the rule should not be followed. So much for general principles. I now turn to the case at hand.

6. Salah Ahmut has achieved settled status in the Netherlands, in fact the best possible settled status: he has acquired Netherlands nationality. Admittedly, one might be tempted to doubt whether he has acquired that status by means which are above suspicion. However, since the Government have not relied on this feature of the case and have accepted that Salah Ahmut is a Netherlands national, the principle of equality requires that the Court apply the same standards as it would apply to those whose Netherlands nationality is irreproachable. In the context of the present case the fact that the Netherlands authorities have allowed Salah Ahmut to retain his Moroccan nationality is immaterial.

7. After Souffiane's mother died, Salah Ahmut decided to take care of his son who - at the moment which the Government have rightly accepted as

decisive, i.e. the moment of the refusal - was only 9 years old. Whether or not his father had then started a new family in the Netherlands, whether or not Souffiane might possibly be brought up by his grandmother, his uncles, his brothers or sister, is all, in principle, immaterial as long as Souffiane's father is ready, willing and able to do so. If a father who is a Netherlands national wants to live with and care for his 9-year-old child in the Netherlands both father and child are, in principle, entitled to have that decision respected.

8. There are, in my opinion, no grounds which justify an exception. The mere fact that the child is an alien does not do so (see paragraphs 5 and 6 above). Nor does the fact that Salah Ahmut, within a year after he had assumed the care of Souffiane, sent his son to a boarding-school in Morocco, if only because this fact occurred after the decisive date.

9. For these reasons I find that the refusal of the Netherlands authorities to admit Souffiane constitutes a violation of their obligations under Article 8 of the Convention (art. 8).

DISSENTING OPINION OF JUDGE MORENILLA

1. To my regret I cannot share the conclusion of the majority in finding that Article 8 of the Convention (art. 8), which recognises everyone's right to respect for his family life, has not been violated by the refusal of the Netherlands authorities to admit Souffiane Ahmut - a 9-year-old child who has lost his mother in Morocco - to live with his father, a well-established immigrant who at the time of application had acquired Netherlands nationality.

2. In view of these circumstances, the measures adopted by the Netherlands authorities do not appear to be either necessary or proportionate to the legitimate aims that Article 8 para. 2 (art. 8-2) foresees, and therefore not justified under this provision (art. 8-2). To deny a father and son their right to be together when the son is at an age at which he needs his father's care and guidance, particularly since his mother has died, and to deny a national of the Netherlands the right to have his son begin an education in the adopted country of which he is a national according to the law, is in my opinion contrary not only to the European Convention of Human Rights but also to "cogent reasons of a humanitarian nature" as set forth in the national legislation (1982 Aliens Circular, Chapter B19, paras. 1.1 and 2.5).

3. Furthermore, human rights are recognised in international instruments in the form of legal formulas imposing on national authorities positive or negative obligations to ensure the effective enjoyment of those rights and liberties. The juridical treatment of these provisions, their interpretation and application by the authorities - and, obviously, by the courts - should in my view be in accordance with the humanitarian grounds for which they were established, avoiding excessive formalism. These humanitarian reasons are to me more "cogent" than the opposite interpretation of the conventional text offered by the majority.

4. The subsequent education of the child in Morocco and the fact that he is now 14 years old and has grown up outside the Netherlands in the care of other relatives are circumstances that should not be considered when deciding the present case. They are facts extraneous to the measures complained of, and, as such, they merely highlight the fatal consequences of impeding the reunited family life which the applicants desired. The benefit of hindsight when deciding judicial cases several years after a complaint has been lodged may certainly prove to be of use when assessing the reality of a risk but never, in my opinion, to judge the conformity with the Convention of impugned measures adopted by national authorities at the time. This opinion is not inconsistent with the principles set out in paragraph 67. The fact that Mr Salah Ahmut is a national of the Netherlands, and his child's age at the time of the refusal, are in my view, decisive in finding a violation in the present case.