



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

AFFAIRE BOUJLIFA c. FRANCE

CASE OF BOUJLIFA v. FRANCE

(122/1996/741/940)

ARRET/JUDGMENT

STRASBOURG

21 octobre /October 1997

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Gravenhage)

SUMMARY¹

Judgment delivered by a Chamber

France – expulsion, following two criminal convictions, of a Moroccan who arrived in France at age of 5 and whose parents and eight brothers and sisters are lawfully resident in France

ARTICLE 8 OF THE CONVENTION

A. Paragraph 1

Question whether applicant had a private and family life within meaning of Article 8 of Convention was to be considered in light of position on date of deportation order – applicant was living in France, although he was not entitled to claim at that time to be involved in a relationship with his French cohabitant, and seemed to have remained in touch with his family.

Order for applicant's deportation amounted to interference with his right to respect for his private and family life.

B. Paragraph 2*1. "In accordance with the law"*

Not contested.

2. Legitimate aim

Prevention of disorder or crime.

3. "Necessary in a democratic society"

Obligation for Contracting States to maintain public order, in particular by exercising their right to control entry and residence of aliens – included power to deport aliens convicted of criminal offences.

Applicant's ties with France: had arrived there at age of 5 and had lived there since 1967, apart from one period of fifteen months – had received his education there, had worked there for a brief period and his parents and eight brothers and sisters lived there. On other hand, he had never shown any desire to acquire French nationality.

Great importance attached to offences committed: by their seriousness and severity of penalties they attracted, they constituted particularly serious violation of security of persons and property and of public order. In instant case requirements of public order outweighed personal considerations which had prompted the application.

Conclusion: no violation (six votes to three).

1. This summary by the registry does not bind the Court.

COURT'S CASE-LAW REFERRED TO

29.1.1997, Bouchelkia v. France; 1.7.1997, Kalaç v. Turkey

In the case of Boujlifa v. France¹,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of Rules of Court A², as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr THÓR VILHJÁLMSSON,

Mr L.-E. PETTITI,

Mr J.M. MORENILLA,

Mr A.B. BAKA,

Mr K. JUNGWIERT,

Mr P. KÜRIS,

Mr U. LÖHMUS,

Mr P. VAN DIJK,

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

Having deliberated in private on 28 June and 22 September 1997,

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”) on 16 September 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 25404/94) against the French Republic lodged with the Commission under Article 25 by a Moroccan national, Mr Driss Boujlifa, on 22 June 1994. The applicant, who was designated during the proceedings before the Commission by the initials D.B., subsequently consented to the disclosure of his identity.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to

Notes by the Registrar

1. The case is numbered 122/1996/741/940. 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 A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included *ex officio* Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 17 September 1996, 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 Thór Vilhjálmsson, Mr J.M Morenilla, Mr D. Gotchev, Mr K. Jungwiert, Mr P. Kūris, Mr U. Lõhmus and Mr P. van Dijk (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the French Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 19 February 1997. The applicant's lawyer and the Delegate of the Commission made oral submissions at the hearing.

5. On 28 May 1997 the Commission produced the documents relating to the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 June 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr J. LAPOUZADE, administrative court judge, on secondment to the Legal Affairs Department, Ministry of Foreign Affairs,	<i>Agent,</i>
Mrs F. DOUBLET, Head of the Comparative and International Law Office, Ministry of the Interior,	<i>Adviser;</i>

(b) *for the Commission*

Mr L. LOUCAIDES,	<i>Delegate;</i>
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(c) *for the applicant*

Mr Y. THiant, <i>avocat</i> , of the Paris Bar,	<i>Counsel.</i>
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The Court heard addresses by Mr Loucaides, Mr Thiant and Mr Lapouzade.

7. On 22 September 1997 Mr A.B. Baka, substitute judge, replaced Mr Gotchev, who was unable to take part in the further consideration of the case (Rules 22 § 1 and 24 § 1).

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

8. Mr Driss Boujlifa was born in Morocco in 1962. He entered France at the age of 5 when he joined his father under the family reunion procedure. Three of his eight brothers and sisters have French nationality.

When he was 20 the applicant committed a number of criminal offences. On 10 May 1985 the Bourg-en-Bresse Juvenile Assize Court sentenced him to six years' imprisonment for armed robbery. On 29 November 1985 the Lyon Court of Appeal sentenced him to eighteen months' imprisonment for robbery.

9. When he had served these sentences he was extradited to Switzerland pursuant to a decree issued in 1984 to serve a prison sentence for theft, from 5 May 1987 to 5 August 1988. At the end of that period he returned to France and went to live with his parents. He has asserted that he was gainfully employed from June 1989 to January 1991.

10. Not having had a valid residence permit since February 1983, Mr Boujlifa went to the Prefecture of Alpes-Maritimes on 2 January 1990 in order to regularise his situation. On 21 November 1990 he was informed that deportation proceedings had been commenced against him on account of the convictions pronounced on 10 May and 29 November 1985.

A. The deportation order

11. On 8 April 1991 the Minister of the Interior made the following order against the applicant:

“Having regard to sections 23 to 25 of Ordinance no. 45-2658 of 2 November 1945, as amended, concerning the conditions of entry and residence of aliens in France,

Having regard to Decree no. 82-440 of 26 May 1982,

Whereas Boujlifa Driss, born on 6 June 1962 at Casablanca (Morocco), committed in 1982 the offences of attempted robbery, armed robbery and receiving stolen goods,

Whereas on account of his conduct the presence of the above-named alien in French territory constitutes a serious threat to public order,

Having regard to the favourable opinion of the board provided for in section 24 of the Ordinance, of 13 December 1990,

On a proposal by the Prefect of Alpes-Maritimes,

IT IS HEREBY ORDERED AS FOLLOWS

Article 1: the above-named person is enjoined to leave France;

Article 2: the Prefect of Police and the Prefects are instructed to serve and execute this order.”

B. The applications for judicial review and stay of execution

1. In the Nice Administrative Court

12. On 21 and 24 May 1991 respectively the applicant applied to the Nice Administrative Court for an order quashing the deportation order and an order staying its execution. He relied in particular on his right to respect for his private and family life, as guaranteed by Article 8 of the Convention.

13. On 20 December 1991 that court dismissed the applications in the following terms:

“The submission based on the failure to give reasons for the impugned decision:

While the Minister of the Interior instanced the offences committed by Mr Driss Boujlifa as reasons for his decision, he also mentioned his conduct and the board’s favourable opinion. Consequently, in the circumstances of the case, the order must be considered to have been accompanied by a sufficient statement of its reasons.

The submission based on an alleged error of law in the application of section 25 of the Ordinance of 2 November 1945:

...

Notwithstanding Mr Driss Boujlifa’s assertion that he has been lawfully resident in French territory since 1967 and that when he entered the territory he was 5 years old, the documents in the case file show that he was extradited, had to leave the territory on 5 May 1987 and was imprisoned in Switzerland until August 1988. Even though the applicant did not leave French territory voluntarily on that occasion, he ceased to be normally resident in France within the meaning of section 25 of the above-mentioned Ordinance. He subsequently returned to France and stayed there unlawfully. The fact that he then applied for a residence permit and the assertion that he had received no explicit reply to an application for a residence permit he had made in 1982 have no bearing on the fact that he remained in French territory unlawfully. It

follows that the submission based on a breach of the provisions of the second paragraph of section 25 of the Ordinance fails on factual grounds.

The submission based on manifest error:

It does not appear from the documents in the file that the aliens deportation board provided for in section 25 of the Ordinance or the Minister of the Interior failed to examine all the evidence relating to the applicant's conduct and the various aspects of his situation in order to determine whether, after he had committed a number of criminal offences and been sentenced both in France and in Switzerland to several terms of imprisonment, his presence in French territory, at a time when he was living there unlawfully, constituted a serious threat to public order. Although Mr Driss Boujlifa asserts that he completed his studies in France, that he has a steady job there and pays rent, that some of his brothers and sisters have acquired French nationality, that he has committed no further offences since serving the sentences mentioned above, that he is perfectly integrated into French society and that he has not maintained any links with Morocco, those facts are not sufficient to establish that the Minister of the Interior made a manifest error.

The submission based on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms:

...

In support of his arguments to the effect that the impugned decision constituted such a serious interference in his family life as to exceed what was necessary to preserve public order, Mr Driss Boujlifa asserts that he no longer has any family ties with the country whose nationality he possesses, that he does not speak its language and has not lived there since the age of 5, that his whole family lives in France and that his youngest brothers and sisters have acquired French nationality. However, it appears from the documents in the file that the impugned decision, which was based on defence of public order, was necessary, in view of the applicant's conduct and the seriousness of the offences he had committed, for the defence of that order. That being so, it did not breach Article 8."

2. *In the Conseil d'Etat*

14. On appeal by Mr Boujlifa, the *Conseil d'Etat* gave judgment on 18 February 1994. It upheld the Administrative Court's judgment in the following terms:

"...

Mr Boujlifa committed and was convicted of armed robbery, receiving stolen goods and assault with a tear-gas spray. The impugned deportation order was necessary, in view of the seriousness of those offences, for the defence of public order, and did not, given that Mr Boujlifa is unmarried and childless, interfere disproportionately with his right to respect for his private and family life. That being so, it did not breach Article 8 of the Convention.

It follows from all the above that Mr Boujlifa fails in his claim that in the impugned judgment the Nice Administrative Court wrongly dismissed his application to have the Minister of the Interior's order of 8 April 1991 requiring him to leave France set aside."

15. Since August 1988 the applicant has lived in France without a residence permit or a work permit; since January 1991 he has cohabited with Miss V., a French national.

II. RELEVANT DOMESTIC LAW

A. Deportation

16. In French law deportation is a public-order measure, not a criminal penalty (Constitutional Council decision no. 79-109, *Droit constitutionnel*, 9 January 1980, *Recueil Dalloz Sirey* 1980, 249; *Conseil d'Etat*, 20 January 1988, Elfenzi, *Actualité juridique, Droit administratif* 1989, 223; and Criminal Division of the Court of Cassation, 1 February 1995, *Juris-Classeur périodique* 1995, *édition générale*, II, 22463). It applies to aliens with a residence permit who live in France, but not to those who have entered illegally and against whom only a removal order may be made.

The deportation of aliens is governed by the provisions of the Ordinance of 2 November 1945 concerning the conditions of entry and residence of aliens in France. Section 1 of the Ordinance provides: "all persons who do not have French nationality, whether they have a foreign nationality or are stateless, shall be deemed to be aliens." The basic provisions of the Ordinance have been amended by, *inter alia*, Law no. 80-9 of 10 January 1980; Law no. 81-82 of 2 February 1981; Law no. 81-973 of 29 October 1981; Law no. 86-1025 of 9 September 1986; Law no. 89-548 of 2 August 1989; Law no. 91-1383 of 31 December 1991; Law no. 93-1027 of 24 August 1993; and Law no. 93-1417 of 30 December 1993.

The Law of 10 January 1980 prescribed six grounds for deportation and substantially altered its role; deportation had been intended to guard against threats to public order, but it was now also used as punishment in certain cases where there had been a breach of the immigration rules.

That Law was rapidly replaced by Law no. 81-973 of 29 October 1981, in which the following two grounds for deportation were retained:

- (i) the first, to which the ordinary rules of procedure applied, was where "an alien's presence on French territory constitute[d] a serious threat to public order" (sections 23 to 25);
- (ii) the second, for which there was a special procedure, concerned "cases of extreme urgency [and] absolute necessity for the security of the State or public safety" (section 26).

That Law also prescribed the categories of aliens who could not be deported under the ordinary procedure and who were protected because of their age, the length of time they had spent in France, their family ties there, the services they had rendered and the fact that they had no criminal record.

The provisions relating to the definition of the protected categories, the substantive conditions and the safeguards provided under the ordinary procedure were alternately amended and restored by subsequent legislation.

In 1991 it was a prerequisite to instituting the ordinary procedure used in the instant case, governed by sections 23 to 25 of the Ordinance of 2 November 1945, that “the alien’s presence on French territory constitute[d] a serious threat to public order”. Recourse to the special procedure required extreme urgency and an “absolute necessity for the security of the State or public safety”.

1. Ordinary procedure

17. This procedure may properly be described as adversarial and applies where “the alien proves that he entered France legally and that he is the lawful holder of a residence permit” (section 24).

An aliens deportation board for the *département* must be consulted. Such boards are composed of the president of the *tribunal de grande instance* of the administrative capital of the *département* or a judge delegated by him, who acts as chairman, a judicial officer (*magistrat*) appointed by the general assembly of the *tribunal de grande instance* of the administrative capital of the *département* and an administrative court judge. Its hearings are held in public. In 1991 the Minister of the Interior had a reduced discretionary power. Since Law no. 93-1027 of 24 August 1993, the board’s opinion is no longer binding on the Minister.

2. Special procedure in cases of extreme urgency and absolute necessity for the security of the State or public safety

18. Deportation orders made to preserve public order are intended to guard against – and not to punish – breaches of public order. With the sole exception of minors, no category of aliens is protected.

Under the special procedure none of the safeguards contained in the ordinary procedure are available. Thus, aliens are not informed in advance that their deportation is being considered, do not receive any special notification, are not given an opportunity to make representations and do not appear before the board; the board does not hold a meeting, not even in the alien’s absence. No formal steps have to be taken before the deportation order is issued and the order does not have to contain reasons.

19. The condition relating to absolute necessity for the security of the State or public safety was introduced by the Law of 29 October 1981. It was replaced in the Law of 6 September 1986 by a requirement of “a particularly

serious threat to public safety”, but was reintroduced in the Law of 2 August 1989. In practice section 26 also covers cases concerning violent and anti-social behaviour by an alien over a long period since the age of 10 (*Conseil d’Etat*, 23 December 1987, Tahraoui, *Recueil des arrêts du Conseil d’Etat* (“*Rec.*”) p. 430) and rape and indecent assault with violence or taking the victim by surprise (*Conseil d’Etat*, 24 May 1993, Igartúa Amondaraín, *Rec.* p. 163, and *Conseil d’Etat*, 23 June 1993, Bouchelkia, *Droit administratif* 1993, no. 412).

20. To the extreme urgency requirement, laid down as from 1945, a requirement of “absolute necessity for the security of the State and public safety” was added in 1981. Extreme urgency is in practice relied on to ensure that aliens who have been convicted by the criminal courts and are serving their sentence can be deported as soon as they are released. Its substance is assessed on a case-by-case basis by the Minister, subject to review by the administrative courts.

For a long time the *Conseil d’Etat* ruled that the question whether there was any urgency itself came within the unfettered discretion of the Minister. From 1970 it interpreted the requirement so as to limit its application solely to cases where the deportation was to take place within a very short time (*Conseil d’Etat*, 16 January 1970, Mihoubi Tayeb, *Rec.* p. 25). It later found that the urgency requirement had been satisfied where the alien was due to be released shortly (*Conseil d’Etat*, 13 November 1985, Ministry of the Interior v. Barrutiabengoa Zabarte, *Rec.* p. 321), then held that it was lawful to use the procedure against an alien who had been released from prison several months before the deportation order was made (*Conseil d’Etat*, 24 June 1988, Hamade, *Rec.*, tables, p. 933, and 8 April 1994, Zehar, *Dalloz* 1994), or who had obtained early release seven months before the issue of a deportation order (*Conseil d’Etat*, 3 February 1995, Kaouche, application no. 145404, *Droit administratif*, May 1995, p. 10). It also accepted that the Minister could use the extreme urgency procedure where, in connection with a deportation initially commenced under the ordinary procedure, the board had expressed an opinion against deportation. The *Conseil d’Etat* held that practice to be lawful “provided that the requirements of section 26 were satisfied at the time the order was made” (*Conseil d’Etat*, 24 May 1993, Igartúa Amondaraín, *Rec.* p. 163).

3. Enforcement and effects of a deportation order

21. A deportation order issued by the Minister of the Interior remains in force indefinitely. Since 1986 such orders embody authority to execute and may be enforced without further order, using force if necessary.

22. In general, deportation is carried out without delay; however, the effects of the deportation order are not exhausted as a result of its execution.

Thus, deported aliens are precluded from returning to French territory for so long as the order has not been rescinded. If they do return, they are liable to the penalties applicable to cases of avoiding or attempting to avoid the execution of a deportation order and returning to France without leave to enter.

Furthermore, according to a circular issued by the Minister of the Interior on 8 February 1994 concerning the application of the Laws of 24 August and 30 December 1993, although the celebration of the marriage of an alien on French territory is not subject to any condition regarding the lawfulness of his stay, a prefect who is informed that the alien wishing to get married is in breach of the immigration rules may, before the wedding, make an order for his removal under section 22 of the Ordinance of 1945 and, after the ceremony, decide to expel him pursuant to that provision. The *Conseil d'Etat* has held that an order for removal could lawfully be made against an alien who was about to marry a French national (*Conseil d'Etat*, Judicial Division, 26 July 1991, Lazaar, application no. 121849).

4. Judicial review of a deportation order

23. As deportation orders are not subject to any special rules, an application for judicial review may be made to the administrative court having territorial jurisdiction under the ordinary rules. Such applications have no suspensive effect and may therefore be accompanied by an application for a stay of execution even where the order has been enforced and the alien is outside France.

On 31 July 1996 (application no. 149765), the *Conseil d'Etat* set aside a deportation order made against an Algerian who was born in France and had always lived there, on the grounds that:

“... his close relatives live in France and some of them have French nationality. When the deportation order was made against him, he was the father of a child of French nationality and was married to a French national. In the circumstances of the case, although it has been shown that he has committed offences for which he has been sentenced to several terms of imprisonment (the most recent being a twelve-year sentence for armed robbery, burglary committed at night or with accomplices and theft) the impugned decision has nonetheless, regard being had to the applicant's conduct subsequent to his convictions for those offences and to the fact that he has no ties with any country other than France, interfered with the applicant's rights to respect for his private and family life in a way that was disproportionate to the aims with which it was taken.”

5. Applications to have a deportation order rescinded

24. The alien concerned may, at any time, and as often as he chooses, apply for the deportation order to be rescinded.

Where the application is submitted less than five years “after the final execution of the deportation order”, the Minister of the Interior is not subject to any specific procedural requirements in reaching his decision. If the application is submitted “after a period of five years ...”, it may be rejected only after the opinion of the deportation board for the *département* has been sought; the alien may be represented before the board”. Consultation is required even where the deportation order was made under the procedure for cases of extreme urgency. Since the Law of 24 August 1993 came into force, the board’s opinion is no longer binding on the Minister.

The *Conseil d’Etat* had considered that a deportation order was executed on the date the alien left French territory and that, in consequence, even if he subsequently returned to France illegally, the five year period ran from that date (*Conseil d’Etat*, 18 November 1988, Higoun, *Rec.* p. 415). However, section 28 *bis*, added to the Ordinance of 1945 by the Law of 24 August 1993, now prevents a deportation order being rescinded if the alien has not left France or if he has returned there illegally: “An application ... for the rescission of a deportation order ... submitted after the expiry of the time-limit for making an application for judicial review cannot be granted unless the foreign national resides outside France.”

An application to which there has been no response within four months is deemed to have been rejected by the Minister of the Interior. Where the Minister of the Interior decides not to enforce a deportation order whilst at the same time refusing to rescind it, a compulsory residence order is made against the alien. If the alien continues to disturb public order, he may be deported. That constitutes a new decision, separable from the deportation order and in respect of which an application for judicial review may be made to the administrative court. In considering the application, the court examines the conduct of the alien during the period when his presence in France was tolerated. In reviewing the lawfulness of the measure the court therefore examines the position at the date of its judgment. However, a ground of appeal on the basis that the alien had mended his ways after the date of the order is ineffective (*Conseil d’Etat*, 27 November 1985, Hamza, *Rec.* p. 712).

The fact that a deportation order has been rescinded does not constitute leave to enter. If leave is sought, it may lawfully be refused.

B. Acquisition of French nationality

25. Article 21-27 of the Civil Code, which is relevant in this case, provides:

“Subject to the provisions of Articles 21-7, 21-8 [concerning aliens born in France of foreign parents] and 22-1 [concerning the minor children of parents who have acquired French nationality], no one may acquire French nationality or be restored to

that nationality if either (i) he has been convicted of a serious crime (*crime*) or other major offence (*délit*) harmful to the fundamental interests of the nation or of an act of terrorism or (ii) whatever the nature of the offence, if he has been sentenced to a term of imprisonment, not suspended, of at least six months.

(*Law no. 93-1417 of 30 December 1993*) The same shall apply to a person who is the subject of a deportation order which has not been expressly set aside or rescinded or to a ban on re-entering French territory that has not expired.

(*Law no. 93-1027 of 24 August 1993*) The same shall apply to persons whose stay in France is unlawful under the laws and treaties relating to the residence of aliens in France.”

PROCEEDINGS BEFORE THE COMMISSION

26. Mr Boujlifa applied to the Commission on 22 June 1994. He alleged a violation of his right to respect for his private and family life, as guaranteed by Article 8 of the Convention.

27. The Commission (Second Chamber) declared the application (no. 25404/94) admissible on 17 January 1996. In its report of 26 June 1996 (Article 31) it expressed the opinion by eleven votes to two that there had been no violation of Article 8 of the Convention. The full text of the Commission’s opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment¹.

FINAL SUBMISSIONS TO THE COURT

28. In their memorial the Government submitted “that [Mr Boujlifa’s] application should be dismissed”. At the hearing the applicant’s lawyer asked the Court to hold that there had been a breach of Article 8 of the Convention and to award his client just satisfaction.

1. *Note by the Registrar.* For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1997), but a copy of the Commission’s report is available from the registry.

AS TO THE LAW

I. SCOPE OF THE CASE

29. At the hearing before the Court the applicant's lawyer relied on the second sentence of the first paragraph of Article 7 of the Convention, which prohibits the imposition of "a heavier penalty ... than the one that was applicable at the time the criminal offence was committed", arguing that deportation was a criminal penalty.

30. The Court notes that this complaint lies outside the compass of the case as delimited by the Commission's decision on admissibility, since it was not dealt with either in that decision or in the Commission's report (see, as the most recent authority, the *Kalaç v. Turkey* judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1206, § 20).

The scope of the case is therefore limited to the questions raised under Article 8.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

31. Mr Boujlifa submitted that the deportation order made against him interfered in his private and family life and was in breach of Article 8 of the Convention, 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."

Neither the Government nor the Commission agreed.

A. Paragraph 1 of Article 8

32. The Court must first determine whether the applicant is entitled to claim that he has a "private and family life" in France within the meaning of Article 8 § 1 and whether the measure in issue amounted to an interference therein.

33. The applicant submitted that he had arrived in France in 1967 at the age of 5, that he lived there and that his parents and his eight brothers and sisters were lawfully resident there.

He further asserted that he had cohabited with a French national since January 1991, even before the deportation order was made.

34. The Government expressed doubt as to whether Mr Boujlifa had a family life within the meaning of Article 8. His ties with his parents and his brothers and sisters came under private life rather than family life, as he had attained the age of majority. In any event, the strength of the ties concerned had not been clearly established by the documents in the file.

Nor could the fact that the applicant lived with Miss V. constitute family life, even if it were taken to be established, given that the couple had begun to live together at a time when Mr Boujlifa was already facing deportation proceedings and when his situation in France was particularly precarious.

35. The Commission expressed the opinion that the deportation order constituted interference with the applicant's right to respect for his private and family life.

36. The question whether the applicant had a private and family life within the meaning of Article 8 must be determined by the Court in the light of the position at the time when the impugned measure was adopted (see, *mutatis mutandis*, the Bouchelkia v. France judgment of 29 January 1997, Reports 1997-I, p. 63, § 41). That means on 8 April 1991, but the applicant had been informed on 21 November 1990 that deportation proceedings had been commenced against him (see paragraph 10 above). Mr Boujlifa was not therefore entitled to claim at that time to be involved in a relationship with Miss V.

However, the Court observes that he arrived in France in 1967 at the age of 5 and has lived there since then, except while he was imprisoned in Switzerland. He received his schooling there (partly in prison), and his parents and his eight brothers and sisters – with whom he seems to have remained in touch – live there (see paragraph 8 above). Consequently, the Court is in no doubt that the measure complained of amounts to interference with the applicant's right to respect for his private and family life.

B. Paragraph 2 of Article 8

37. The Court must accordingly determine whether the adoption of the measure in issue satisfied the conditions of paragraph 2, namely whether it was “in accordance with the law”, whether it pursued one or more of the legitimate aims listed therein and whether it was “necessary in a democratic society” in order to achieve the aim or aims concerned.

1. “In accordance with the law”

38. It has not been contested that the deportation order made against Mr Boujlifa was based on Articles 23 to 25 of the Ordinance of 2 November 1945, as amended, concerning the conditions of entry and residence of aliens in France.

2. *Legitimate aim*

39. Nor has it been disputed that the interference in question sought to achieve aims which are wholly compatible with the Convention, namely “the prevention of disorder or crime”.

3. *“Necessary in a democratic society”*

40. The applicant pointed out that he had been only 20 years old when he committed the offences on account of which the deportation order had been made. He asked the Court not to make too much of the seriousness of these offences, as he had stolen “through need”. Moreover, he had not been accused of any further criminal act since his return to France after his imprisonment in Switzerland. Lastly, he had no family ties with Morocco, whose language he did not speak.

In short, his expulsion was not justified by the need to preserve public order.

41. The Government and the Commission observed that Mr Boujlifa had been sentenced first to six years’ and later to eighteen months’ imprisonment for armed robbery and robbery respectively. They emphasised the seriousness of these offences and the sentences imposed, noted that the applicant had not established that he had lost all links with Morocco other than his nationality and submitted in conclusion that there had been no breach of Article 8.

42. The Court reiterates that it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences.

However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, as the most recent authority, the *Bouchelkia* judgment cited above, p. 65, § 48).

43. The Court’s task accordingly consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant’s right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

44. With regard to Mr Boujlifa’s ties, the Court observes that he arrived in France at the age of 5 and has lived there since 1967, except for the period from 5 May 1987 to 5 August 1988, when he was serving a prison sentence in Switzerland. He received his education in France, he worked there for a short period and his parents and his eight brothers and sisters live there (see paragraph 9 above).

On the other hand, it seems that he did not show any desire to acquire French nationality at the time when he was entitled to do so.

The Court notes that the offences committed (armed robbery and robbery), by their seriousness and the severity of the penalties they attracted, constituted a particularly serious violation of the security of persons and property and of public order.

It considers that in the instant case the requirements of public order outweighed the personal considerations which prompted the application.

45. Having regard to the foregoing, the Court considers that the making of the order for the applicant's deportation cannot be regarded as disproportionate to the legitimate aims pursued. There has accordingly been no breach of Article 8.

FOR THESE REASONS, THE COURT

Holds by six votes to three that there has been no breach of Article 8 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 October 1997.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

- (a) dissenting opinion of Mr Morenilla;
- (b) joint dissenting opinion of Mr Baka and Mr van Dijk.

Initialed: R. B.
Initialed: H. P.

DISSENTING OPINION OF JUDGE MORENILLA

(Translation)

To my regret, I cannot agree with the majority in this case. The considerations I set out in my partly dissenting opinion in the case of *Nasri v. France* (judgment of 13 July 1995, Series A no. 320-B, pp. 30–33) remain valid in the present case, although the extreme situation of Mr Nasri, a deaf-mute from birth, raised in even more dramatic terms the same question of the compatibility with Articles 3 and 8 of the Convention of the deportation from France to his country of origin of a “second generation” immigrant who had been convicted of serious crimes committed in his youth, a measure adopted by the French authorities after he had served the sentences imposed on him.

Mr Boujlifa – like Mr Nasri – is the son of an immigrant and came to France from Morocco in 1967 at the age of 5 under a family-reunion procedure. His whole family lives in France and three of his brothers have French nationality on account of their birth in French territory. He has never returned to Morocco, whose language he says he does not know (see paragraph 40), and he has been living since 1991 with a French national who will not follow him to Morocco.

In these circumstances, since the deportation of Mr Boujlifa to his country of origin, where he now has no social ties, tears him away from his French environment, it constitutes an interference on the part of the French authorities with his right to respect for his private and family life, as set forth in Article 8 of the Convention, and has no ethical or legal justification under paragraph 2 of that Article. The pressing social need to preserve public order cannot be invoked, since the measure concerned amounted to an aggravation of the criminal penalty imposed on Mr Boujlifa in relation to those imposed on French nationals, so that it is discriminatory. It is also incompatible with the objective of promoting the social rehabilitation of offenders. Lastly, it is unjust for the country which has to take in the deported alien, which is not responsible for its national’s antisocial behaviour.

JOINT DISSENTING OPINION
OF JUDGES BAKA AND VAN DIJK

We are unable to agree with the majority that Article 8 of the Convention has not been violated.

We share the view of those members and former members of the Court who have expressed the opinion that if an immigrant has spent almost his whole life in the host country with all his close relatives and received all his schooling there, retaining no links with his country of origin apart from the formal link of nationality, very serious reasons have to be put forward by the authorities to make the deportation proportionate to the legitimate aim pursued; in principle, such an immigrant should be no more liable to expulsion than the State's own nationals.

In the present case the only such serious reason might possibly be the seriousness of the crimes committed by the applicant. However, in the case of *Moustaquim v. Belgium* (judgment of 18 February 1991, Series A no. 193), the crimes committed by the applicant were perhaps less serious, but they were more numerous. In the case of *Beldjoudi v. France* (judgment of 26 March 1992, Series A no. 234-A), the applicant had committed numerous serious offences, while in the case of *Nasri v. France* (judgment of 13 July 1995, Series A no. 320-B) the list of crimes committed would seem to be more or less comparable to that of those committed by the applicant in the present case. In those three earlier cases the Court reached the conclusion that the applicant's deportation was disproportionate to the legitimate aim pursued. We are aware that the Court reached a different conclusion in certain other recent cases concerning "second generation" immigrants, where the facts did not, in our opinion, differ to a decisive extent from the cases just mentioned.

The Court has been divided on the issue of the deportation of "second generation" immigrants for quite some time. This "reality of life" becomes rather problematical when the application of the proportionality test leads to different outcomes in cases in which the factors to be weighed would not seem to differ in any essential respect. It would therefore seem to be highly desirable that the Court should abandon its casuistic approach to the matter and take a clear position on the question whether and to what extent so-called "second generation" immigrants constitute a special category for whose deportation very serious reasons have to be advanced to make it justifiable under the second paragraph of Article 8. Failing that, the Court should at the very least, in each separate case involving a "second generation" immigrant, indicate in an explicit and well-reasoned way in what respects it is to be distinguished from other cases involving a "second generation" immigrant in which the Court has reached a different

conclusion as to the proportionality of the measure. In our opinion, and to our regret, the present judgment does not provide the national authorities and the possible victims of future deportations with the certainty and clarity to which they are entitled.

As far as the present case is concerned, we fail to see why there was a pressing social need for Mr Boujlifa's deportation to prevent disorder or crime. He spent most of his life in France and his only real ties are with that country. As said before, in our opinion, these facts imply that he should enjoy treatment from the French authorities not significantly less favourable than would be accorded to France's own nationals. When the deportation order was made, Mr Boujlifa had served the terms of imprisonment to which he had been sentenced and which may be assumed to have been proportionate to the seriousness of the crimes committed by him. Moreover, he had given no serious cause to believe that he would commit crimes again. In those circumstances, in our opinion, there was no pressing social need for his deportation, which as a measure to prevent disorder or crime was disproportionate in view of the resulting interference in his private and family life.