CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 46410/99
by Ziya ÜNER
against the Netherlands

The European Court of Human Rights (Second Section), sitting on 26 November 2002 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr GAUKUR JÖRUNDSSON,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 4 August 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ziya Üner, is a Turkish national, who was born in 1969 and is currently residing in Eskişehir, Turkey. He is represented before the Court by Mr R. Dhalganjansing, a lawyer practising in The Hague.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant came to the Netherlands with his mother and two brothers in 1981, when he was 12 years old, in order to join his father who had already been living there for 10 years. He was granted a residence permit (*vergunning tot verblijf*) which was valid for one year at a time, and, in 1988, he obtained a permanent residence permit (*vestigingsvergunning*).

On 18 January 1989 the applicant was convicted by the Regional Court (*arrondissementsrechtbank*) of Almelo of not having complied promptly with an order given by a civil servant to vacate premises given over to administrative use where he was remaining unlawfully (breach of the peace, *lokaalvredebreuk*), and fined 200 Netherlands guilders (NLG). The same court convicted him on 30 May 1990 of having committed an act of violence against persons in a public place (*openlijke geweldpleging*) and sentenced him to a fine of NLG 350 and a suspended term of imprisonment of two weeks.

In or around 1990 the applicant entered into a relationship with a Dutch national. They started living together not long afterwards. A son was born to the couple on 4 February 1992.

On 30 June 1992 the applicant was convicted by the Court of Appeal (*gerechtshof*) of Arnhem of having committed an act of violence against persons in a public place, and sentenced to 80 hours of community service.

On 21 January 1994 the same court convicted him of manslaughter (*doodslag*) and intentionally having caused grievous bodily harm (*zware mishandeling*) and sentenced him to seven years' imprisonment.

A second son was born to the applicant and his partner on 26 June 1996. Both children have Dutch nationality and have been recognised (*erkend*) by the applicant.

By decision of 30 January 1997, the Deputy Minister of Justice (*Staatssecretaris van Justitie*) withdrew the applicant's permanent residence permit and declared him an undesirable alien (*ongewenst vreemdeling*) in view of the seven-year prison sentence imposed on him in 1994. The Deputy Minister considered that the interest of public safety and the prevention of disorder and crime outweighed the interest of the applicant in being able to continue his family life with his partner, children, parents and brothers in the Netherlands.

The applicant lodged an objection (*bezwaarschrift*) against this decision, arguing that the offence in question had been committed as long ago as May 1993, that he had not reoffended, that there was no indication that he would reoffend, and that his partner and children could not be expected to follow him to Turkey. Following a hearing before the Advisory Commission for Aliens' Affairs (*Adviescommissie voor vreemdelingenzaken*), the Deputy Minister rejected the objection on 4 September 1997 and ordered the applicant to leave the Netherlands as soon as he was released from detention.

The applicant appealed to the Regional Court of The Hague sitting in Zwolle, submitting that, as there was no risk of him reoffending, there was no necessity to declare him an undesirable alien and to do so amounted to the imposition of a second penalty.

The applicant was released from prison on 14 January 1998 and subsequently placed in aliens' detention (*vreemdelingenbewaring*).

Following a hearing on 28 January 1998, the Regional Court rejected the applicant's appeal on 4 February 1998. The Regional Court did not accept the applicant's argument that such a long period of time had elapsed between the date on which his criminal conviction had become irrevocable and the date on which the decision to declare him an undesirable alien had been taken, that the Deputy Minister should be deemed to have acquiesced in the applicant's continued residence in the Netherlands. The court further did not discern any facts or circumstances capable of justifying a reduction of the period during which the applicant would be an undesirable alien. The applicant's claim that there was no risk of him reoffending was only based on his own statements and was not supported by the facts, given that he had also been convicted of violent offences in 1990 and 1992. In addition, it had not appeared that the applicant had put down roots in the Netherlands and had become dissociated from Turkish society to such an extent that he would be unable to return to his country of origin. Finally, the Regional Court considered that the interference with the applicant's family life was justified for the prevention of disorder and crime.

The applicant was expelled to Turkey shortly after the decision of the Regional Court. The applicant submits that, prior to his expulsion, he had only been back to Turkey once in order to attend the funeral of his grandmother, and that he does not speak the Turkish language apart from understanding certain expressions. In the proceedings at the national level, the applicant also submitted that he had no relatives in Turkey.

During his detention in the Netherlands, the applicant took courses in computer skills, administration and accounting and he also obtained a retailer's certificate (*middenstandsdiploma*). He further took courses in order to qualify as a sports instructor.

According to a report drawn up by a psychiatrist in Turkey on 9 June 1998, the applicant was suffering psychological problems due to the

fact that he was living apart from his family. In particular the fact that he was missing his children was making him depressed. Treatment began in March 1998 and was continuing even though some improvement had been noted.

B. Relevant domestic law

A person who has been declared an undesirable alien in the Netherlands is allowed neither to reside in that country nor to visit it. The decision to declare a person an undesirable alien is taken pursuant to Article 21 of the 1965 Aliens Act (*Vreemdelingenwet 1965*) and the policy laid down in Chapter A4 of the "1994 Circular on Aliens" (*Vreemdelingencirculaire* – a body of directives drawn up and published by the Ministry of Justice). Underlying this policy is the principle that the longer an alien has lawfully resided in the Netherlands, the more serious an offence has to be before it may justify excluding the alien from Dutch territory; the authorities thus apply a sliding scale (*glijdende schaal*).

In accordance with this policy, an alien who, at the time of committing the offence, has been residing in the Netherlands for more than 10 but less than 15 years – like the applicant in the present case – may be declared an undesirable alien if he/she is sentenced to an unsuspended prison sentence of more than 60 months following a conviction for a serious violent crime or drug trafficking.

If a person was declared an undesirable alien on the basis of a conviction for a serious violent crime or drug trafficking, this declaration will in any event be repealed upon a request thereto if he/she has been residing outside the Netherlands for a period of 10 years.

COMPLAINTS

The applicant complains that the withdrawal of his residence permit and the decision to declare him an undesirable alien amounts to inhuman treatment in breach of Article 3 of the Convention, to an unjustified interference with the right to respect for his family life as guaranteed by Article 8 of the Convention, and a second punishment for an offence of which he had already been convicted, contrary to Article 4 of Protocol No. 7. Invoking Article 14 of the Convention in conjunction with this last provision, he also submits that he is being punished more severely than a Dutch national would have been. He finally complains of a violation of Article 6 of the Convention and Article 2 of Protocol No. 7 in that he was unable to appeal the decision of the Regional Court of 4 February 1998.

THE LAW

1. The applicant complains that his 10-year exclusion from Dutch territory, where his partner and small children reside, amounts to treatment contrary to Article 3 of the Convention, which provides as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Court reiterates that treatment has to reach a certain level of severity before it can be considered to be contrary to Article 3 of the Convention. The assessment of this level depends on all circumstances of the case (see the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 31, § 83). The Court finds that the facts of the present case do not demonstrate that this level was attained.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. The applicant further submits that he had a close-knit and stable family in the Netherlands whose members remained in close contact with him despite his detention. His young children in particular had high hopes that, once released from detention, their father would again become a part of the family and that they would see him every day. By declaring him an undesirable alien and withdrawing his residence permit, the Dutch authorities have caused the unity and continued existence of the family as such to come to an end. Bearing in mind the long duration of his stay in the Netherlands and the ties he has built up in that country, the decision to expel him was disproportionate to the aims pursued.

The applicant invokes Article 8 of the Convention, which, in so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his ... family life ...
>
> 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 ... 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 Court considers that it cannot, on the basis of the case-file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 3 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

3. As regards the applicant's complaint under Article 6 of the Convention that he was unable to appeal the decision of the Regional Court, the Court reiterates that this provision does not apply to proceedings concerning the entry, stay and deportation of aliens (see *Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000-X).

In respect of the same complaint raised under Article 2 of Protocol No. 7, as well as the complaint made under Article 4 of that Protocol that the applicant's being declared an undesirable alien constituted a second punishment, the Court notes that Protocol No. 7 has not been ratified by the Netherlands. That being the case, the Court is also precluded from examining the complaint under Article 14 of the Convention in conjunction with Article 4 of Protocol No. 7, since the former provision only applies where the facts at issue fall within the scope of one or more of the substantive provisions of the Convention and its Protocols (see, among many other authorities, the *Van Raalte v. the Netherlands* judgment of 21 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 184, § 33).

It follows that these complaints are incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaint concerning the interference with the right to his respect for his family life;

Declares the remainder of the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President