AS TO THE ADMISSIBILITY OF

Application No. 21702/93
by Salah AHMUT, Souad AHMUT and Souffiane AHMUT
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 12 October 1994, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Mr. K. ROGGE, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 23 February 1993 by Salah AHMUT, Souad AHMUT and Souffiane AHMUT against the Netherlands and registered on 22 April 1993 under file No. 21702/93;

Having regard to :

- reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 21 February 1994 and the observations in reply submitted by the applicant on 14 April 1994;

Having deliberated;

Decides as follows:

THE FACTS

1. Particular circumstances of the case

The first applicant was born in 1945 in Morocco, and resides in Rotterdam. He has both the Dutch and the Moroccan nationality. The second and third applicants are his daughter and son. They are Moroccan nationals, born on 28 July 1972 and 27 November 1980 respectively, and currently reside in Rotterdam. The second applicant is the mother of a child whose father resides in Morocco. Before the Commission the applicants are represented by Mr. J.H.M. Nijhuis, a lawyer practising in Rotterdam.

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

The first applicant's marriage with the second and third applicants' mother was dissolved in 1984. The five children born out of this marriage in 1969, 1970, 1971, 1972 and 1980 remained with their mother. The first applicant went to the Netherlands in September 1986

where, in November 1986, he married a Dutch national, who already had three children. On the basis of this marriage he obtained a Dutch residence permit.

The first applicant's first wife died in March 1987. Their five children were taken into the household of the first applicant's mother. The first applicant supported the second and third applicants financially and they saw each other during visits. According to the applicants, the first applicant's mother can no longer continue to care for her grandchildren in view of her poor state of health.

In February 1990, the first applicant separated from his second wife. Their divorce was pronounced on 21 December 1990.

On 26 March 1990, the second and third applicants entered the Netherlands without having the required authorisation for entry (machtiging tot voorlopig verblijf). On 3 May 1990 the first applicant requested residence permits (vergunning tot verblijf) on their behalf on the basis of family reunification.

These requests were rejected by the Deputy Minister of Justice on 26 June 1990. The Deputy Minister noted that the second and third applicants had entered the Netherlands without the required authorisation for entry. As to the requests for a residence permit on the basis of family reunification, the Deputy Minister considered that the second and third applicants did not fulfil the conditions of Section 11 para. 5 of the Aliens Act (Vreemdelingenwet) and the applicable policy rules laid down in the Circular on Aliens (Vreemdelingencirculaire) because they did not in fact belong to their father's family in the Netherlands, as, following their parents' divorce, they had remained with their mother and had subsequently become members of their paternal grandmother's family in Morocco. It had furthermore not been shown in which way their father had contributed either financially or otherwise to their upbringing. It had not been substantiated that their paternal grandmother could no longer care for them.

As regards Article 8 of the Convention, the Deputy Minister did not find that the link between the first applicant and the second and third applicants could be regarded as constituting family life within the meaning of this provision. He considered that, if there were family life, and if the personal interests of the applicants were weighed against the general interest, an interference with the rights under Article 8 para. 1 of the Convention was justified under para. 2 of this provision as being necessary in a democratic society in the interests of the economic well-being of the country.

The Deputy Minister finally held there were no other compelling humanitarian reasons on the basis of which residence permits to the second and third applicants could be granted.

On 26 October 1990, two other children from the first applicant's first marriage, Foad and Chauki Daijaf, born in 1970 and 1971 respectively, obtained permission to reside in the Netherlands for initially one year to study at the Technical University of Delft.

On 13 November 1990, the first applicant requested the Deputy Minister of Justice to review (herziening) the two decisions of 26 June 1990. By decision of 4 January 1991, these requests were granted suspensive effect in respect of the proposed expulsion of the second and third applicants.

Since the Deputy Minister had failed to decide the requests for review within the prescribed period of three months, the first applicant - on behalf of the third applicant - and the second applicant filed an appeal on 6 March 1991 to the Judicial Division of the Council of State (Afdeling Rechtspraak van de Raad van State) against the

presumed refusals (fictieve weigering) by the Deputy Minister of the requests for a review.

On 11 March 1991, the first applicant married a Moroccan national, who, on the basis of that marriage, obtained a Dutch residence permit.

On 20 March 1991, a hearing took place before the Advisory Commission for Aliens Affairs (Adviescommissie voor Vreemdelingenzaken) in respect of the requests of 13 November 1990 for a review. The Commission heard the first and the second applicants in the presence of their lawyer; the third applicant was also present, but no questions were put to him.

During this hearing the first applicant stated, inter alia, that he had no proof of his divorce from his first wife since one has to pay for such a document, that his second wife had always refused to take his children of his first marriage into their household, that he never applied for any children allowance (kinderbijslag) in the Netherlands but that he had sent or taken money to Morocco for the maintenance of his children on a regular basis, that his oldest son from his first marriage lives and works in Morocco and that he has two brothers living in Morocco. The second applicant stated, inter alia, that she is unmarried and pregnant since July 1990, that the prospective father resides in Morocco, but travels between the Netherlands and Morocco on a regular basis.

After having considered the statements and the documents submitted, the Advisory Commission, unanimously, decided on 20 March 1991 to advise the Deputy Minister of Justice to reject the requests for a review. However, as it had appeared in the meantime that the applicants had appealed to the Judicial Division of the Council of State, the Deputy Minister did not determine the request for a review.

Following a hearing on 10 August 1992, the Judicial Division rejected the appeals on 24 August 1992. It held that the second and third applicants did not meet the requirements for a residence permit for family reunification as laid down in Chapter B19 of the Circular on Aliens, as they could not be considered as members of their father's family in the Netherlands. In respect of the second applicant the Judicial Division, noting her age, the fact that she had an older adult brother and two uncles upon whom she could rely where necessary, the fact that the prospective father of her child resided in Morocco and that it had not appeared that it was impossible for her own father to continue to provide for her financially, found that she could not claim a right to reside in the Netherlands. In respect of the third applicant the Judicial Division held additionally that it had not appeared nor been argued that his older brother or two uncles in Morocco could not care for him. He could return to Morocco together with his sister who could equally provide him with care in Morocco. It had not appeared or been argued that it was impossible for his father to continue to provide for him financially.

Under Article 8 of the Convention the Judicial Division found no interference with the applicants' rights since their cases did not concern the revocation of a residence permit which had allowed them to enjoy a family life with their father in the Netherlands. The Judicial Division did not consider that the Netherlands authorities, after weighing the personal interests of the applicants against the general interest, were under a positive obligation under Article 8 of the Convention to grant the second and third applicants residence permits.

2. Relevant domestic law

The rules on entry and residence in the Netherlands and the grounds on which aliens may be expelled are laid down in the Aliens Act (Vreemdelingenwet), the regulations implementing this Act, and the

Circular on Aliens (Vreemdelingencirculaire). The Circular on Aliens is a compilation of binding policy rules and directives drawn up and published by the Dutch Ministry of Justice.

Section 11 para. 5 of the Aliens Act states, inter alia, that a residence permit can be refused in the public interest. On the basis of this provision, the Dutch authorities pursue a restrictive immigration policy for the purposes of regulating the labour market and restricting immigration in a densely populated country. As a rule, a residence permit is only granted if an international obligation must be respected, if the alien's presence in the Netherlands serves an essential Dutch interest, or if there are compelling humanitarian reasons.

Family reunification, which is dealt with in Chapter B19 of the Circular on Aliens, is one of the grounds on which a residence permit can be granted. Provided that a number of conditions concerning, inter alia, sufficient means of existence, health, and public order, have been fulfilled, a residence permit on the grounds of family reunification can be granted to, inter alia, the spouse of a Dutch national or an alien who lawfully resides in the Netherlands, and to his/her minor children regardless of whether they are born in or out of wedlock, provided that these children in fact belong to his/her family.

If an alien is not entitled to a residence permit on the basis of the law and the policy, the authorities will always consider whether there are nonetheless compelling humanitarian reasons on the basis of which an alien should be granted residence in the Netherlands.

COMPLAINT

The applicants complain that the Netherlands authorities' refusal to grant the second and third applicants a residence permit in order to take up residence with the first applicant unjustly interfered with their right for respect for their family life within the meaning of Article 8 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 23 February 1993 and registered on 22 April 1993.

On 1 December 1993, the Commission (Second Chamber) decided to communicate the application to the respondent Government and to invite them to submit written observations on the admissibility and merits of the application.

The Government's observations were submitted on 21 February 1994 and the applicants' observations in reply were submitted on 14 April 1994.

THE LAW

1. The applicants complain under Article 8 (Art. 8) of the Convention that the refusal to grant the second and third applicant a residence permit unjustly interfered with their right to respect for their family life.

Article 8 (Art. 8) of the Convention, insofar 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 in the interests of (...) the economic well-being of the country (...)."

The Government submit in the first place that the second applicant's bond with her relatives living in Morocco should be regarded as family ties and that the bond between the first and the second applicant has weakened over the years to such an extent that they can no longer be regarded as constituting family life within the meaning of Article 8 para. 1 (Art. 8-1) of the Convention. As to the bond between the first and the third applicant, the Government submit that their relationship is not close enough to be described as family life within the meaning of Article 8 para. 1 (Art. 8-1) of the Convention. Subsidiarily the Government submit that even if there were family life, within the meaning of Article 8 (Art. 8), between the applicants, the refusal to grant residence permits to the second and third applicants constitutes no interference with their family life, because the family life as it had existed prior to March 1990, i.e. occasional contacts and financial support, can be continued when the second and third applicants reside in Morocco. Finally the Government submit that, should the Commission be of the opinion that the refusal to grant residence permits constitutes a violation of Article 8 para. 1 (Art. 8-1), the interference is justified under Article 8 para. 2 (Art. 8-2) of the Convention, because the interests of the applicants do not outweigh the public interest; the lifestyle of the second and third applicants in Morocco would not be such that they cannot reasonably be expected to continue to live in Morocco.

The applicants submit, referring, inter alia, to the emotional and financial bonds that continued to exist after 1984, and to the fact that the second and third applicants were taken into the household of the paternal grandmother, that there is family life within the meaning of Article 8 para. 1 (Art. 8-1) between them and that the refusal to grant residence permits to the second and third applicants constitutes an interference with their family life. In this respect the applicants argue that the second and third applicants cannot return to their grandmother and that none of their brothers was living in the household of the grandmother when they left in March 1990. According to the applicants the refusal of residence permits resulted in a situation in which continuation of family life as it had existed until then was no longer possible. The applicants finally submit that the interference is not justified under Article 8 para. 2 (Art. 8-2) of the Convention.

The Commission recalls that the Convention does not guarantee a right to enter or reside in a particular country. However, in view of the right to respect for family life ensured by Article 8 (Art. 8) of the Convention, the exclusion of a person from a country in which his close relatives reside may raise an issue under this provision of the Convention (cf. No. 11274/84, Dec. 1.7.85, D.R. 43 p. 216).

The Commission finds that the links between the first applicant and the second and third applicants may be regarded as constituting family life within the meaning of Article 8 para. 1 (Art. 8-1) of the Convention.

2. As regards the right to respect for the family life of the first and second applicants, the Commission recalls that relationships between adults - in the present case a father and his adult daughter - would not necessarily acquire the protection of Article 8 (Art. 8) of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties (cf. No. 10375/83, Dec. 10.12.84, D.R. 40 p. 196). The Commission does not find that such elements have been established in the present case.

Noting that the second applicant is the mother of a child, that she has substantial links with Morocco, where she was born, where, until March 1990, she has always lived and where also her paternal

grandmother, two uncles, an adult brother and the father of her child reside, the Commission concludes that the decision to refuse the second applicant a residence permit does not amount to a lack of respect for the first and second applicants' family life within the meaning of Article 8 para. 1 (Art. 8-1) of the Convention.

It follows that the complaint under Article 8 (Art. 8) of the Convention in respect of the second applicant is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. As regards the right to respect for the family life between the first and third applicants, the Commission, having regard to the parties' submissions, and in the light of the criteria established by the Convention organs, considers that this part of the application raises issues of fact and law requiring an examination of the merits. The application cannot, therefore, be declared manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for inadmissibility have been established.

For these reasons, the Commission, by a majority,

DECLARES ADMISSIBLE, without prejudging the merits of the case, the first and third applicants' complaint under Article 8 (Art. 8) of the Convention concerning their right to respect for their family life;

and, unanimously,

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Second Chamber President of the Second Chamber

(K. ROGGE) (S. TRECHSEL)