AS TO THE ADMISSIBILITY OF

Application No. 35137/97
by Yilmaz DILEK
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 1 July 1998, the following members being present:

MM J.-C. GEUS, President
M.A. NOWICKI
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
I. CABRAL BARRETO
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA
A. ARABADJIEV

Ms M.-T. SCHOEPFER, 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 10 October 1996 by Yilmaz DILEK against the Netherlands and registered on 28 February 1997 under file No. 35137/97;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Turkish national, born in 1961, and resides in Rotterdam. He is represented by Ms G.E.M. Later, a lawyer practising in The Hague.

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

a. The particular circumstances of the present case

The applicant entered the Netherlands on 3 November 1987 and, on 25 January 1988, was employed on a permanent basis. On 5 July 1988 he married a Dutch national. On 7 September 1988 the applicant was granted a Dutch residence permit valid for one year in order to live with his spouse and to work in the Netherlands. On 23 May 1989, a son was born to the applicant and his wife. On 19 September 1989, on the basis of his marriage, the applicant was granted an indefinite right to remain pursuant to Article 10 para. 2 of the Aliens Act (Vreemdelingenwet).

On or around 19 June 1990, the applicant and his wife separated. On 26 June 1990, the applicant's wife started divorce proceedings before the Regional Court (Arrondissementsrechtbank) of Rotterdam. As

his residence right was dependent on his marriage, the applicant applied for an independent residence permit on 27 July 1990.

His request for an independent permit was rejected on 8 August 1990 by the State Secretary of Justice (Staatssecretaris van Justitie, hereinafter referred to as "the State Secretary"). Insofar as the applicant relied on Article 8 of the Convention, the State Secretary did not find it established that there were any contacts between the applicant and his son and, further, that it had not appeared that the applicant had made any contributions to the costs of his son's upbringing. In these circumstances the State Secretary did not find that the tie between the applicant and his son could be considered as "family life" under Article 8 of the Convention. On 7 March 1991, the applicant filed a request for review (herziening) of this decision with the State Secretary.

On 27 February 1991, the Regional Court of Rotterdam pronounced the applicant's divorce. By decision of 21 May 1991, it appointed the applicant's former wife as guardian (voogdes) and the applicant as auxiliary guardian (toeziend voogd) over his son. The Regional Court further ordered the applicant to pay 300 Dutch guilders monthly to his former wife as a contribution to the costs of their son's upbringing and education. As regards parental access, the applicant and his wife had concluded an agreement according to which the applicant had access to his son every Saturday and Sunday between 12.00 and 18.00 hours.

On 18 December 1991, the applicant's former wife filed a criminal complaint against the applicant for assault and refused the applicant access to his son as from that moment. On 2 September 1992, the applicant requested the Regional Court of Rotterdam to determine an access arrangement (omgangsregeling) to the effect that he would be given access to his son one day every two weeks.

On 22 September 1992, the applicant was heard by the Advisory Commission for Aliens Affairs (Adviescommissie voor Vreemdelingenzaken) in connection with his request for review of the decision of 8 August 1990. Following this hearing, the Advisory Commission advised the State Secretary for Justice to reject the applicant's request for revision.

Having noted the advice of the Advisory Commission, the State Secretary rejected the applicant's request for review on 13 January 1993. On 15 March 1993, the applicant filed an appeal with the Council of State (Raad van State).

In March 1993, the applicant lost his job and was granted unemployment benefits.

On 18 March 1993, the applicant started summary proceedings (kort geding) before the President of the Regional Court of The Hague seeking an injunction on his expulsion pending the outcome of his appeal to the Council of State.

By decision of 22 January 1994, the Regional Court of Rotterdam determined an access arrangement to the effect that the applicant had access to his son one afternoon per fourteen days in the presence of his son's grandmother.

By judgment of 4 March 1994, the President of the Regional Court of The Hague sitting at Haarlem rejected the applicant's request for an injunction on his expulsion. Noting that since the separation from his wife the applicant had not had any contacts with his son, the President considered that the family life between the applicant and his son was not of such a nature that, in balancing the interests involved, the applicant's expulsion would be contrary to Article 8 of the Convention.

As to the argument that regular contacts between the applicant and his son had been established in the meantime, the President held that this could not lead to a different decision as these contacts did not exist at the time the decision challenged by the applicant before the Council of State was taken. As the Council of State can only examine the appeal in the light of the facts and circumstances at the time the challenged decision was taken, it would be unable to take these re-established contacts into consideration. The President, therefore, concluded that the applicant's appeal had not a reasonable chance of success and, consequently, rejected the applicant's request for an injunction. The applicant filed an appeal with the Court of Appeal (Gerechtshof) of The Hague.

On 28 January 1995, the applicant was expelled from the Netherlands. Shortly after having been expelled, he returned to the Netherlands and, on 12 October 1995, filed a new application for an independent Dutch residence permit.

On 28 November 1995, the applicant submitted further arguments for this new application, including an argument relating to the Association Agreement between the European Economic Community and Turkey which had not been raised before. Pursuant to this Agreement Turkish nationals who have had a residence permit for stay with a Dutch spouse and who are gainfully employed qualify for an independent residence permit valid for one year after having lawfully resided in the Netherlands for at least one year and where the person concerned is certain of employment for at least another year.

In this context the applicant explained that, as from 25 January 1988, he had been employed for an indefinite duration by the M. company, that on 24 November 1990 he was dismissed from this company following its bankruptcy, that already as from 18 November 1990 he had been employed by the M. company's successor C. for whom he worked until March 1993 when C. went bankrupt. After that date he obtained unemployment benefits to which he was entitled until 25 March 1995. The applicant further submitted that at the time of his expulsion he met the conditions for a residence permit under the rules on the legalisation of the status of illegal immigrants having resided and worked in the Netherlands for at least six years. In support of this argument the applicant submitted certain documents, including written statements from his employers M. and C., and salary and social security payment slips covering the period of January 1989 to February 1994.

As from 15 November 1995, the applicant is registered at the Chamber of Commerce (Kamer van Koophandel) as owner of a one-man-business.

On 11 December 1995, the applicant submitted his grounds of appeal against the judgment of 4 March 1994 of the Regional Court of The Hague.

On 10 April 1996, following a hearing held on 15 January 1996, the Administrative Law Division (Afdeling Bestuursrechtspraak) of the Council of State rejected the applicant's appeal against the State Secretary's decision of 13 January 1993. It recalled that, under Article 11 para. 5 of the Aliens Act, a residence permit may be refused on public interest grounds and that the Netherlands have a restricted immigration policy given the situation of its population and labour market. It noted that, with the exception of obligations derived from international agreements, an application for a residence permit in the Netherlands is granted only if the individual's presence serves an essential national interest or if there are compelling reasons of a humanitarian nature.

As to the applicant's arguments under Article 8 of the Convention, the Administrative Law Division accepted that the refusal to grant the applicant a residence permit constituted an interference

with his right to respect for his family life within the meaning of this provision.

The Administrative Law Division noted, however, that the applicant and his son had only lived together for about one year and did not find it established that since December 1991 there had in fact been any contacts between the applicant and his son or that he had made any financial contribution to the costs of his son's upbringing and education. It further noted that, on 2 September 1992, the applicant had filed a request with the Regional Court of Rotterdam to determine an access arrangement of one day per fourteen days which had not yet been decided upon when the decision of 13 January 1993 had been taken. In any event, the Administrative Law Division found that this access arrangement would not in itself be a decisive element in balancing the interests involved.

The Administrative Law Division held that it was not convinced that the ties between the applicant and his son were so close that the interest of these ties should be given decisive weight. It further considered, as regards the applicant's professional activities, that on the Dutch labour market other people, having priority over the applicant, were available for this kind of work.

The Administrative Law Division concluded that the State Secretary, after having balanced the interference with the applicant's right to respect for his family life against the economic interests of the State, could find that the interference with the applicant's rights under Article 8 of the Convention was not disproportionate and that the refusal to grant him a residence permit was thus justified under Article 8 para. 2 of the Convention.

On 17 April 1996, the applicant's lawyer informed the Administrative Law Division that she had not been given access to the applicant's case-file despite her request of 30 November 1995, after having taken over the applicant's case from another lawyer, to be provided with certain documents. The applicant's lawyer, referring to a number of documents and submitting a number of recently obtained documents, all relating to the applicant's history of employment in the Netherlands, requested the Administrative Law Division to grant a revision (herziening) of its decision of 17 April 1996 on the basis of incorrect conclusions as to the facts of the applicant's employment history.

The revision request was rejected by the Administrative Law Division on 1 November 1996. It noted that certain documents relating to the applicant's employment history had been submitted on 30 November 1995 after the expiry of the time-limit for making submissions. When the applicant's lawyer nevertheless sought to submit these documents in the course of the hearing held on 15 January 1996, the Administrative Law Division rejected this request.

The Administrative Law Division considered that no circumstances had appeared on grounds of which the applicant would have been unable to submit these documents at an earlier stage of the proceedings at issue and, consequently, held that this point did not constitute a ground for revising its decision. It further held that no other facts or circumstances had been submitted which could constitute a ground for a revision. It added that the extraordinary remedy of revision is not intended to provide an unsuccessful party in proceedings with an opportunity to reopen the debate.

On 13 November 1996, the State Secretary rejected the applicant's request of 12 October 1995 for a residence permit. The State Secretary, noting the applicant's employment situation at the relevant time, considered that he did not meet the requirements for a residence permit pursuant to the Association Agreement and further held that he did not meet the requirements for a residence permit pursuant to the rules on

the legalisation of the status of illegal immigrants having resided and worked in the Netherlands for more than six years.

In this decision it was further noted that, according to a written statement dated 21 October 1996 by the applicant's former wife, the applicant had availed himself in 1994 only twice of the access arrangement determined by the Regional Court of Rotterdam of 11 January 1994. It was further noted that it had not appeared that the applicant had made any contributions to the costs of his son's upbringing or that there had been any contacts between the applicant and his son.

The State Secretary concluded that the State's interests in securing the economic well-being of the country outweighed the applicant's interests as regards respect for his rights under Article 8 para. 1 of the Convention and that, therefore, the refusal to grant him a residence permit was justified under Article 8 para. 2 of the Convention. The applicant was further ordered to leave the Netherlands within four weeks. On 9 December 1996, the applicant filed an objection (bezwaarschrift) against this decision with the State Secretary.

On 26 February 1997, the applicant filed a request with the Regional Court of The Hague for an interim measure (voorlopige voorziening) allowing him to await the outcome of the appeal proceedings in the Netherlands. These proceedings are currently still pending. A hearing has been scheduled for 6 August 1998.

On 15 May 1997, the Court of Appeal of The Hague handed down its judgment on the applicant's appeal against the judgment of 4 March 1994 of the Regional Court of The Hague. It noted that the facts set out in the judgment of 4 March 1994 had not been disputed, that on 10 April 1996 the Administrative Law Division of the Council of State had rejected the applicant's appeal in the proceedings on the merits (bodemprocedure) and that the Administrative Law Division had further rejected the applicant's request for revision on 1 November 1996. As the applicant's appeal of 10 March 1994 was limited to the refusal to order an injunction on his expulsion pending the proceedings before the Council of State, the Court of Appeal considered that the applicant's appeal no longer had an object.

However, as the President of the Regional Court had also awarded costs against the applicant, the Court of Appeal nevertheless examined the substance of the applicant's appeal.

After having examined the applicant's various submissions as regards his employment history, the Court of Appeal rejected the applicant's argument that he met the conditions for an independent residence permit pursuant to the Association Agreement. It further rejected the argument that the applicant met the conditions for a residence permit under the rules on legalisation of the status of illegal immigrants having resided and worked in the Netherlands for more than six years.

Insofar as the applicant relied on Article 8 of the Convention, the Court of Appeal considered that the applicant had only lived with his son for about one year, noted the history of the arrangement of the applicant's access to his son and found that it had not been submitted nor appeared that the applicant, after the rupture of the initial access arrangement in December 1991, had continued to pay any contribution towards the costs of his son's upbringing and education. It finally found established that on the Dutch labour market other people, having priority over the applicant, were available for the kind of work the applicant was doing at the relevant time.

The Court of Appeal did not find it established that, at the time of the decision of 13 January 1993, the tie between the applicant and his son was so strong that it should be given decisive weight when

balancing the right to respect for the applicant's private and family life with his son against the State's interest as regards the economic well-being of the country. It concluded that, on balance, the refusal to grant the applicant a residence permit was justified under Article 8 para. 2 of the Convention.

After having rejected all arguments advanced by the applicant, the Court of Appeal upheld the Regional Court's judgment of 4 March 1994 and made a cost order against the applicant.

By decision of 11 November 1997, the State Secretary rejected the applicant's objection of 9 December 1996. As regards the applicant's arguments under Article 8 of the Convention, the State Secretary referred to the findings in the judgment of 15 May 1997 of the Court of Appeal of The Hague.

On 19 November 1997, the applicant requested the State Secretary to review the decision of 11 November 1997. In support of this request the applicant submitted a copy of the Commission's Decision on admissibility in the case of Çiliz v. the Netherlands (Application No. 29192/95, Dec. 27.6.96), copies of written statements by his former wife stating that she had received from the applicant 200 Dutch guilders on 28 July 1990 and 250 guilders on 5 August 1990 and monthly amounts of 300 Dutch guilders during the period from February to December 1991, and copies of the applicant's unemployment benefits payment slips from which it appears that between 12 July 1993 and 11 September 1994 a weekly amount of 93,75 Dutch guilders was withheld and paid to the Children Welfare Council (Raad voor de Kinderbescherming) in respect of his son.

On 26 June 1998, the applicant informed the Commission that, by letter of 8 January 1998 to the State Secretary, he had submitted a statement of his former wife as to his contacts with his son. Without explicitly referring to the contents of this statement, the applicant submitted that since the beginning of 1997 he sees his son weekly and that he has contacts by telephone. He further submitted that he makes financial contributions to the costs of his son's education and upbringing.

On 19 February 1998, the State Secretary informed the applicant that there were no reasons for a review of the decision of 11 November 1997. The applicant's objection against that decision is currently still pending.

b. Relevant domestic law and practice

In general, an application for a residence permit in the Netherlands is granted only if the individual's presence serves an essential national interest or if there are compelling reasons of a humanitarian nature (klemmende redenen van humanitaire aard) (see also Eur. Court HR, Nsona v. the Netherlands judgment of 28 November 1996, Reports of Judgments and Decisions 1996-V, pp. 1993-1994, paras. 64-65). A residence permit may be refused on public interest grounds (Article 11 para. 5 of the Aliens Act).

At the relevant time, foreigners married to either a Dutch national, a recognised refugee or a holder of a permanent residence permit were granted a residence permit as there were considered to exist compelling reasons of a humanitarian nature. After one year of legal residence in the Netherlands they acquired ex iure an indefinite right to remain pursuant to Article 10 para. 2 of the Aliens Act.

This right expired ex iure when the spouses no longer co-habited (Section 47 para. 1 (a) of the Order on Aliens [Vreemdelingenbesluit]). If, at that time, the foreigner had been married for more than three years and had legally resided with his spouse in the Netherlands for at least one year during the time directly preceding the dissolution

or breakdown of the marriage, he would be eligible for an independent residence permit (see also Eur. Court HR, Berrehab v. the Netherlands judgment of 21 June 1988, Series A no. 138, pp. 10-11, paras. 14-15).

An independent residence permit in order to work in the Netherlands following the dissolution or breakdown of a marriage could be granted if at the time of the request for such a permit the foreigner was certain of employment for at least another year. However, an independent residence permit was not refused if, inter alia, there were compelling reasons of a humanitarian nature to accept the individual's presence in the Netherlands.

An "essential national interest" as mentioned above is considered to exist where a foreigner is employed in a sector where there is not a sufficient number of capable people available on the labour market to fill all vacancies. To establish whether this is the case, regard is only had to the number of registered unemployed people enjoying priority (prioriteit genietend aanbod). For example, on the Dutch labour market citizens of the European Union have priority over most other foreigners.

COMPLAINTS

1. The applicant complains that the refusal to grant him a residence permit is contrary to his rights under Article 8 of the Convention. He submits that since his return in 1995 he re-established weekly contacts with his son and makes regular contributions to his former wife for the costs of his son's upbringing and education.

2. The applicant complains under Articles 6 and 13 of the Convention that the Council of State did not find it established that he had in fact been working in the Netherlands between 21 June 1989 and 1 June 1990. He complains in particular that he had not been granted access to his case-file at the Council of State. It appeared that his former lawyer had not requested access and his current lawyer was not granted access. He further submits that he transmitted a number of documents related to his work to the Council of State but the State Secretary objected to these submissions. These documents indicated that he had in fact worked between 21 June 1989 and 1 June 1990.

THE LAW

1. The applicant complains that the refusal to grant him a residence permit is contrary to his rights under Article 8 (Art. 8) of the Convention.

I. Article 8 (Art. 8) of the Convention, insofar as relevant, reads:

> "1. Everyone has the right to respect for his private and 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 Commission accepts that there is family life within the meaning of Article 8 para. 1 (Art. 8-1) between the applicant and his son (cf. Eur. Court HR, Berrehab v. the Netherlands judgment of 21 June 1988, Series A no. 138, p. 14, para. 21; and No. 12411/86, Dec. 4.3.87, D.R. 51, p. 245) and that thus the refusal of the Dutch authorities to grant the applicant a residence permit constitutes an interference with the exercise of his right to respect for family life.

It must therefore be examined whether or not this interference

can be considered as justified under paragraph 2 of Article 8 (Art. 8-2).

The Commission observes that the refusal to grant the applicant a residence permit was taken in accordance with Section 11 para. 5 of the Aliens Act. It was, therefore, taken in accordance with Dutch law.

The Commission accepts, moreover, that the decision was taken in line with the policy followed by the Dutch authorities to regulate the labour market in view of the population density. The legitimate aim pursued was, thus, the preservation of the country's economic well-being (cf. Berrehab judgment, loc. cit., p. 15, para. 26).

The question which remains to be answered is whether or not the decision was "necessary in a democratic society".

The Commission considers that Article 8 (Art. 8) does not impose a general obligation on States to allow aliens to remain on their territory for the purpose of enjoying access to children of a broken marriage. Whether a refusal to allow an alien to re-enter or remain in a particular country for this purpose is necessary will depend on the facts of the individual case. A fair balance must be struck between the competing interests of the individual and of the community as a whole, and in the assessment of this balance the Contracting State enjoys a certain margin of appreciation (cf. Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 19, para. 49).

Although the applicant alleges that, since his return to the Netherlands in 1995, he has re-established contacts with his son in that he sees him weekly, the Commission finds that this assertion has remained insufficiently substantiated. It notes that in the domestic proceedings it was not found that, since 1991 and apart from twice in 1994, there had been any contacts between the applicant and his son. In this respect, the Commission further notes that it was not before 8 January 1998 that the applicant informed the State Secretary that he sees his son, as from the beginning of 1997, on a weekly basis and that he makes financial contributions to the costs of his son's education and upbringing, whereas this assertion was only brought to the Commission's attention on 26 June 1998 without any further substantiation. Furthermore, no explanation was provided as to why this assertion was not raised earlier in the domestic proceedings at issue.

In these circumstances the Commission considers that, unlike the respective situations in the cases of Berrehab v. the Netherlands (loc. cit.) and Çiliz v. the Netherlands (No. 29192/95, Dec. 27.6.96, unpublished), it has not been established that at the relevant time the applicant has had in fact more or less regular contacts with his son since his return in 1995. Furthermore, apart from twice in 1994, it has not been established that, between his return to the Netherlands in 1995 and the beginning of 1997, the applicant has actively sought to establish such regular contacts by, for instance, seeking to avail himself of the access arrangement as determined by the Regional Court of Rotterdam. Moreover, it has not been submitted nor has it appeared that, during this period, the applicant's former wife objected to contacts between the applicant and his son on the basis of this access arrangement.

On the other hand, the Commission observes that the applicant has made certain financial contributions to the costs of his son's upbringing and education over the periods July - August 1990, February - December 1991 and July 1993 - September 1994. Although the applicant has submitted that, since his return to the Netherlands in 1995, he makes financial contributions on a regular basis towards the costs of his son's upbringing, the Commission finds that this assertion has also remained insufficiently substantiated. There is no indication in the applicant's case-file that he has in fact made such contributions since September 1994. Also his assertion on this point in his letter of

8 January 1998 to the State Secretary has remained unsubstantiated and no explanation has been provided as to why this assertion has not been raised earlier in the domestic proceedings.

In these circumstances, the Commission is of the opinion that the applicant's right to respect for his family life does not outweigh valid considerations relating to Dutch immigration policy and that a proper balance has been struck between the interests involved when the domestic authorities determined the applicant's case on the basis of the facts before them. It therefore finds that the Dutch authorities' refusal to grant the applicant an independent residence permit cannot be regarded as disproportionate to the legitimate aim pursued and, accordingly, may reasonably be regarded as being necessary in a democratic society.

It follows that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains under Articles 6 and 13 (Art. 6, 13) of the Convention that the Council of State did not find it established that he had in fact been working in the Netherlands between 21 June 1989 and 1 June 1990. He complains in particular that he had not been granted access to his case-file at the Council of State.

Article 6 (Art. 6) of the Convention, insofar as relevant, reads:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by a ...tribunal..."

Article 13 (Art. 13) of the Convention provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Insofar as the applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention, the Commission recalls its constant case-law, that this provision is not applicable to proceedings concerning residence permits for aliens (cf. No. 9285/81, Dec. 6.7.82, D.R. 29 p. 205; and No. 33124/96, Dec. 25.2.97, unpublished). Consequently, the Commission cannot examine the applicant's complaints of the proceedings at issue under this provision.

Insofar as the applicant relies on Article 13 (Art. 13) of the Convention, the Commission notes that the applicant's case, including his arguments that his expulsion would amount to a violation of his rights under Article 8 (Art. 8) of the Convention, has been examined by several national authorities, i.e. the State Secretary, the Administrative Law Division of the Council of State, the Regional Court and the Court of Appeal. The Commission is, therefore, of the opinion that the applicant had effective remedies within the meaning of Article 13 (Art. 13) of the Convention, of which he did in fact avail himself.

It follows that this part of the application must also be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER	J.-C. GEUS
Secretary	President
to the Second Chamber	of the Second Chamber