AS TO THE ADMISSIBILITY OF

Application No. 37312/97
by Yalçin ESEN
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 21 October 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. ŠVÁBY
P. LORENZEN
E. BIELIŪNAS
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 24 January 1997 by Yalçin ESEN against the Netherlands and registered on 7 August 1997 under file No. 37312/97;

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 1955, and resides in The Hague. 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.

The applicant resides in the Netherlands since 1976. On 12 June 1980, he obtained a residence permit for the purpose of staying with his spouse, at that time a Turkish national holding a Dutch residence permit, whom he had married in the Netherlands in 1977. The applicant and his wife have two children, born in 1978 and 1979 respectively. On 12 April 1983, the Netherlands authorities granted the applicant a permanent residence permit (vergunning tot vestiging). His wife obtained a permanent residence permit on 19 March 1984.

By judgment of 26 January 1984, the Regional Court (Arrondissementsrechtbank) of The Hague convicted the applicant of narcotics offences and sentenced him to two years and six months' imprisonment and payment of a fine of 40,000 Dutch guilders.

By decision of 20 August 1985, on the basis of this conviction, the State Secretary of Justice (Staatssecretaris van Justitie, hereinafter referred to as "State Secretary") withdrew the applicant's permanent residence permit and, pursuant to Article 21 of the Aliens Act (Vreemdelingenwet), declared the applicant an undesired alien (ongewenst vreemdeling).

After the State Secretary, in conformity with the advice issued by the Advisory Commission for Aliens Affairs (Adviescommissie voor Vreemdelingenzaken), had rejected the applicant's request for a review (herziening) of the decision of 20 August 1985, the applicant filed an appeal with the then Judicial Division (Afdeling Rechtspraak) of the Council of State (Raad van State). By a final decision of 28 March 1988, the Judicial Division rejected the applicant's appeal against the decision of 20 August 1985.

In August 1989, the applicant was expelled to Turkey. However, he returned to the Netherlands some weeks later. At some unspecified point in time after the applicant's expulsion, the applicant's wife and children obtained Dutch nationality.

In 1990, the applicant's wife received treatment for a vital depression and hyperventilation.

On 9 June 1993, the applicant requested a Dutch residence permit, which was refused by the State Secretary on 24 October 1994. On 10 December 1994, the applicant made a new request for a residence permit for staying with his Dutch spouse and children and also requested that the decision of 20 August 1985 be lifted. On the same day, the

applicant sought an injunction prohibiting his expulsion pending the proceedings on his requests for a residence permit and the lifting of the decision of 20 August 1985 in which he had been declared an undesired alien.

On 12 December 1994, the State Secretary decided not to determine the applicant's request for a residence permit, since he did not hold a valid entry visa (machtiging tot voorlopig verblijf). The applicant filed an objection (bezwaar) with the State Secretary on the same day.

By letter of 4 April 1995, the State Advocate (Landsadvocaat) informed the applicant that his request for a residence permit would be determined and that he was allowed to await this determination in the Netherlands. On the basis of this information, the applicant withdrew his request for an injunction against his expulsion.

On 18 May 1995, the State Secretary declared the applicant's objection against the decision of 12 December 1994 well-founded and further decided that the applicant's request for a residence permit should be determined.

By decision of 26 April 1996, the State Secretary rejected the applicant's request for a residence permit. The State Secretary noted that the applicant had been declared an undesired alien and that, pursuant to Article 21 of the Aliens Act, Articles 8 - 10 which deal with the admission and residence of aliens do not apply to persons who have been declared an undesired alien. The State Secretary concluded that, pursuant to Article 21 of the Aliens Act, an undesired alien cannot obtain any residence title as long as the decision of undesirability remains in force.

As regards the applicant's request to have the decision declaring him an undesired alien lifted, the State Secretary observed that such a decision may be lifted in case of a conviction of drug trafficking where the person concerned has resided outside the Netherlands for a period of ten years. Noting that the applicant had been convicted of narcotics offences, the State Secretary concluded that the decision declaring the applicant an undesired alien could only be lifted after he had resided outside the Netherlands for ten years. As the applicant did not meet this condition, given his own statement that after his expulsion in August 1989 he had returned to the Netherlands within two weeks, the State Secretary concluded that the measure could not be lifted.

Pursuant to Article 32 of the Aliens Act, the State Secretary further decided that an appeal would have no suspensive effect as regards the applicant's expulsion from the Netherlands.

On 11 June 1996, the applicant filed an objection against this decision with the State Secretary and, on 30 August 1996, requested the President of the Aliens Chamber (Vreemdelingenkamer) of the Regional Court of The Hague to issue a provisional measure (voorlopige voorziening), i.e. an injunction prohibiting his expulsion pending the appeal proceedings.

According to a medical statement dated 22 August 1996, the applicant's wife was informed by her treating medical specialist that, apart from a relatively minor infection, most of her health complaints were related to her weight. She was advised to consult a dietician.

On 12 November 1996, the State Secretary rejected the applicant's objection of 11 June 1996. On 13 December 1996, the applicant filed an appeal against this decision with the Aliens Chamber of the Regional Court of The Hague.

By judgment of 30 December 1996, following a hearing held on 16 December 1996, the Acting President of the Aliens Chamber rejected the applicant's request for a provisional measure.

The President noted that the applicant was subject to a decision in which he had been declared an undesired alien which had obtained the force of res iudicata on 28 March 1988 and that this decision could only be lifted after the applicant had resided outside the Netherlands for a period of at least ten years whereas, apart from a brief period in 1989, the applicant had not resided outside the Netherlands. As Article 21 para. 3 of the Aliens Act provides that Articles 8-10 of this Act do not apply to persons having been declared undesired aliens, the President concluded that the applicant did not qualify for a residence permit.

As to the applicant's argument that the decision declaring him an undesired alien had been taken pursuant to a previous Government policy so that his request to have this decision lifted should therefore be examined under this old policy, the President noted that the applicant's request to have this decision lifted had been made on 10 December 1994 and that the State Secretary had, therefore, correctly examined this request under the Government policy rules as set out in the 1994 Aliens Circular (Vreemdelingencirculaire 1994). The President added that, under the former policy, the State Secretary would also only consider lifting a decision in which a person had been declared an undesired alien, when the person concerned had resided outside the Netherlands for a certain period of time and, therefore, rejected as untenable the applicant's argument that the introduction of the new policy constituted a disadvantage for him.

The Acting President held that the refusal to allow the applicant to reside in the Netherlands was not contrary to Article 8 of the Convention, in that it did not constitute an unjustified interference with the applicant's right to respect for his family life with his spouse and children within the meaning of this provision of the Convention.

The President noted that this family life had in fact been reinforced during a long period during which the applicant was not allowed to reside in the Netherlands. The President rejected the argument that the passage of time since the commission of the acts of which the applicant had been convicted should lead to a shift in the balance of the interests involved to the effect that the applicant's personal interests should outweigh the public interests of the State Secretary. The President further held that this was not altered

by the fact that the Dutch authorities had not immediately expelled the applicant after his release from prison, thus enabling him to continue to enjoy his family life in the Netherlands without hindrance, as the applicant had been aware all along that he was an undesirable alien, a measure confirmed in judicial decisions. The President held that the applicant could have continued his family life in Turkey and that no objective obstacles to this had become apparent. Noting the serious breach of public order committed by the applicant, the President found that the State Secretary could reasonably have attached more weight to the general interest. According to the President this finding was not altered by the fact that, since his conditional release from prison in 1985, the applicant had not been engaged in any criminal activities.

Having reached this finding and as no other legal rules appeared to have been violated, the Acting President concluded that the State Secretary's decision not to allow the applicant to remain in the Netherlands pending the outcome of the appeal proceedings could not be regarded as unreasonable. As the applicant's appeal did not stand a reasonable chance of success and as a further investigation was not susceptible of contributing to the examination of the applicant's case, the Acting President also decided the merits of the applicant's appeal against the State Secretary's decision of 12 November 1996 and rejected it as ill-founded.

By letter of 24 January 1997, the applicant informed the State Secretary that he had filed an application with the European Commission of Human Rights and, on this basis, requested not to be expelled pending these proceedings.

On 3 February 1997, the applicant was ordered to present himself on 20 February 1997 to the competent authorities in order to be expelled from the Netherlands. On 11 February 1997, the State Secretary informed the applicant that his letter of 24 January 1997 did not constitute a ground for staying his expulsion.

On 12 February 1997, the applicant filed an objection with the State Secretary and, on the same day, requested the President of the Aliens Chamber of the Regional Court of The Hague to issue a provisional measure to the effect that he would not be expelled pending the proceedings regarding his objection of 12 February 1997.

In a letter dated 18 February 1997, a staff member of the Foundation "Jeugdzorg", dealing with probation and after-care of juvenile offenders informed the applicant's lawyer that, on 5 January 1995, the juvenile court judge (kinderrechter) had ordered the Foundation to supervise the applicant's son, born in 1978, in the framework of probation and after-care of juveniles (jeugdreclassering). The letter further stated that the presence of a father figure may be important for juveniles in the age category of the applicant's son and that the latter listens to the applicant and the applicant tries to achieve that his son structures his life. According to the letter, a consequence of such structuring could be that the applicant's son would no longer engage in criminal activities, as he did in the past.

The applicant was expelled to Turkey on 21 February 1997. He returned to the Netherlands on 9 March 1997 carrying a forged Dutch passport and was removed again from the Netherlands to Turkey on the same day.

On 15 September 1997, following a hearing held on 4 August 1997, the Acting President of the Aliens Chamber rejected the applicant's request for a provisional measure. The President considered that, even leaving aside the question whether the order of 3 February 1997 and the State Secretary's reply of 11 February 1997 could be regarded as a decision within the meaning of the Aliens Act, no new facts or circumstances had been submitted which had not been examined in the proceedings which had ended with the decision of 30 December 1996.

## COMPLAINTS

1. The applicant complains that the refusal of his requests for a residence permit and the refusal to lift the expulsion is contrary to his rights under Article 8 of the Convention. He submits that since 1988, when the last decision as to his expulsion order was handed down, and apart from some weeks he has always resided in the Netherlands, where he has built up his family life. He further submits that, despite his presence and the fact that he was working in the Netherlands, no action has been undertaken against him by the authorities.

2. The applicant complains that the decision declaring him an undesired alien is contrary to Article 7 para. 1 of the Convention in that it constitutes an additional penalty and in that at the time it was issued, there were no statutory or other rules concerning the duration of this measure.

3. The applicant complains that the proceedings at issue are not in conformity with the requirements of Article 6 of the Convention in conjunction with Articles 8 and 13 of the Convention.

4. The applicant finally complains that the decision not to allow him to reside in the Netherlands constitutes treatment contrary to Article 3 of the Convention. He submits that in 1990 his wife received treatment for a vital depression related to the applicant's residence status and risk of expulsion and that this might reoccur. His wife holds Dutch nationality and wished to remain with her children who also hold Dutch citizenship.

## THE LAW

1. The applicant complains that the refusal of his requests for a residence permit and the refusal to lift the expulsion is contrary to his rights under Article 8 of the Convention. He submits that since 1988, when the last decision as to his expulsion order was handed down, and apart from some weeks, he has always resided in the Netherlands where he has built up his family life. He further submits that, despite his presence and the fact that he

was working in the Netherlands, no action has been undertaken against him by the authorities.

Article 8 of the Convention, insofar as relevant, reads:

"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 ..."

The Commission accepts that the decision declaring the applicant an undesired alien constituted an interference with the applicant's rights under Article 8 of the Convention. However, the Commission is not required to examine whether this interference is compatible with Article 8 of the Convention, as the final decision as regards the applicant's expulsion from the Netherlands was given on 28 March 1988 by the Judicial Division of the Council of State, which is more than six months before the introduction of the application.

The Commission considers that this is not altered by the applicant's subsequent request to have this measure lifted. Noting that the applicant has failed to comply with this order, which under Dutch law is a condition sine qua non for the examination of a subsequent request to lift an expulsion order, the Commission is of the opinion that the applicant's request was in fact an unsuccessful attempt to reopen the discussion on a decision which had obtained the force of res iudicata. Consequently, the decision not to reopen that discussion cannot be regarded as being the starting-point of a new six months' time-limit (cf. mutatis mutandis No. 23949/94, Dec. 18.5.94, D.R. 77, p. 140).

It follows that this part of the application must be rejected for failure to respect the six months' time-limit contained in Article 26 of the Convention.

Insofar as the applicant complains that the refusal to grant him a new residence permit is contrary to his right to respect for his family life within the meaning of Article 8 of the Convention, the Commission recalls that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective respect for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (cf. Eur. Court HR, Ahmut v. the Netherlands judgment of 28 November 1996, Reports of Judgments and Decisions 1996-VI, p. 2031, para. 63).

Under the applicable principles, the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular

circumstances of the persons involved and the general interest. As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory. Furthermore, where immigration is concerned, Article 8 of the Convention cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion on its territory (cf. Ahmut v. the Netherlands judgment, loc. cit., p. 2033, para. 67).

The Commission notes that, following his conviction for narcotics offences, the applicant has been deprived of his residence permit and declared an undesirable alien in a final decision of 28 March 1988 and that, pursuant to this decision, he was expelled in August 1989. However, he returned shortly after and since then has continued to reside unlawfully in the Netherlands until his second expulsion on 21 February 1997. The applicant's situation is, therefore, comparable to that of an illegal entrant.

The Commission observes that the applicant is a Turkish national and that also his wife is of Turkish origin. The Commission further observes that it has not been argued that there would be any practical obstacles for the applicant's wife to follow him to Turkey although the Commission does not exclude that this might entail a certain social hardship for her. Against this background, the Commission cannot find that there are significant obstacles preventing the applicant to continue his family life with his wife in their country of origin.

The Commission further observes that the applicant's two children have come of age. The Commission recalls that for "family life" to exist between a parent and an adult child, there must be inter alia elements of dependency going beyond the normal emotional ties (cf. No. 10375/83, Dec. 10.12.84, D.R. 40, p. 196). The Commission does not find it established that in the present case such elements of dependency exist. It might be true that the applicant's physical presence might be beneficial for his son's conduct in life. However, considering that the applicant's son has come of age, the Commission does not find that, on this ground, the State's interest involved must be considered as being outweighed for the purposes of Article 8 of the Convention.

The Commission is, therefore, of the opinion that the refusal to allow the applicant to take up residence in the Netherlands cannot be regarded as contrary to his rights under Article 8 of the Convention.

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

2. The applicant complains that the decision declaring him an undesired alien is contrary to Article 7 para. 1 of the Convention in that it constitutes an additional penalty and in that at the time it was issued, there were no statutory or other rules concerning the duration of this measure.

Article 7 para. 1 of the Convention provides as follows:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The Commission is of the opinion that the decision to declare the applicant an undesirable alien and, consequently, to exclude him from the Netherlands, although it was based on the applicant's prior conviction of narcotics offences by a competent trial court, cannot be regarded as tantamount to a conviction of a "criminal offence" or a "penalty" within the meaning of Article 7 of the Convention (cf. mutatis mutandis, No. 19583/92, Dec. 20.2.95, D.R. 80, p. 38).

It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 of the Convention.

3. The applicant complains that the proceedings at issue are not in conformity with the requirements of Article 6 of the Convention in conjunction with Articles 8 and 13 of the Convention.

Article 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 and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Article 13 of the Convention provides as follows:

"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 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. 20.10.97, unpublished).

It follows that this part of the complaint is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 of the Convention.

Insofar as the applicant relies on Article 13 of the Convention, the Commission notes that the applicant's case, including his argument that the refusal to allow him to reside in the Netherlands was contrary to his right to respect for his family life as guaranteed by Article 8 of the Convention, has been examined by the State Secretary of Justice and the Acting President of the Regional Court, respectively.

The Commission is, therefore, of the opinion that the applicant had effective remedies within the meaning of Article 13 of the Convention, of which he did in fact avail himself.

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

4. The applicant finally complains that the decision not to allow him to reside in the Netherlands constitutes treatment contrary to Article 3 of the Convention. He submits that in 1990 his wife received treatment for a vital depression related to the applicant's residence status and risk of expulsion and that this might reoccur. His wife holds Dutch nationality and wished to remain with her children who also hold Dutch citizenship.

Article 3 of the Convention reads:

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

Even assuming that the applicant has complied with the requirement of exhaustion of domestic remedies under Article 26 of the Convention by having raised this complaint under Article 3 of the Convention, either in form or substance, in the domestic proceedings, the Commission is of the opinion that the facts of the case do not disclose an issue under this provision of the Convention.

It follows that this complaint must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

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